FEDERALISM AND THE WAY TO PEACE

Daniel J. Elazar

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Reflections/Réflexions is a publications series of the Institute of Intergovernmental Relations. Contributions present the personal thoughts and arguments of their authors on a variety of subjects having to do with federalism and intergovernmental relations. The series is intended to place new ideas into the public forum, where they will be open to challenge and rebuttal.

Reflections/Réflexions est une collection de l'Institut des relations intergouvernementales. Les articles publiés sont l'oeuvre d'auteurs dont les points de vue ou les thèses abordent divers sujets touchant le fédéralisme et les relations intergouvernementales. Cette collection se propose de livrer à l'opinion publique de nouveaux motifs de réflexion pouvant prêter au débat de fond, voire à la polémique.

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FOREWORD

The latter half of the twentieth century has seen the development of two powerful, thoroughly interdependent, yet distinct and contradictory political trends in the direction of integration and disintegration. The former trend towards direction of larger supranational political units and organizations is generated by the goals and values shared by most Western and non-Western societies today: a desire for progress, for a rising standard of living, for a wider range of goods available to consumers, and for social justice in the world arena, and by a growing awareness of a worldwide interdependence in an era whose advanced technology makes both mass destruction and mass construction possible. The latter trend arises from the desire for smaller self-governing political units more responsive to the individual citizen and from a renewed desire to give expression to the primary group attachments — ethnicity and nationalism, linguistic and cultural ties, religious connections, historical traditions and social practices — that provide the distinctive basis for a community's sense of identity and yearning for self-determination. The result has been concurrent but conflicting pressures for larger political units facilitating economic development and improved security on the one hand, and for smaller political units more sensitive to their electorates and capable of expressing national and local distinctiveness on the other hand.

The end of the Cold War has if anything accentuated the force of these contradictory pressures. It has ushered in a new and dangerous era of fragmentation, ethnic conflict, and heightened nationalism in the various regions of the world. In the essays in this book Daniel J. Elazar argues that the way to peace in many, if not all, of these situations of conflict is through embracing one form or other of the basic federal idea involving a combination of self-rule with shared rule. In these ten essays, he explores the federal idea and its many forms including its relevance in the contemporary world, its interrelation with pluralism and liberty as political ideas, its roots in biblical covenants, the concepts of covenant and federalism in the thought of Johannes Althusius in sixteenth-century Europe, the founding of modern federalism in the United States and its subsequent operation, the more recent reinvention of confederal and other forms of federalism in contemporary Europe, and the relevance of federal ideas

as a possible path to lasting peace in Europe, the former Soviet Union, South Africa, and the Middle East.

Two of these essays, "The Federalist Revolution and the Way of Peace" (Chapter 1) and "Can Federal Arrangements Serve the Cause of Middle East Peace?" (Chapter 7) are based on lectures given by Daniel Elazar at Queen's University in the autumn of 1992 as the Kenneth R. MacGregor Lecturer in Intergovernmental Relations. To these have been added eight other essays recently presented at various occasions elsewhere by Daniel Elazar. Together they provide a compendium of highly relevant analysis on the applicability to the world today of the federal idea in its various forms.

The MacGregor Lectureship was established in order to bring to Queen's University each year a prominent public figure or scholar who has made an important contribution to the understanding or practice of federalism, intergovernmental relations, and related issues in Canada or other countries. The MacGregor Lecturer spends a week at Queen's University where he or she presents one or more formal lectures, which are subsequently published, and meets informally with classes in relevant fields and with groups of students and staff.

The lectureship honours Kenneth R. MacGregor, a Queen's graduate and long-time member of the Queen's Board of Trustees. It marks his distinguished career both in Ottawa and in the private sector where he personally experienced the complexities of intergovernmental relations in Canada especially as they related to the field of insurance. From 1953 to 1964 Kenneth MacGregor was the federal superintendent of insurance. Subsequently, he was president of the Mutual Life Assurance Co. of Canada from 1964 to 1973, chairman of its board 1973-1982 and chairman of the Executive Committee of its board 1982-1983. During his 55 years of experience in the insurance field he was personally responsible for the development of sound legislation in this field.

The lectureship is funded by an endowment established through the generosity of the Mutual Life Assurance Co. of Canada, members of the Queen's Board of Trustees, and friends. The previous lecturers have been Robert Stanfield, former Progressive Conservative leader of Canada, Peter Lougheed, former premier of Alberta, Professor Alan Cairns of the University of British Columbia, Allan Blakeney, former premier of Saskatchewan, Professor Albert Breton of the University of Toronto and Gordon Robertson, former clerk of the Privy Council and secretary to the Canadian Cabinet for Federal-Provincial Relations.

Few scholars are as qualified to lecture and write on the contemporary international relevance of federalism as Daniel J. Elazar. Born in Minneapolis and with a Ph.D. from the University of Chicago, Professor Elazar now maintains academic and other postings in two countries. In the United States, he is a professor of political science at Temple University in Philadelphia and

director of its Center for the Study of Federalism. He has also been a citizen member of the United States Advisory Commission on Intergovernmental Relations (an appointment made by the president of the United States). In Israel, Professor Elazar holds the Senator N.M. Paterson Professorship in Intergovernmental Relations at Bar Ilan University, is founder and president of the Jerusalem Center for Public Affairs, and a member of various consultative bodies of the Government of Israel. As well, he has served as a consultant to the governments of Canada, Russia, Japan, South Africa, Brazil, India, and Sri Lanka, among others. Professor Elazar was also the founding president of the International Association of Centres for Federal Studies (IACFS), an organization which now encompasses some 20 centres and institutes spread all across the world (and of which the Institute of Intergovernmental Relations was a founding member). Professor Elazar is a prolific scholar having written or edited more than 50 books and other publications. He was the founding editor 24 years ago, and continues to be editor, of *Publius: The Journal of Federalism*, the leading international journal on subjects relating to federalism. What is striking about his writing is the broad range of his interests and the fact that he is a leading authority on both the practical and theoretical dimensions of the issues he explores.

This book contributes fresh perspectives on the variety and flexibility of federal ideas and their applicability to a wide range of troubled regions in the world. It thus holds insights for those faced with the task of redefining their political communities or rediscovering the values of peaceful coexistence. The Institute of Intergovernmental Relations at Queen's University is therefore very pleased to publish it.

Ronald L. Watts
Director, 1988-93
Institute of Intergovernmental Relations
July 1994

SOMMAIRE

La fin de la guerre froide nous a fait entrer dans une ère nouvelle et dangereuse de fragmentation, de conflits ethniques et d'intensification du nationalisme à l'échelle mondiale. Ces textes soutiennent que, dans la majorité des conflits auxquels nous sommes confrontés à l'échelle mondiale, sinon tous, la façon de conclure la paix passe par l'une ou l'autre des conceptions du fédéralisme, en combinant l'auto-détermination à l'autorité partagée.

En dix chapitres, Daniel J. Elazar explore les différentes conceptions du fédéralisme, depuis ses racines dans les alliances bibliques, en passant par le concept de l'alliance dans la pensée de Johannes Althusius dans l'Europe du XVIe siècle, la fondation américaine du fédéralisme moderne, la réinvention plus récente de la confédération et d'autres formes du fédéralisme en Europe contemporaine, jusqu'à la pertinence des conceptions du fédéralisme pour une paix durable en Afrique du Sud, au Moyen Orient et dans l'ancienne Union Soviétique.

Cet ouvrage apporte des perspectives nouvelles quant à la diversité et à la flexibilité des conceptions du fédéralisme, allant bien au-delà du cadre constitutionnel particulier au Canada ou à d'autres fédérations. Il contient par conséquent de nombreuses pistes pour les Canadiennes et les Canadiens, et pour d'autres, qui doivent redéfinir leur communauté politique ou encore redécouvrir les vertus de la coexistence pacifique.

Éminent spécialiste du fédéralisme américaine et comparé, Daniel J. Elazar est le directeur du Centre pour l'étude du fédéralisme (Center for the Study of Federalism) à l'université Temple de Philadelphie et directeur du Centre pour les affaires publiques de Jérusalem (Jerusalem Center for Public Affairs) en Israël. Ces textes comprennent les conférences prononcées en 1992 par le Dr. Elazar à l'université Queen's alors qu'il était conférencier invité des Conférences Kenneth R. MacGregor en relations intergouvernementales.

ABSTRACT

The end of the Cold War has ushered in a new and dangerous era of fragmen-tation, ethnic conflict and heightened nationalism worldwide. The promise of peace remains unfulfilled. The argument in these essays is that the key to peace in many if not all of the conflicts faced today is in embracing one form or other of the federal idea: combining self-rule with shared rule. In ten essays Daniel J. Elazar explores the federal idea and its many forms, from its roots in Biblical covenants, to the concept of covenant in the thought of Johannes Althusius in sixteenth century Europe, the American founding of modern federalism, the more recent reinvention of confederal forms and new kinds of federalism in contemporary Europe, through to the relevance and emerging practice of federal ideas in South Africa, the Middle East and the former Soviet Union.

This book contributes fresh perspectives on the variety and flexibility of federal ideas, well beyond any specific constitutional framework. It holds many insights for Canadians and others faced with the task of redefining political communities or rediscovering the values of peaceful coexistence.

A preeminent scholar of American and comparative federalism, Daniel J. Elazar is Director of the Center for the Study of Federalism at Temple Univer-sity, Philadelphia and Director of the Jerusalem Centre for Public Affairs. These essays constitute an expanded version of Dr. Elazar's lectures at Queen's University as the 1992 Kenneth R. MacGregor Lecturer in Intergovernmental Relations.

ACKNOWLEDGEMENTS

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The Federalist Revolution and the Way to Peace

The twentieth century has been a century for proclamations of eternal peace and the harshest realities of total war. One of the saddest truths that we have learned in the twentieth century is that ideas for, and sympathies towards, achieving peace alone are not enough. It is true that in order to have peace in the world, we first must have an acceptance of the idea of peace in the minds of people. But peace in the minds of people is not enough. Human cultures must also be oriented towards peace, and there must be institutional mechanisms and frameworks for the achievement and maintenance of peace. The twentieth century began with the First World War, perhaps the most horrible of all modern wars because it was so totally unnecessary. It was a war that threw the whole world into decades of convulsion, cost tens of millions of lives directly, and tens of millions indirectly, and ruined the lives of literally hundreds of millions of others, all because of the personal ambitions of a handful of European leaders.

The dominant political stance among the European masses at that time was socialism. The socialist leadership of the world, and most especially of Europe, firmly believed that the commitment of socialists not to fight in capitalist or imperialist or royal wars would be sufficiently powerful to overcome nationalism and prevent the explosion that took place. Yet in July and August of 1914, when the governments of the states involved mobilized their armies, hardly any of the ordinary people called up, including the most fervent socialist workers,

refused to go. On the contrary, they marched out with banners flying, singing the national songs of the time, their socialist ideas notwithstanding. Nationalism proved to be a far stronger ideology than socialism. In only two countries in the world did socialists refuse to fight — the small group of socialist faithful in Russia and in the United States.

In the last analysis, if the political institutions of the world are directed toward war or have no way to avoid it, ordinary human beings will be dragged along into conflict, and will acquiesce whether out of conviction or out of necessity. This is critically important because one of the best ways to prevent wars is to have democratic self-government in civil society. Where the people truly have a significant share in national governance and are not merely there to exercise an occasional review power over a ruling class; they are less likely to go to war.

Here, I make a distinction between two kinds of democratically elected governments. There are those governments that are democratically elected from among what is, in effect, a ruling class; the people simply choose between those in the ruling class they want to favour with empowerment for a period — four years, five years, ten years. That is democracy in the limited way of popular referenda on rulers.

There is another kind of democracy where, those individuals who are involved in government chose to be public people; they become different from private people, but remain tied to the broad body of the people nonetheless. This kind of democracy is not simply a question of having periodic referenda on the ruling class, but something far more open and participatory. Most of the problems of democracy's failure to maintain peace come in the former case rather than in the latter, because the incentives among one segment or another of the ruling class are to try to gain or to maintain power by appealing to those passions of the democratic electorate that will divert that electorate from their better interests into interests that will serve one or another segment of the ruling class.

Take Yugoslavia as an example. In great part, the Yugoslav crisis, after the question of the Slovenians wanting to keep the fruits of their own prosperity rather than share them with other republics, occurred because the ruler of Serbia, an ex-communist who could no longer rely upon communism to keep him in power, had to find some other means of stirring up passions to do so. So he went back to Serbian nationalism. That creed, so to speak, coupled with his own domination of political power, and his own understanding that that creed would appeal most immediately to the military, generated the war. I am quite skeptical as to whether many people in Yugoslavia, ordinary people, really wanted civil war. The Serbian nationalists clearly led. The Serb leader was able to bring about this war when there was every sign that what the Slovenians and the Croatians wanted was to constitutionalize, to formalize the kind of looser

confederal relationships that had come to be in Yugoslavia in the ten years following Tito's death. So this is a good example of the former case where there is a ruling class for whom the people "voted" every once in a while but who remained the same ruling class.

When one looks at the situation where democracy is deeper than that, where those engaged in government emerge out of the ordinary body of the people at regular intervals and are not permanently separated from them, then the people feel that they have too much to lose by engaging in dangerous wars, tend to reject wars, and to be able to make that rejection stick. How to provide for the kind of rule in which the people do have a significant share, but which institutionally can move towards peace, has been a human problem for a long time, exacerbated by the conditions of the twentieth century. In the last analysis, if the political institutions of the world are directed toward war, or have no way to avoid it, then human beings will find themselves involved.

Nor are the causes of war easily identified and isolated. At one time it was widely believed that the elimination of poverty would eliminate war. Today we understand that, ironically, poverty may limit the chances of war because people who are too poor do not have the resources or the energy to fight, and that prosperity, at least in its early stages, may actually make war both possible and more likely. The same energy that brings the first prosperity may generate ambitions that can be satisfied only by war. At the same time, it is entirely possible that advanced prosperity may indeed lessen the chances for war for the most selfish of reasons. As people grow more prosperous, they grow lazy and slothful, and they are unwilling to risk their comfort for any reason, even a good reason.

I mention these negative elements in irony, but in part because we must be open-minded enough to pursue the fostering of a peaceful world in the minds of people and even through those elements of human personality and culture that are less attractive from other perspectives. Ultimately, however, we must recognize that in every population there are those humans who are drawn to the most difficult challenges and cannot control their desire for gain. One of the wisest of all men, the American president Abraham Lincoln described the problem to which I refer in his famous speech to the Young Men's Lyceum in Springfield, Illinois, when he was a young attorney in 1838.

> It is to deny what the history of the world tells us is true to suppose that men of ambition and talents will not continue to spring up amongst us. And when they do, they will as naturally seek the gratification of their ruling passions as others have so done before them. The question then is can the gratification be found in supporting and maintaining as, an edifice, the Constitution of the federal republic of the United States that has been erected by others? Most certainly it cannot. Many great and good men sufficiently qualified for any task they should undertake may even be found whose ambition would aspire to nothing beyond a seat in Congress, a gubernatorial, or presidential chair. But such belong not to the family

of the lion or the tribe of the eagle. What! think you these places would satisfy an Alexander, a Caesar, or a Napoleon? Never! Towering genius disdains a beaten path. It seeks regions hitherto unexplored. It sees no distinction in adding story to story, upon the monuments of fame, erected to the memory of others. It denies that it is glory enough to serve under any chief. It scorns to tread in the footsteps of any predecessor, however illustrious. It thirsts and burns for distinction and, if possible, it will have it whether at the expense of emancipating slaves or enslaving free men.

It is for such reasons that men like William James, one of the world's eminent philosophers at the end of the nineteenth century, who foresaw with foreboding the transition from a century of relative peace to one of total war, sought to find a moral equivalent of war to engage human energies and ambitions. More than two generations later we humans, sadder and perhaps wiser, have adopted a different equivalent of war in the form of sport — local, national, and international — to engage human urges, passions, and ambitions which were formerly devoted to the battlefield. However pleasurable, sport is not exactly the moral equivalent of war, but if less noble, it may be even a better one for ordinary ambition. But we are still left with the problem of the Alexanders, the Caesars, and the Napoleons.

Our century has indeed been the century of total war. Its first generation, from 1914 through 1947, witnessed two global wars whose scope and human costs were unequalled in history. These wars brought with them a totality of involvement and destruction which only the new technologies of modernity could make possible. In their wake they brought revolutionary totalitarianism to scourge the world — fascism, nazism, and communism. It was a generation in which the periods of so-called peace witnessed so-called limited war and mass killings hardly less extensive than those of the two World Wars. We are generally agreed as to Hitler's place among horrible tyrants, but in fact Stalin killed even more people than Hitler did in ways that were not only less visible but enabled him to win over many of the so-called "good people" of the time who served as his apologists.

The second generation of the twentieth century, from 1948 to 1976, was informed by a cold war between the two great powers and their allies which also extended worldwide, punctured by several limited "hot war" confrontations between those powers and their clients. Yet that generation also witnessed the decolonization of what came to be known as the Third World. And the Cold War, however unpleasant, was confined and generally kept from becoming hot.

Now we are in the third and final generation of this century. Since 1977 the trend has been towards ending the Cold War and related conflicts great and small. This trend reached new heights in the late 1980s and early 1990s with Glasnost and Perestroika, the self-liberation of Eastern Europe, East-West rapprochement, serious moves towards disarmament, the breakup of the Soviet

Union, and the settling of various outstanding regional conflicts tied in one way or another to the Cold War. For the moment we seem to be in the springtime of the world, when peace may indeed be within our grasp. There will be setbacks, indeed, in the dismantling of totalitarian and other anti-peace forces. But the air is full of promise, which we must transform into fulfillment. To reach that fulfillment, we must address people's minds, their cultures, and their institutions.

THE FEDERAL IDEA AS THE KEY TO PEACE

One of the most promising vehicles for addressing all three — people's minds, their cultures, and institutions — is the federal idea. While federalism is normally understood as having to do with political structures, in fact, the federal idea speaks principally to the character of human relationships. With its roots in the biblical idea of covenant, it understands humans as autonomous equals capable of entering into covenants to establish the rules and institutions of their self-government, who form civil societies and polities through covenanting with one another on the basis of mutual consent to advance human cooperation in such a way that all the partners preserve their respective integrities, even as they build a common framework, or common frameworks, to cooperate to secure common ends.

The word "federal" is derived from the Latin *foedus*, which means covenant. The political federalism that we know is one expression of the federal ideal. The evolving world order and its many facets offers a variety of such expressions. What is critical is that federalism involves both a set of attitudes and a set of institutions that, through constitutional means, can establish those means to transform those attitudes into instruments of self-government.

Federalism is the practical application of the covenantal way to the organization of political authority and power. The great political philosophers of the seventeenth century saw constitution- making as a federal act because, properly done, it is the assembly of the people as equals to constitute civil society and government. We are once again beginning to appreciate something of the meaning of the idea of civil society as a result of its revival, especially in eastern Europe in recent years, to try to serve as a beacon for the elimination of totalitarianism.

Civil society is radically different from totalitarianism of any form, principally because it has two dimensions intolerable to totalitarianism. On one hand it suggests that no political-social order that is legitimate and appropriate can exist without providing for a great deal of private space where government cannot interfere, whether on the grounds of natural rights or human rights or whatever. The existence of that space is not simply a matter of government grant

but is inherent to the people in the civil society. On the other hand, civil society rejects what became a very prominent notion in the nineteenth century and which lingers in some quarters, that society can exist without political order, without government.

The seventeenth-century philosophers and the eighteenth-century revolutionaries understood full well that all society, to exist, must have a governmental-political order to frame it. It must be a *civil* society. In the nineteenth century, all the various panaceas proposed for the world were based upon the notion that all that humans needed to do was to find and implement the right set of principles and society would govern itself. This view was shared by laissez-faire capitalism (the market), by Marxism (the march of history) and other forms of Hegelianism, by anarchism (unchaining the natural goodness of humankind), and by all the "isms" accompanying sociology and the social sciences that came to exist. The idea was to find the mechanism, strip away those elements in human existence that prevented the mechanism from working, and then all would be well, we would not have to work at the matter again. Social organization and social life would simply continue in the way that automatically is correct for humanity.

In the twentieth century, we certainly have become disabused of this idea. We understand that any system, any "ism," at best is merely a mechanism that can provide for the periodic self-correction that humans need because of human weakness. Even if 90 percent of people are law-abiding, government and its coercive powers are needed to control the other ten percent. Civil society has now come back into consideration as an idea initially among those who did not have it and learned the hard way about what they lacked.

International relations were also seen by those early philosophers as federal, in that the community of nations was a community of equals, which also had to establish rules of conduct, and control the exercise of power in the international arena. And whereas these seventeenth-century philosophers led to eighteenth-century, philosophically-oriented activists who achieved federal organization in a number of civil societies in the world, they all failed in the realm of international relations, which simply became a somewhat more self-regulated jungle, of the kind that Thomas Hobbes described as "a war of all against all, except insofar as its members see advantages in cooperation."

The modern epoch from the mid-seventeenth to the mid-twentieth centuries was the epoch of runaway nationalism dominated by two principal features of political behaviour. One, national separatism, featured not only the multiplication of states but the myth that each state had to serve a single nation whose special character gave it a privileged position in the world and the right to pursue its national genius and, most especially, to recover what it defined as its national territory to the best of its ability, through whatever means including war. Accompanying that myth was the second feature of political behaviour,

also a myth: the belief that only through centralized, unitary government, with its concomitant concentration of power in a single centre, could the nation state be maintained and pursue its divine mission. These two myths fostered endless wars, large and small, both external and internal: external, to secure the separation of nations and their territorial aggrandizement; internal, to suppress divergent groups or dissident forces that kept the new state from being homogenous.

In the twentieth century, both of these myths were intensified in many states by the additions of ideological homogeneity as a requisite leading to totalitarian repression. Today these myths have been exploded, unfortunately, all too literally. Two world wars and the many revolutionary convulsions demonstrated, perhaps especially to Europeans, with some notable exceptions in the last few years, how false these myths were. Despite the wars and revolutions, in almost no case had nations and states become coterminous where they were not in premodern times. Each state was either composed of several nations — such as the United Kingdom, which harmoniously devised a means for the English, the Scots, and the Welsh to live together (less harmonious when it came to the Irish) — or continued to have significant national minorities, as in Italy, or where each nation was scattered over several states, as in the case of the German nation.

Nor did the centralized states deliver peace and prosperity. Rather, they delivered wars and repression, more horrible than any before. Whereas in medieval times, there was a kind of continuous war, in the sense that there was always some duchy going to war against another. This usually meant that a duke was offended and he mobilized those who owed feudal allegiance to him. He sent them into the duchy of the offending duke where they fought for a few weeks, some people were killed, some satisfaction was gained, and everyone went home. In the twentieth century, when such offences became either the offences of imperial rulers, or of broad masses of the people mobilized by ideology, they produced a century of total war.

THE EUROPEAN COMMUNITY AND CONFEDERATION

Exhausted from their conflicts in our time, when they were free to do so, Europeans slowly turned to the development of a new European political order. One that accepted the existence of many polities, and sought to limit statism in both international and internal spheres. From the ashes of World War II, the European Community developed, anchored in the newly peaceful relationship between France and Germany, the two major historic enemies of western Europe. The federal principle — at first it was discussed in the European Community as functionalist but now it has emerged into the open — has become

Europe's new idea. Federalism, though not necessarily in its modern meaning of federation, but in old-new ways such as confederation, federacy, associated statehood, and autonomy, is fast becoming Europe's way. This new way provides political, social, and cultural autonomy for even more polities than could be accommodated in the traditional state system while providing for greater interstate economic cooperation, political cooperation, and personal liberty than the old system allowed.

In previous centuries, it would have been hard to think of a Germany of *lander* and one that was both united as Germany and also part of a European Community. In the past, Germany either consisted of totally separate and warring small units, or almost totally consolidated national states. It is quite significant, in my opinion, that when West Germany reached out to embrace East Germany, the first thing that had to be done was to re-establish the five eastern *lander* and unite them with the eleven *lander* of the West to form the new German Federal Republic. Similarly, Spain would have had great difficulty in providing appropriate self-expression for Basques and Catalans and other peoples of Spain had Spain not been striving for, and had not attained, membership in the European Community, now Union.

This federal idea and way is not designed to foster the establishment of a new universal state subject to all the evil propensities of the nation state on a larger, more threatening scale. There are those who do hope for that. During the struggle around the Treaty of Maastricht, Jacques Delors and those who supported him seemed to believe that a bureaucratic state, formally a federation, would be more benign. But a majority of the people in the Community, while interested in preserving the confederal gains of European unity and community, were very resistant to a new federal union led by a bureaucracy tied to the Community alone, or are very skeptical that this would bring them greater happiness. The struggle is now going on and we will have to see where it will end. But I think it is fair to say that a leaguing of states to live together for the sake of greater benefits, while preserving their political sovereignty is what most of the people of Europe want, and indeed what the new European Union has been successful in achieving.

The EU is not necessarily committed to federation, the sole accepted manifestation of the federal idea in the modern epoch, although federation has been a successful device in integrating or decentralizing and thereby restoring peace to some European states, not only to Germany as I have already mentioned, but also to Austria, Belgium, Spain, and Switzerland even earlier. In Western Europe, what was initially a league of states for limited economic purposes is being transformed into a confederation which preserves the full political integrity of the confederated states while creating a new common, if limited, regime for them all. There the struggle is between those seeking confederal unity and those seeking bureaucratic federalism — a version of the Jacobin state which

was devised at the time when modern nationalism was merged with modern democratic revolution.

The confederal variant of the federal idea, which was unable to sustain itself in practice during the modern epoch when the separatist and centralist orientations of statism were too powerful, is now being successfully revived under the very different conditions of the postmodern epoch.

Let me elaborate. During the time when the nation-state was the desideratum of Europe, or virtually all of Europe, the invention of modern federation by the United States in 1787 provided a way to have one's cake and eat it too; to link the constituent units of a new nation, as a nation, defined through its constitution, so that it appeared to the outside world as a nation while inside, power and authority were dispersed among and between the constituent units and the federal government. The federalist founders developed a new approach to governing that allowed the expression of nationalism and of nation-statism while at the same time allowing for the non-centralization of power. And this system, the modern system of federation, displaced the older way of federating integral constituent units, that came to be known as confederation, whereby the bulk of the power resided with the constituent units that developed common institutions for limited purposes.

Now in the postmodern epoch, after World War II, confederation is once again becoming a viable option. The European Community, now Union, has demonstrated that there can be the use of the federal idea, and federal principles, in other ways, not only through modern federation. At times the federal idea takes on other forms of practical expression. Sometimes they are asymmetrical, as in the ties between Switzerland and Liechtenstein, Britain and its offshore islands, the Netherlands and the Netherlands Antilles, and about 15 to 20 other such arrangements that exist in the world. These applications of the federal idea have enabled micro-states to survive and prosper in the new Europe and among the former colonies of the former European empires. In a case like Andorra, a true micro-state, a Spanish-French condominium formed 700 years ago has preserved the freedom of that little republic, and has continued to provide a political space for Andorra, throughout the age of national consolidation, in the face of the rivalry of these two great powers.

What is happening in Europe can be seen as building on what began in North America at the height of the modern epoch when the United States established modern federation 200 years ago. That idea of modern federation spread to the new worlds of British colonization and to Latin America in the western hemisphere during the next century. It had great success in fostering and preserving peace and a climate of peace in those countries, even in the face of separatist tendencies, and even where federal principles had to struggle against authoritarian ventures as in Latin America. The federal idea, introduced as a key element in Latin American revolutionary liberalism, lay the groundwork for the

liberalization of Latin America in our own time. As peace and democracy have come to Latin America, federal ideas and practices are a strong part of the new reality.

The federal idea has had mixed success in the Third World more generally where, at the beginning of the postmodern epoch, it has had to confront those very same statist myths that were imported from Europe and which were then being exploded there. Where the colonial powers tried to introduce federal arrangements as a means of interethnic accommodation, their efforts usually failed because those who sought power could call upon by now discredited European statist myths to serve their own ends. Nevertheless, in India, that greatest of Third World countries, the federal way has made union and civil peace possible, despite all of the difficulties that country has encountered.

Perhaps even more interesting have been the efforts at confederation in the West Indies. British efforts to establish a West Indies Federation failed in the 1960s. The island states involved were simply too insular by definition. But the need for some kind of linkage of those micro-states was necessary if they were more than merely to survive. What they did was to establish a network of overlapping joint authorities that preserved their separate status as states, yet enabled them to share a common currency, a common supreme court, a common university, a common central bank, and, to some extent, a common market. As a result, they have been moving toward a level of regional integration that has taken on confederal characteristics. These new regional institutional arrangements are possible only when there is a will, where the minds of the people are attuned in that direction.

Europe also provides us with the most current examples of the renaissance of either nationalism. The premise of the modern epoch was that liberalism and rationalism would prevail. Liberalism and rationalism, in turn, were defined in part as the disappearance of primordial groups and their replacement by rational enlightened individuals choosing on the basis of a rational enlightened self-interest. That, we have seen, has not happened. If anything, primordial groups have survived almost everywhere, almost no primordial groups have disappeared — not even Native American tribes — and they have been revived in what, certainly, even people who were not ideologically liberal rationalists would have considered the oddest places — Bretons in France or Lombards in Italy, not to speak of Croatians and Serbians, who are very close to the issues of primordial group struggle and have been all along. At present, we have not developed very many mechanisms to either secure group rights for primordial groups without undercutting liberal societies, nor have we found ways to convince very many primordial groups that they can survive successfully and more prosperously and peacefully by coming together in federal arrangements.

Nevertheless, we have an opportunity to be realistically optimistic. That is to say, we do know some things about when primordial-group demands work

counter to federal ways that promote peace, prosperity, democracy, and justice. For example, if Yugoslavia had been much more prosperous, then it probably would have had a much better chance of surviving. It was the declining economy in Yugoslavia, the long problem of diminishing returns, that led the more prosperous Slovenians to refuse to share with the Macedonians, Montenegrans, and others. And so they put forth claims of secession in order to keep their prosperity to themselves.

This is the situation in other cases as well. The real demands for secession were greater in Quebec when the province seemed to be moving uninhibitedly in an undiminished way towards greater and greater prosperity. While there may be more posturing today, in fact there also are more second thoughts because of the world economic downturn which has affected Quebec as it has affected everybody else. We can know something about those phenomena although we may not be able to do anything about them at the appropriate time.

Or, to take another example, we now know more about the role of accident in these cases. Certainly the role of accident should never be ignored. Abraham Lincoln went on to say in the Young Mens' Lyceum speech, that he thought that if the United States was ever threatened, it would be threatened internally. This seems to be more true than not. At the same time, he suggested ways in which interior grand social changes in the United States could imperil the American system. Lincoln talked about those matters in terms of the human ambition of individuals, but we now know something more about accident. Again, we may not be able to control it, but we can foster some conditions in which there is less chance of it occurring.

In the last analysis, having the opportunity to do more makes us need to channel our optimism in realistic ways, but we should not avoid the moment when it is possible to operate on a somewhat more optimistic set of premises. Social scientists always predict the worst as social scientists. At the same time, as humans we always know that even though all the signs point to the correctness of predicting the worst, that something usually happens by accident to make matters not quite so bad, and maybe even better, and better over the long pull. Federalism, unlike ideological "isms," should not be seen as a fantasy, but as a method to build in the kinds of checks and balances, the kinds of barriers, the kinds of political cultural encouragements, and the kinds of self-correcting mechanisms needed to enable flawed human beings, who will continue to be flawed and to make mistakes as they have throughout the history of humankind, to build the institutions to even overcome some of the flaws.

In most cases, federal experiments have succeeded where the states themselves have abandoned the idea that the concentration of power in a single centre is the best way. The states themselves have adopted federal or consociational structures or arrangements or have undertaken constitutional transfer of functions to their local governments. In other words, the first step is

a shift in the minds of men from thinking statist to thinking federal. Once begun, the possibility for combining various arrangements of different degrees of scope and intensity has wide limits. I have already referred to the Indian example.

The United States of America, for example, is noted for being a federation, now of 50 states. As such, it has always been predisposed toward thinking federal and fostering non-centralized government, so much so that when the courts held the states to be unitary and not federal in their internal composition, the overwhelming majority, 45 of the 50 states, adopted home-rule provisions, most in their constitutions, in a few cases by statute, to extend greater autonomy to their cities and counties and to anchor it constitutionally.

Since 1952, the United States has developed and constitutionalized asymmetrical federal arrangements with Puerto Rico and the Northern Marianas in which any change in the relationship requires the consent of both parties, none of whom seem to want any change. More recently, the three Micronesian republics, one of which is itself formally a federation, established an associated statehood with the United States which can be terminated unilaterally under certain conditions by either party, but which allows the continuation of the relationship if the parties so desire. Increasingly, American Indian tribes defined by the United States Supreme Court over 150 years ago as "domestic dependent nations," are developing their own asymmetrical federal relationship with the federal and state governments which have a share in the jurisdiction over their common lands.

Across the Pacific Ocean, the Association of Southeast Asian Nations (ASEAN), carefully preserving the political sovereignty of each member state, has moved from being a defensive league organized during the Vietnam conflict to the threshold of confederation through the development of a growing number of overlapping functional linkages. Although it has not crossed that threshold and may not in the next few years, nor should it until it is ready to do so, it is a good example how federal thinking can begin to lead a region along the paths of peace.

THREE FORMS OF POLITICAL RELATIONSHIP

In the last analysis, there are only three ways to establish political relationships. One is by conquest or force. We are all too familiar with that way, which is the antithesis of the achievement of peace. A second is through organic development, seemingly by accident. Under the right conditions, organic development can sometimes lead to domestic peace, but it is very chancy indeed and is likely to lead to continuing wars between states in pursuit of their respective myths and ambitions; hence it is not to be depended upon in our highly interdependent world as a vehicle for achieving peace.[1]

The third way is through reflection, choice, and covenant, through the establishment of communities of equals on an equal basis by pacts reflecting agreement and consent.

Democracy grows out of covenant or reflection and choice which, like the other ways, has a history that goes back to the beginning of time. And democracies are notably reluctant to go to war, especially against other democracies. The American document written at the time of the American founding, speaking to the American people, who were the first moderns to embark on the federal path, put it thus. "It seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force." That is now the choice before the world. *The Federalist* continues: "A wrong election of the part we shall act, may, in this view, deserve to be considered as the general misfortune of mankind." How much more so is this true of humanity on this planet today.

Democracy, which is rooted in covenants and constitutions, has a history that goes back to the beginnings of what today often is referred to as the Judeo-Christian tradition. The Bible, in describing the making of the covenants that instituted constitutional government in ancient Israel, speaks in the same terms of reflection and choice between good and evil ways. Modern constitutionalism is the most widespread current manifestation of establishing the kind of regimes that we are describing within nations.

In the twentieth century, we have tried to introduce this principle into the international arena as well. At first hesitantly and ineffectively through the League of Nations, but since 1945, still haltingly but somewhat more effectively, through the United Nations and the network of organizations linked with it. We are still in the very first stages of this process, building an international community through overlapping covenantal linkages. It is a community that does not purport to be federal in its structure in the modern understanding of the term but, rather, international, protecting the status of each member state. Nevertheless, world events have overtaken that careful constitutional position. An interconnected world community has developed in economics, in communications, and increasingly in matters of public opinion and of peace and security. We need not seek more of this than the reality, nor should we impose more of a burden on this fledging world community than it can bear, as we may be in danger of doing because of our natural desire to correct such problems as the Yugoslav situation or the Iraq-Kuwait one before that. But as we think of how to build peace in the world, we can see the direction in which we may be going, and we may be able to proceed slowly but effectively further along the path.

between the two. Great Britain cannot be made federal by simply saying that the Act of Union, by providing for separate religions, a separate legal system, separate administrations, separate educational systems, makes Great Britain federal. But Great Britain as it is drawn more and more into the European Union is likely to follow that path more than the original path of organic England. In time it may even be necessary to re-establish a Scottish government to meet European Union demands. There is a kind of a Scottish quasi-government now and it is likely that ultimately the European Union will necessitate some kind of legislative expression that Scotland needs to be "complete."

2

Federalism and Pluralism
in a Free Society

Federalism is resurfacing as a significant political force just as it did in the
transition from the late medieval to the modern era which took place from the
sixteenth to the eighteenth century.[1] It is resurfacing as a political force because
it reflects a practical embodiment of the principle that there are no simple
majorities or minorities but that all majorities are compounded of congeries of
groups, and the corollary principle of minority rights, which not only protects
the possibility for minorities to preserve themselves, but forces majorities to be
compound rather than artificially simple. Furthermore, it serves those principles
by emphasizing the consensual basis of the polity and the importance of liberty
in the constitution and maintenance of democratic republics. Both principles
are especially important in a world increasingly complex and interdependent,
where people and peoples must live together whether they like it or not, and
where some even aspire to do so democratically. Hence it is not surprising that
peoples and states throughout the world are looking to federal solutions to the
problems of political integration within a democratic framework.

FEDERALISM AND THE ORIGINS OF THE POLITY

In chapter one, it was noted that since its beginnings, political science has
identified three basic ways in which polities have come into existence: conquest
("force," in the words of *The Federalist*), organic development (for *The*

Federalist, "accident"), and covenant or "reflection and choice." These questions of origins are not abstract; the mode of founding of a polity does much to determine the framework of its subsequent political life.

Conquest can be understood to include not only its most direct manifestation, a conqueror gaining control of a land or a people, but also such subsidiary ways as the revolutionary conquest of an existing state, a coup d'état, or even an entrepreneur conquering a market and organizing control through corporate means. Conquest tends to produce hierarchically organized regimes ruled in an authoritarian manner; power pyramids with the conqueror on top, his agents in the middle, and the people underneath the entire structure (see figure 1). The original expression of this kind of polity was the Pharaonic state of ancient Egypt. It was hardly an accident that those rulers who brought the Pharaonic state to its fullest development had the pyramids built as their tombs. Although the Pharaonic model has been judged illegitimate in Western society, modern totalitarian theories, particularly fascism and nazism, represent an attempt to give it a certain theoretical legitimacy.

FIGURE 1:   The Power Pyramid
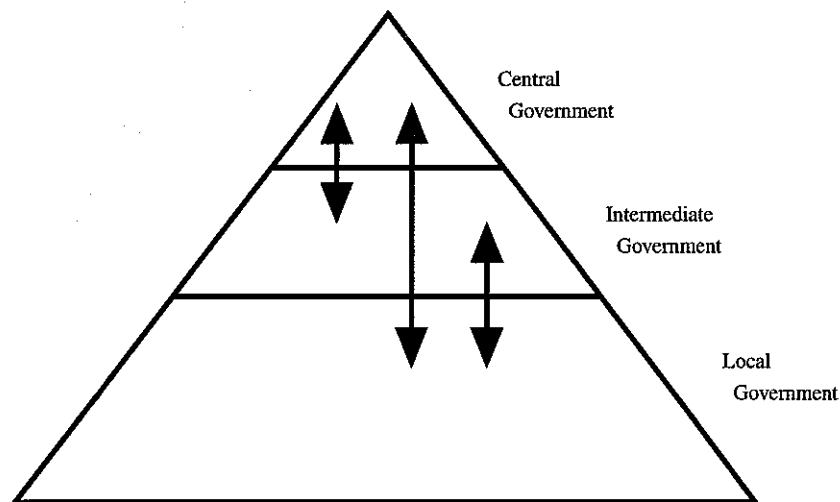
Organic evolution involves the development of political life from its beginnings in families, tribes, and villages to large polities in such a way that institutions, constitutional relationships, and power alignments emerge in response to the interaction between past precedent and changing circumstances, with a minimum of deliberate constitutional choice. The end result tends to be a polity with a single centre of power organized in one of several ways. Classic Greek political thought emphasized the organic evolution of the polity and rejected any other means of polity-building as deficient or improper. The organic model is closely related to the concept of natural law in the political order (see figure 2).

The organic model has proved most attractive to political philosophers precisely because, at its best, it seems to reflect the natural order of things. Thus it has received the most intellectual and academic attention. However, just as conquest tends to produce hierarchically organized regimes ruled in an authoritarian manner, organic evolution tends to produce oligarchic regimes which, at their best, have an aristocratic flavour, and, at their worst, are simply the rule of the many by the few. In the first, the goal is to control the top of the pyramid; in the second, the goal is to control the centre of power.

FIGURE 2:   The Centre-Periphery Model
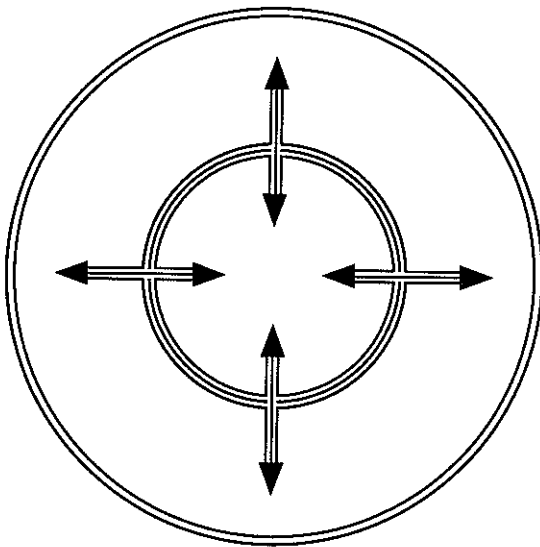
Covenantal foundings emphasize the deliberate coming together of humans as equals to establish bodies politic in such a way that all reaffirm their fundamental equality and retain their basic rights. Even the Hobbesian covenant — and Hobbes specifically uses that term — which establishes a polity in which power is vested in a single sovereign, maintains this fundamental equality although, in practice, it would not be able to coexist with the system of rule that Hobbes proposes. Polities whose origins are covenantal reflect the exercise of constitutional choice and broad-based participation in constitutional design. Polities founded by covenant are essentially federal in character, in the original meaning of the term—whether they are federal in structure or not. That is to say, each polity is a matrix compounded of equal confederates who come together freely and retain their respective integrities even as they are bound in a common whole (see figure 3). Such polities are republican by definition, and power within them must be diffused among many centres or the various cells within the matrix.[2]

FIGURE 3:   The Matrix Model
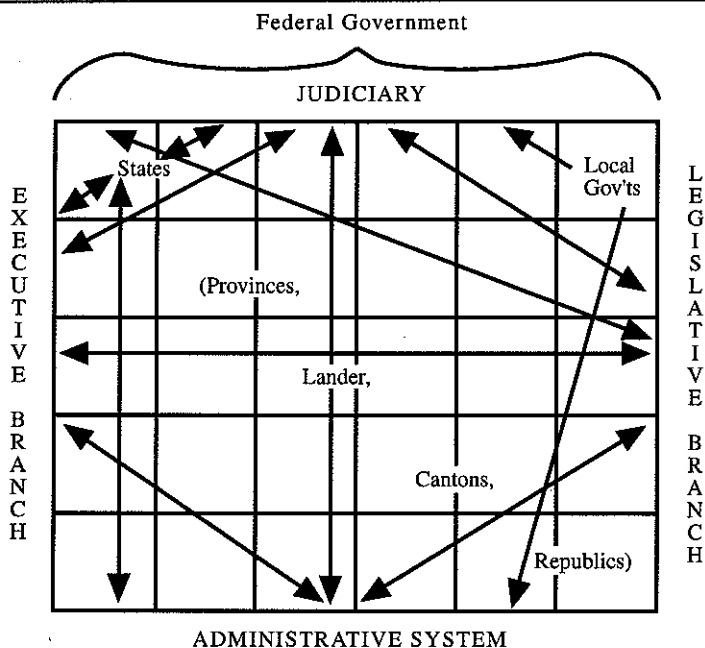
THE FEDERAL IDEA

As many philosophers, theologians, and political theorists in the Western world have noted, the federal idea has its roots in the Bible.[3] Indeed, the first usage of the term was for theological purposes, to define the partnership between man and God described in the Bible, which, in turn, gave form to the idea of a covenantal (or federal) relationship between individuals and families leading to the formation of a body politic, and between bodies politic leading to the establishment of compound polities. The political applications of the theological usage gave rise to the transformation of the term federal into an explicitly political concept.[4]

The term "federal" is derived from the Latin *foedus*, which, like the Hebrew term *brit*, means covenant. In essence, a federal arrangement is one of partnership, established and regulated by covenant, whose internal relationships reflect the special kind of sharing which must prevail among the partners, namely one that both recognizes the integrity of each partner and seeks to foster a special kind of unity among them. Significantly, *shalom*, the Hebrew term for peace, is a cognate of brit, having to do with the creation of the covenantal wholeness that is true peace.[5]

Federal principles are concerned with the combination of self-rule and shared rule. In the broadest sense, federalism involves the linkage of individuals, groups, and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties. As a political principle, federalism has to do with the constitutional diffusion of power so that the constituting elements in a federal arrangement share in the processes of common policy-making and administration by right, while the activities of the common government are conducted in such a way as to maintain their respective integrities. Federal systems do this by constitutionally distributing power among general and constituent governing bodies in a manner designed to protect the existence and authority of all. In a federal system, basic policies are made and implemented through negotiation in some form so that all can share in the decision-making and executing process.

THE FEDERALIST REVOLUTION

The federalist revolution is among the most widespread—if one of the most unnoticed—of the various revolutions that are changing the face of the globe in our time. In the modern and postmodern epochs, federalism has emerged as a major means of accommodating the spreading desire of people to preserve or revive the advantages of small societies with the growing necessity for larger combinations to better mobilize the utilization of common resources, or to maintain or strengthen their cultural distinctiveness within more extensive

polities. Consequently, federal arrangements have been widely applied, on one hand, to integrate new polities while preserving legitimate internal diversities and, on the other, to link established polities for economic advantage and greater security. Nearly 80 percent of the world's population now lives within polities that are formally federal, and that utilize federal arrangements in some way.[6]

The phrase "federal arrangements" properly suggests that there is more than one way to utilize federal principles. Indeed, to use a biological analogy, federalism can be considered a genus of political organization of which there are several species. Premodern Europe knew of only one federal arrangement, *confederation*, whereby several pre-existing polities joined together to form a common government for strictly limited purposes, usually foreign affairs and defence, that remained dependent upon its constituent polities. Two centuries ago, the United States invented modern federalism and added *federation* as a second form, one that was widely emulated in the nineteenth century. A federation is a polity compounded of strong constituent entities and a strong general government, each possessing powers delegated to it by the people and empowered to deal directly with the citizenry in the exercise of those powers. Federations became the only successful way to apply federal principles during the modern epoch which emphasized the centralized nation-state as the norm.

In the twentieth century, especially since World War II, new federal arrangements have been developed, or federal elements have been recognized in older ones previously not well understood. *Federacies, associated state arrangements*, and *common markets* represent postmodern applications of the federal principal. In a federacy arrangement, a larger power and a smaller polity are linked asymmetrically in a federal relationship whereby the latter has greater autonomy than other segments of the former and, in return, has less of a role in the governance of the larger power. The relationship between them is more like that of a federation than a confederation and can only be dissolved by mutual agreement. Associated state arrangements are equally asymmetrical but are like confederations in that they can be dissolved unilaterally by either of the parties under certain conditions. Consequently the associated state has even less of a role in the governance of the associated power. Common markets are forms of confederation emphasizing shared economic rather than political functions. They have led the way toward the revival of confederation as a feasible form of federalism in the globally more interconnected world that encompasses new linkages but allows for loose arrangements.

Political scientists have rediscovered the federal characteristics present in *consociational polities, unions,* and *leagues.* Consociational polities are non-territorial federations in which polities divided into transgenerational religious, cultural, ethnic, or ideological groupings are constituted as federations of "camps," "sectors," or "pillars" and jointly governed by coalitions of the leaders of each. Unions are polities compounded in such a way that their constituent

entities preserve their respective integrities primarily or exclusively through the common organs of the general government rather than through dual government structures. Leagues, on the other hand, are linkages of politically independent polities for specific purposes that function through a common secretariat rather than a government and from which members may unilaterally withdraw. While neither are species of federalism, properly speaking, both utilize federal principles in their constitution and governance.

New *regional arrangements*, which are essentially leagues that emphasize regional development, represent more limited applications of federal mechanisms. There is every reason to expect that the postmodern world will develop new applications of the federal principle in addition to the arrangements we already know, including *functional authorities* for the joint implementation of particular tasks and *condominiums* involving joint rule by two powers over a shared territory in such a way that the inhabitants of the latter have substantial self-rule. Thus, reality itself is coming to reflect the various faces of federalism.

A major reason for this lies in the reassertion of ethnic and regional identities, now worldwide in scope, which promises to be one of the major political issues of this generation and the next century. There are some 3000 ethnic or tribal groups in the world conscious of their respective identities. Of the over 180 politically "sovereign" states now in existence, over 160 are multiethnic in composition. Approximately 40 percent of those states are involved in formal arrangements utilizing federal principles in some way to accommodate demands for self-rule or shared rule within their boundaries or in partnership with other polities. In sum, while the ideology of the nation-state — a single state embracing a single nation — remains strong, the nation-state itself is rare enough.[7]

The federalist revolution in Western Europe is taking on two forms. On one hand, Western Europe has established a new-style confederation of old states through the European Union and, on the other, there is a revival of even older ethnic and regional identities in the political arena within those states. As a result, Belgium, Italy, and Spain have constitutionally federalized or regionalized themselves and even France is being forced to move in that direction, at least in the case of Corsica and its overseas possessions. Portugal has devolved internal self-governing power to its island provinces — as the Netherlands and Denmark have long since done. Switzerland, Germany, and Austria, already federal systems, are undergoing an intensification of their federalist dimensions in one way or another. The issue also remains alive, if unresolved, in Britain. The idea of a Europe of ethnic regions is a potent force on that continent and the European Union has not only taken note of but fostered this movement.[8]

Most of the new states of Asia and Africa must come to grips with the multiethnic issue. It is an issue that can be accommodated peacefully only through the application of federal principles that will combine kinship (the basis

of ethnicity) and consent (the basis of democratic government) into politically viable, constitutionally protected, arrangements involving territorial and non-territorial polities. Although only a few of those states have formally federal systems, as in India, Malaysia, Nigeria, and Pakistan, a number of others have adopted other federal arrangements internally and are combining in multinational arrangements on a regional basis.[9]

Western Asia and the eastern Mediterranean region, known collectively as the Middle East, are no exceptions to this problem of ethnic diversity. Indeed many current problems can be traced to the breakdown of the Ottoman Empire, which had succeeded in accommodating communal diversity within a universal state for several centuries. The intercommunal wars in Cyprus, Iraq, Israel, Lebanon, and Sudan, not to speak of the minority problems in Egypt, Iran, and Syria, offer headline testimony to this reality. Federal solutions are no less relevant in the Middle East than elsewhere, but especially in the Middle East the need is greatest for a postmodern federalism, a federalism that is not simply based upon territorial boundaries but recognizes the existence of long enduring peoples as well.[10]

On the other hand, in the older, more established federal systems of North America, the re-emphasis of ethnic and cultural differences has challenged accepted federal arrangements. In Canada, this challenge has taken the form of a provincial secessionist movement in Quebec, and in the United States, an emphasis on non-territorial as against territorial-based subnational loyalties on one hand and a revival of Native American (Indian) tribal aspirations on the other. Latin America, the first cultural area outside of the United States to adopt federal solutions to encourage political liberty, continues to struggle with the problems of reconciling the republican dimensions of federalism with a penchant for autocratic leadership. Venezuela has strengthed its federal structure by reintroducing popular election of state governors. Brazil's new constitution was avowedly designed to strengthen its states. Even Mexico has been moving toward more political autonomy for its states as part of a shift to democratic party politics. In sum, federal forms have been applied to a widening variety of relationships ranging from federation in support of group pluralism and individual liberties in the United States, to federalism in support of local liberties in Switzerland and federalism on a linguistic basis in India, to federalism as a means of gaining mild decentralization in Venezuela. Federal arrangements to accommodate ethnic differences are becoming more widespread than ever in Canada, Belgium, Spain, the United Kingdom (under other names), Malaysia, and Nigeria. In every case, these developments have emerged as practical responses to real situations.

In most, if not all of these cases, whether they know it or not, the various parties have arrived at the point which the late Martin Diamond described as the classic position of federalism — the position expressed by the song that

Jimmy Durante, the American comedian, belted out in the film, "The Man Who Came to Dinner": "Did you ever have the feeling that you want to go, and the feeling that you want to stay?" That is the classic problem for which federalism, as a technology, was invented.

FEDERALISM AND PLURALISM

Federalism differs from pluralism precisely because it bases its efforts to deal with the realities of human nature on a firm constitutional structure, and does not leave so vital a task to chance, that is to say, to the possible existence of cultural or social phenomena which, within the right environment, manifest themselves politically as pluralism. The federalist argument is that pluralism in one form or another may indeed be a safeguard of liberty, but that it cannot be relied upon by itself unless properly institutionalized constitutionally. Some proponents of federalism argue that it is primarily important as a means to institutionalize pluralism and thus guarantee (insofar as it is possible to guarantee) the latter's continued existence; this role often goes unrecognized by pluralists in federal systems, who take pride in the pluralism to be found in their polities, but who assume that this pluralism continues to exist in and of itself.[11]

Pluralism is more likely to sustain itself in polities where strongly rooted primordial groups, which emerged in premodern times, continue to dominate political and social life. Unfortunately, where such groups exist they are also likely to make political integration — federal or otherwise — more difficult, as in Yugoslavia. Highly egoistic ethnic nationalism is often too exclusionist to sustain federal arrangements. The United States of America is often considered to be the post-traditional pluralistic commonwealth *par excellence*, in the sense that plural ways of social, religious, and, to some degree, political and economic expression, are accepted as part of the natural order of things, yet its pluralism is based more on individual choice than primordial ties, thus making pluralism more fluid.

Two points are significant here. On one hand, each form of pluralism emerged in relation to a political base that either stimulated it or gave it the requisite support and grounding. On the other, the existence of federalism allows the development of a variety of forms of pluralism, side by side within the same civil society. The constitutional-political base for pluralism is particularly important in post-traditional societies.

FEDERALISM AND LIBERTY

The central interest of true federalism in all its species is liberty. All forms of federalism begin with the assumption that government in some form is necessary and that the development of appropriately effective government is a major human task. In this respect federalist theories are realistic. The other "given" of federalism is that humans are born free and that good government must be grounded in a framework of maximum human liberty. The task of constitution-makers is to develop a regime that secures liberty for each person while recognizing and allowing for government even in its coercive aspects.

In the last analysis, political federalism is designed to secure good government based upon liberty or, put in other terms, to maintain effective government under conditions whereby the liberties of the partners to the federal bargain are maintained. It seeks to do so, in part, by restricting and dividing governing powers and, in part, by giving the partners to the federal compact (whether individuals, communities, or polities) a participatory role in the exercise of those powers. Yet it seeks to do so, not out of a desire to prevent governing, but to allow governance to the maximum extent required. It is the combination of ends: liberty, citizenship (or participation), and governance, and the relationship between them, that is one of the defining characteristics of federal systems.

To say that liberty stands at the centre of federalist striving is to open the door to the question of what constitutes liberty in the federal context and how do federalists deal with the problem of liberty. Each of the several models of pluralism reflects its own conception of liberty. One, communitarian pluralism, emphasizes the liberty to build communities, each with its own way of life and the necessity to make distinctions as to who can build what and where. Two others emphasize the liberty to maintain group (including or especially primordial-group) identities within a shared polity, with its corollary emphasizing the market model based upon shared rules of the game. The difference between them lies in that one emphasizes the moral foundations of civil society and the other civil society, as a marketplace, pure and simple. A fourth, the pluralism of caste, emphasizes the liberty of one group at the expense of another, and hence has been judged severely wanting in terms of contemporary equalitarian ideals.

The fifth, like the first, emphasizes the liberty of the marketplace based upon common subscription to the rules of the game, but goes beyond it to emphasize the liberty of the individual to choose his or her other primary and secondary associations. This liberty is limited only by the shared recognition that it is necessary to have binding, long-term, primary associations, however free one is to choose them. The sixth model rejects even that, seeking radical liberty for every individual, even to the point of raising questions about the extent to which individuals are bound by shared rules of the game.

Pluralism is a necessary concomitant of democracy, American style. It may not be a concomitant of every democracy. Indeed, strong arguments have been made by various political philosophers and others that true democracy can only function under conditions of social homogeneity. However, pluralism is a concomitant of federal democracy, almost by definition. The United States, as a nation of immigrants, has gone down one such path, which is fraught with its own problems as well as blessed with its own virtues. Every federal system is informed by its own pluralism which it must confront and conciliate. It does so through some conception of liberty which relates to the form or forms of pluralism which inform it. Switzerland, for example, was founded on the principle of communal liberty; Yugoslavia, on national (i.e. ethnic) liberty; and Canada on the often clashing principles of ethnic-cultural and individual liberty.

These questions lead us to what may be the decisive difference between various species of federalism. Take, for example, confederation and federation. Federations are communities of both polities and individuals and emphasize the liberties of both. The American federation has placed even greater emphasis on the liberty of individuals than on the liberties of its constituent polities, an emphasis which has grown more pronounced over the generations. Confederations, on the other hand, are primarily communities of polities, which place greater emphasis on the liberties of the constituent polities to protect individual liberty, more or less as each defines it, although the constituent polities of confederations of republics must conform to at least minimum standards of individual liberty in order to preserve the republican character of the whole.

In the case of the United States, Article III of the Articles of Confederation set forth its ends:

> The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon, them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Contrast it with the Preamble to the Constitution of 1787:

> We, the people of the United States, in order to form a more perfect union, establish Justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and insure the blessings of liberty to ourselves and to our posterity, do ordain and establish this Constitution for the United States of America.

Following Madison, the distinction between the two regimes can be summarized as follows: the Constitution of 1787 provided a government that was partly national and partly federal to replace the Articles of Confederation which established a regime that was partly federal and partly a league. The first combination came to be known as federation and the second came to be known

as confederation. The tension built into the former is between the national and the federal elements, while the tension built into the latter is between the federal and the league elements. Since federal arrangements always involve one or another set of built-in tensions, the character of the tension of each particular arrangement is the major clue as to the species of federalism involved.[12]

Because of the special character of American pluralism, Americans have a very difficult time understanding the issues of group rights. That made federation easy for them. But for much of the world, group rights — variously defined as national, local, or ethnic liberties — are of the essence. For them confederation may be the most viable way to attain the combination of liberty, good government, and peace which federalism promises.

FEDERAL VERSUS NATURAL LIBERTY

Liberty has a variety of meanings within the federal context. It may reflect the desire to maximize individual liberty (as in the United States and the Latin American federal systems); it may reflect the desire to maintain the liberties of the constituting units in which the individual's place in the community is what counts (as in Switzerland and French Canada); and it may reflect the desire to establish what was termed by John Winthrop of Massachusetts, "federal liberty," namely the liberty of the partners to act in accordance with the moral principles embodied in God's covenant with humanity (as in biblical Israel and colonial New England). In whatever form, liberty is the key, and it is assumed that it is through the maintenance of liberties that other human values are best maintained.

The concept of federal liberty goes beyond Winthrop's theological definition and is vital for understanding the proper relationship between federalism and liberty. It can be juxtaposed against the idea of natural liberty, its principal rival in the modern epoch. John Adams told the story of an encounter he had with a horse jockey in Boston at the outbreak of the Revolution. The jockey indicated to Adams how grateful he was that the Patriots had liberated them all so that every man could do as he pleased. Adams' response was to express shock at this misinterpretation of the meaning of political liberty, rejecting the jockey's equation of liberty with anarchy. He sought a more secularized version of the federal liberty of his Puritan ancestors — that is to say, liberty limited by political covenant or compact. That kind of liberty is both morally and mutually agreed upon, hence it is the liberty to do what is right from a moral sense and according to the rules of the game in a consensual one.

Adams was to give his views operational embodiment in the Constitution of Massachusetts which he wrote and which was ratified by the people of that Commonwealth in 1780 and which remains its fundamental law:

The end of the institution, maintenance and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it, with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: And whenever these great objectives are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness. The Body-Politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each Citizen, and each Citizen with the whole people, that all shall be governed by certain Laws for the Common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them. WE, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the Universe, in affording us, in the course of his Providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an Original, explicit, and Solemn Compact with each other; and of forming a New Constitution of Civil Government, for Ourselves and Posterity; and devoutly imploring His direction in so interesting a Design, DO agree upon, ordain and establish, the following *Declaration of Rights and Frame of Government,* as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS.

Natural liberty is unrestricted, the freedom of the state of nature, whether understood in Hobbesian or Lockean terms. In the end, it is the liberty that leads to anarchy, or the war of all against all. According to federal principles, proper liberty is federal liberty, that is, the liberty to act according to the terms of the covenant (*foedus*) which calls the body politic into existence.

Every proper polity is established by a pact among its constitutuents, which is covenantal insofar as it rests upon a shared moral sensibility and understanding, and legitimate insofar as it embodies the fundamental principles of human liberty and equality. Behaviour which does not fit within those terms is, in effect, a violation of the covenant and a manifestation of anarchy. Hence it can be stopped and its perpetrator punished by the appropriate institutions or government.

In sum, federal liberty is liberty established by agreement. The content of any particular agreement may and will vary. Thus John Winthrop could understand true liberty as that flowing from the covenant in which God dictated the terms of the agreement and which the people pledged to accept. On the other hand, James Wilson of Pennsylvania, one of the authors of the Constitution of 1787, could understand federal liberty as a strictly secular expression of the compact establishing civil society. Today, when the Supreme Court of the United States holds the state and federal governments to standards of behaviour based upon the U.S. Constitution, even when the implementation of those standards places heavy restrictions on individual behaviour, in effect it does so on the grounds that the Constitution is a compact entered into by the people of

the United States which, *inter alia*, delineates what constitutes federal liberty within the American system with regard to proper actions towards others, implicitly if not explicitly.

Federal liberty has had to contend with natural liberty throughout history. Natural liberty celebrates the "natural man," who is not bound by the conventions of civilization but is able to pursue true freedom in nature. Much of the myth of the American West is associated with natural liberty and natural men, implictly rejecting federal liberty, even though the reality of westering, whether in wagon trains or mining camps — not to speak of temperance colonies or settlements of sober farm folk — rested upon the introduction of federal liberty into the wilderness. Postmodern theories of human rights in their more radical manifestations reflect a different version of that myth spread far beyond the United States of America.

This struggle between federal and natural liberty can be traced back to the earliest days of the modern experience, in the confrontations between the Puritan vision and the Rousseauian ideal of the noble savage. In an earlier generation of this century, natural liberty was expressed as "doing what comes naturally" and today by "let it all hang out," a kind of pluralism run wild. Natural men in the western wilderness were limited by raw nature, which they confronted daily and thoroughly respected. Hence they were no more unlimited in their freedom than those bound by covenant. When people in civilization seek to behave as natural men, however, it is another matter entirely. In fact, even they are finally restrained by nature as reflected in the increased incidence of death among young celebrities and others from drug- or alcohol-induced causes.

Modern federalists also differ from certain other democrats in that, while they see substantial equality as a necessary precondition for the establishment and maintenance of liberty, they also see liberty as taking precedence over the striving for absolute equality. That is to say, they are willing to sacrifice a certain amount of equality for the sake of liberty as distinct from those who would sacrifice liberty on behalf of equality. Most federalists would argue that, operationally, the best way to attain meaningful equality is through the maintenance of liberty, even though that means the rejection of the attainment of absolute equality as a goal. They argue that absolute equality (in itself a problematic concept) is not attainable in any case (it is contrary to human nature in certain crucial ways), and attempts to sacrifice liberty for equality tend to lead to the loss of both. Federalism, by its nature, is based on the recognition of the reality and legitimacy of distinctions and the desirability of maintaining legitimate distinctions, something that goes against the grain of modern conceptions of absolute equality.

FEDERALISM, PLURALISM, AND LIBERTY

Here we come to the intersection between federalism, pluralism, and liberty. Democratic polities must both maintain and contain pluralism if democracy is to survive. There are many elements in politics which are necessary or useful in fostering a polity conducive to accomplishing both tasks, including the proper political structure and processes, imbedded in a proper constitutional framework, and rooted in turn in a proper political culture, while encouraged by appropriate social and economic conditions. An increasing number of people have found federalism, although they have not always recognized it as such, to be an extraordinarily important element in both the maintenance and containment of pluralism.

In other words, pluralism is not enough because sentiments for pluralism are not enough. Only constitutional barriers will overcome the natural propensities of ambitious men to consolidate power. Even these barriers may not be enough but at least they give pluralism a fighting chance.

Every form of federalism can be used to gain the ends of pluralism. Is pluralism not advanced when Puerto Rico enters into a federal arrangement with the United States as a federacy (commonwealth is the accepted American term), allowing it more internal autonomy to preserve its own language and culture than the 50 constituent states? Is liberty not advanced by the fact that Puerto Rico, as part of the United States, is spared the black plagues of revolution, dictatorship, and authoritarian government characteristic of most independent Latin American states forced to maintain standing armies, ostensibly for their security? Students of the European Union will certainly attest that, as the member states have developed the EU into a confederation with a high constitutional court responsible for the maintenance of the common market and common standards of human rights, both pluralism and liberty have been advanced. At the very other end of the scale, little Andorra has preserved its liberty for over 700 years even though it is a tiny speck between two great and imperialistic powers, France and Spain, which for most of that period pursued policies designed to eliminate both liberty and pluralism within their own territories. The joint rule of the little state by France and Spain, through a federal arrangement known as condominium, gave Andorra the space it needed to survive and be free while all the states around it, which were independent when Andorra was founded, were absorbed by one or the other of the two powers and lost their liberties and much of their ability to maintain anything like pluralism.

The virtue of federalism not only lies in its utility in maintaining pluralism but also in simultaneously containing it. Needless to say there are many systems of government and political devices for eliminating pluralism. The problem is, how does a polity contain it while maintaining it. That is where federalism has a special contribution to make.

In the first place, the governmental compact upon which a federal polity rests can in itself define or delineate what constitutes legitimate pluralism for the particular polity, while its constitution can define the framework within which that pluralism is maintained and contained. It is here that federal arrangements can be most useful. Through federalism different constitutuent units are able to maintain different styles of pluralism, allowing people who prefer one kind of pluralism over another to find their appropriate place and also to prevent the spread of particular styles where they are not wanted.

Here, too, the ability of federal systems to encourage experimentation without overcommitment to the results of the experiment is relevant. While radically individualistic pluralism has had a certain nationwide influence in the United States, in those states which are influential as civil societies in other directions, its influence is much diminished. For example, one need only look at the contrast between the mass-based politics of California and the more personal politics of Minnesota to note the differences in political culture and style between the two and the limits of California's influence as long as Minnesota maintains its own political system and party politics. If this is less true in other spheres of human activity in the United States, it is because American federalism has been weakened and no longer provides sufficient barriers.

The argument here rests on the assumption that various kinds of pluralism are appropriate in a large, multifaceted polity. If there is any kind which is not acceptable, it is a pluralism which violates the spirit of federal liberty, that is to say, which seeks to elevate "doin' what comes naturally" at the expense of the bonds of covenant. Implicit here is the argument that without the bonds of covenant there can be no decent civil society. Natural man can function only in the wilderness where his contact with others is limited, and, moreover, where nature itself provides sufficient checks to control his behaviour.

This leads to the second part of the argument, that liberty is served by having different varieties of pluralism, provided that the extended republic is so structured as to allow those different varieties to find expression and to reach different syntheses in different parts of the polity. Federalism is an excellent way to make this possible. Hence for those who believe that pluralism is a significant dimension of liberty, the maintenance of a proper federal system should be high on their agenda.

It should be apparent by this point that federal theory assumes that dialectical relationships — diadic, triadic, or even quadrilateral — are of the essence in human relationships and that they offer an alternative to monism of any kind in the human sphere. There is a set of dialectical relationships involved here, as we have already suggested. Government itself is one element in a dialectical relationship. For federalists, a key dialectical relationship is that between government and liberty.

In this respect, federalists differ from anarchists, who emphasize liberty as the central principle to the exclusion of government as a legitimate phenomenon. Similarly, federalists are necessarily opposed to hierarchs and authoritarians who see government as the central principle and reject or strongly limit claims of liberty.

NOTES

1.   This paper draws heavily on the argument in my book *Exploring Federalism* (University, AL: University of Alabama Press, 1987).

2.   For further discussion of these models, see Elazar, *Exploring Federalism* and Daniel J. Elazar and John Kincaid, eds. *Covenant, Polity and Constitutionalism* (Lanham, MD: Center for the Study of Federalism and University Press of America, 1986).

3.   Delbert Hillers, *Covenant, The History of a Biblical Idea* (Baltimore: John Hopkins Press, 1969); George Mendenhill, "Covenant Forms in Israelite Tradition," *Biblical Archeologist* 17(1959):50-76; Norman H. Snaith, *The Distinctive Ideas of the Old Testament* (New York: Schocken Books, 1966); Moshe Weinfeld, "Covenant," in *Encyclopedia Judaica* (5:1012-1022); Daniel J. Elazar, "Covenant and Freedom in the Jewish Political Tradition." Gratz College Annual Sol Feinstone Lecture, March 1981.

4.   Cf. Perry Miller, *The New England Mind: The Seventeenth Century* (Cambridge: MA: Harvard University Press, 1953) and *The New England Mind: From Colony to Province* (Cambridge, MA: Harvard University Press, 1953); "Federal" in *Oxford English Dictionary* (Oxford: Clarendon Press, 1989); Daniel Elazar and John C. Kincaid, eds., *The Covenant Connection: Federal Theology and the Origins of Modern Politics* (Lanham, MD: Center for the Study of Federalism and University Press of America, 1984).

5.   Daniel J. Elazar, *Some Preliminary Observations on the Jewish Political Tradition* (Ramat Gan and Jerusalem: Bar Ilan University and the Jerusalem Center for Public Affairs, 1978).

6.   For data on each polity see Daniel J. Elazar, ed. *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements* (London: Longman Group UK Limited, 1991).

7.   Ivo Duchacek, ed. "Federalism and Ethnicity," *Publius* 7(4), 1977.

8.   European Commission, *Regional Policy Series* (Brussels: Commission of the European Communities, 1985).

9.   Cf. Daniel J. Elazar, "Will the Postmodern Epoch Be an Era of Federalism?" in *Exploring Federalism* and Daniel J. Elazar, ed. *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements* (London: Longman Group UK Limited, 1991).

10. See Daniel J. Elazar, *Two Peoples — One Land* (Lanham, MD: Jerusalem Center for Public Affairs and University Press of America, 1991).

11. This is particularly true among American scholars in the twentieth century. See, for example, Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), *Modern Political Analysis* (Englewood Cliffs, NJ: Prentice-Hall, 1963) and *Who Governs?* (New Haven: Yale University Press, 1961); Robert A. Dahl and Charles Lindblom, *Politics, Economics and Welfare* (New York: Harper and Row, 1953).

12. On federal liberty, see for example, Daniel J. Elazar, ed. "The Continuing Legacy of the Articles of Confederation, *Publius* 12(4), 1982.

3

The Multi-Faceted Covenant
in the Thought of Johannes Althusius

INTRODUCTION

Two of the most pronounced characteristics of modernity in Western civiliza-
tion are, on the one hand, the radical separation between the individual and the
state necessary to secure individual liberty, and on the other hand, the radical
lack of separation used to advance some ideological effort to recast human
nature. The former has been most characteristic of civil society in the United
States of America, the latter, most characteristic of totalitarian society in the
Union of Soviet Socialist Republics, at least until the recent effort to revive
civil society in that empire. Despite the polar differences that separate these
characteristics, they can be seen as two sides of the same coin, as De Tocqueville
perceptively and precisely pointed out in *Democracy in America*.[1]

One of the common aspects of these characteristics of modernity is the
absence of a truly significant place for non-governmental institutions in their
respective founding theories. In totalitarian states, the nominal existence of
mediating institutions is simply a facade since they are controlled by the state,
or more likely, by the single totalitarian political party that controls the state.
The matter is more subtle in the contemporary United States. American tradition
and ideology require the maintenance of very independent public non-
governmental institutions with real status and function in the civil society. In
reality, however, both governmental actions and the exercise of radical

individualism have been encroaching on them in a manner that has been ideologically justified as serving the ends of democracy.[2]

While their position is justified by the ideology of pluralism, the radically individualistic new pluralism, embraced by many, increasingly undermines the federal dimension that gives non-governmental institutions much of their authority and power in civil society.[3] By the same token, contemporary ideologies emphasizing equality of result have enabled government to encroach upon them in the name of a greater good, further cutting into their authority and power. This is true of churches, universities, professional associations, labour unions, and every other form of public non-governmental association. The very fact that they are now referred to as mediating institutions distorts their original character to indicate that they are somehow to be subordinated to the individual, on the one hand, and to the state, on the other.

Increasingly, such institutions are truly authoritative and powerful in the political-social fabric but only in those polities where they are associated with primordial groups, that is to say, groups into which one is born and which are organically part of each individual's identity.[4] The importance of primordial-group institutions in the political-social fabric of the body politic needs to be recognized by students of politics and society not only in the premodern or modernizing societies of the Third World but in the First and Second Worlds as well. A resurgence of primordial-group identity, especially in Europe, has been an unexpected development of the past generation.[5]

The existence of these primordial groups is a reality. Theoretically they remain problematic in modern views of civil society, especially those that emphasize individual liberty. Are they, then, merely realities that may have some useful consequences fostering pluralism against a monolithic state? Is there any justification for human communities or collectivities having sufficiently compelling qualities to be endowed with a special status because they continue on an intergenerational basis without necessarily being based on primordial groups? Primordial groups make their own demands on their members which may, or may not, be consistent with individualism, demands which require recognition of the community or collectivity as a "good" or "end" in itself. Is there a theory that can accommodate both individual and communal liberty, as true expressions of liberty, the way we understand it?

Now that we are in the postmodern epoch and the battles of modernity have been won, we need to reconsider these questions in light of the experiences of modernity. We must do so in a hardheaded manner without either romanticizing our premodern past or rejecting it out of hand.

What seems to be most characteristic of that premodern past in relation to these questions is that the body politic existed as a seamless web. Civil society, which requires the existence of a private sector side by side with the public sector, and in which the public sector is divided into governmental and non-

governmental spheres, is, after all, a modern conception. Some people, such as Karl Popper, have argued that as a result, premodern society was essentially totalitarian, modified only by its lack of effective methods to impose conformity.[6] To those who hold this view, there is little difference between the ancient *polis* and the contemporary communist state other than size. This argument can be refuted with relative ease simply by noting that the *polis* or its equivalent, the tribe, were total societies but, as such, did not have a separately articulated state. Their norms were those of tradition or traditional religion, internalized by their citizens or members rather than imposed by a separable, all-powerful state.

Where does that leave us, other than with an awareness that our ancestors were better off than those who have had to survive (or have failed to survive) under twentieth-century totalitarian regimes? Still, our ancestors did not have liberty as individuals in the modern sense. What, then, prevented the body politic from imposing upon them in the way the totalitarian state has done in our time? Often, nothing beyond good will. On the other hand, in at least one tradition, the biblical tradition, there were built-in limitations that recognized the worth and dignity of the individual and the special status of the community qua community. This chapter will consider that tradition as it was developed and applied in the political sphere, on the edge of the modern epoch, by Johannes Althusius, perhaps the greatest of the Christian political scientists to apply it in the design of a proper commonwealth. But first we shall look briefly at the biblical tradition itself.

THE THEORY PRESENTED IN THE BIBLE AND ITS REFORMED PROTESTANT APPLICATIONS

The system presented in the Bible is among those that try to accommodate the individual in the commonwealth without abandoning the fabric of the commonwealth as a collectivity with its own responsibilities. The basis for this effort is four-fold: *first*, is the idea that every individual is created in the image of God, has a soul, and is holy. *Second*, it is the task of the individual and the community, indeed the individual in the community, to strive to be holy by observing not only what are today referred to as prescribed religious rituals, but by doing justice, providing for the poor, maintaining human freedom and dignity, and assuring a basic economic floor for every household. *Third*, every individual is morally autonomous and his or her consent is required for all acts, even in response to God's commandments. In biblical terminology, God commands but humans hearken. That is to say, they listen to God's commandments and in essence decide whether or not to observe them. Biblical Hebrew has no word for obey. All human actions require hearkening. *Fourth*, humans act together

through covenants and covenanting beginning with the foundation of existence, the covenant with God, whereby God enters into a partnership with humans for the fulfillment and governance of this world. According to the terms of the constitution which He has set before them, all human organization flows from that original covenant, and is ordered by the subsidiary covenants, to which the parties must consent and which are morally binding under God who serves as partner, guarantor, or witness. All, of course, are based on consent and the ability of the partners to make autonomous moral commitments.[7]

While we do not know exactly how this biblical system worked in practice in ancient Israel, we can gather some sense of its reality in the way it has shaped the Jewish people who are noted for their commitment to individual autonomy, liberty, and equality, and for their striving to achieve one or another moral end, as well as their tendency to view public issues in moralistic terms even as they are among the most communal, almost tribal, of peoples, tied together through a rich fabric of history and destiny.[8]

The biblical world view also entered Christianity when that religion emerged out of Judaism, but it did not reach its full flowering until the Protestant Reformation. Reformed Protestants, in particular, not only sought to foster the true faith but to build the holy commonwealth. The road to modern democracy began with the Protestant Reformation in the sixteenth century, particularly among those exponents of Reformed Protestantism (later rather mistakenly referred to as Calvinism) who developed a theology and politics that set the Western world back on the road to popular self-government, with emphasis on liberty and equality. In their efforts they turned to what they referred to as the Old Testament — the Hebrew Bible — for guidance. There they rediscovered the biblical teaching and sought to adapt it to their Christian commonwealth.[9] We know their principal efforts as milestones in the history of liberty in the Western world, even if limited or flawed ones — Zwingli's Zurich, Calvin's Geneva, Knox's Scotland, Cromwell's England, Winthrop's Massachusetts, William's Rhode Island, Hutchinson's Connecticut.

While several of these commonwealths have been called theocracies, in fact, they were theocracies only in the sense that they recognized God's sovereignty as the basis of their community and tried to use God's law as its foundation. As in ancient Israel, they divided authority and power among magistrates and ministers, civil and ecclesiastical rulers. (In ancient Israel, as in every Jewish polity, the division was three-fold, between civil rulers, expounders of the Torah, and priests, but that need not concern us here.) The magistrates were as much responsible for maintaining the moral foundations of the community as the ministers.

However limited these regimes were from the perspective of modern democracy, they did advance the cause of republicanism and strengthened the foundations of what later became democratic republicanism. All were established

by the covenant. In the case of Rhode Island and Connecticut, they were also federal in the more conventional sense of being federations of towns. Their great limitations were two: because they were led by militant reformers during the first flush of the Reformation, most insisted on orthodoxy and expelled or persecuted (and on occasion even executed) those whom they deemed heretics. Nor did they leave room for individualism in the more private ways that we understand to be necessary. If the truth be told, those that survived the initial revolutionary period settled down to be bourgeois republics until engulfed by some later revolutions or conquest. As such they allowed considerable room for private behaviour as long as community norms were publicly honoured.

A number of the foregoing figures, particularly Calvin, Knox, Roger Williams, and, to a lesser extent, Zwingli and John Winthrop developed political theories to accompany their work of governing. All however, were primarily theologians. While they, and the other original founders and spokesmen for Reformed Protestantism, did much political writing, their writing was either theological or polemic in character. Only at the end of the first century of the Reformation did a political philosopher emerge who built a systematic political philosophy out of the Reformed experience by synthesizing the political experience of the Holy Roman Empire with the political ideas of covenant theology. That man, Johannes Althusius, presented his political philosophy in his classic work, *Politica Methodice Digesta*, first published in 1603, and revised in final form in 1614. It remained for Althusius, a political scientist by his own definition, to develop the theory and philosophy of a compound polity that considered most of these problems.

JOHANNES ALTHUSIUS AND HIS POLITICS

Althusius is a figure at the intersection of the major trends of Western culture. One of the Protestant Christian grand designers, he straddled the Reformation and the opening of the modern epoch. Accordingly, he made an effort to synthesize and somewhat secularize Reformed Protestant thought on the ideal polity and to push it in concrete, practical directions.

Althusius was born in Westphalia, one of the German states, about 1557. He was educated at the universities of Cologne and Basle, where he received his doctorate in civil and ecclesiastical law in 1586. He then received an appointment to the Reformed Academy of Herborn to teach law. There he spent his academic career and became rector in 1597. He published his third and most important book, *Politica Methodice Digesta* (hereafter referred to as the *Politics*) while at Herborn. Althusius wrote as a political scientist — and as one who was interested in the theoretical and the practical dimensions of human behaviour that must be addressed and accommodated. Apparently as a result of

that book, he was invited to become syndic of Emden in East Friesland. Known as the "Geneva of the North," Emden had embraced Reformed Protestantism in 1526, one of the first cities in Germany to do so. With the Netherlands just across the border, the city was very influential in educating the leaders of Dutch Calvinism. A seaport, it maintained close connections with the Reformed Protestants of the British Isles. In a way, it was the fulcrum of northern Calvinism during the time of the Dutch revolt against Spain, the rise of Presbyterianism in Scotland, and the Catholic reaction in England. Althusius served Emden as syndic from 1604 until his death in 1638. He was elected an elder of the church in 1617 and, from then on, served in both capacities. He published two enlarged editions of the *Politics*, in 1610 and 1614.

This chapter does not attempt to present a comprehensive summary of Althusian theory, rather, it is directed to outlining the form of civil society in the Althusian view, which itself is derived from Althusius' understanding of biblical teaching on the subject. While he relied on many classical and contemporary sources, first and foremost he relied on the Scripture, so much so that for him, the others were merely a means to elucidate biblical teaching. Althusius saw in the biblical polity, the ideal regime. As he put it:

> I more frequently use examples from sacred scripture because it has God or pious men as its author, and because I consider that no polity from the beginning of the world has been more wisely and perfectly constructed than the polity of the Jews. We err, I believe, whenever in similar circumstances we depart from it.[10]

What emerges from the *Politics*, then, is a biblically informed theory of the polity and the society it serves. It is presented in the systematic fashion of Western civilization at the juncture between the end of the medieval and the beginning of the modern epochs. Althusius' *Politics* was the first book to present a comprehensive theory of federal republicanism rooted in a covenantal view of human society derived from, but not dependent on, a theological system. It 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 a reified state, imposed by a ruler or an elite.

Althusius published the last edition of his *Politics* just on the eve of the philosophic revolution of the seventeenth century. Ironically, his contribution was ignored, if not forgotten, for the next 300 years; considered only by Otto van Gierke in the nineteenth century and a few other German thinkers as part of Gierke's effort to revive medieval forms for the development of modern German political thought.[11] Althusius was rediscovered by Carl Friederich who published a complete Latin edition of the *Politics* in 1932 with an extensive (if, in my opinion, a somewhat misleading) introduction.[12] Frederick Carney published his masterfully digested translation of the *Politics* in English 30 years

later.[13] His was and remains the first translation of the *Politics* into any vernacular language.

Althusius was ignored because his philosophy was bounded by the same biblical principles of polity-building that informed Reformed Protestantism and that were rejected by modern statist political thought. In may respects, he was the theoretical godfather of modern federalism but was never recognized as such because of what were deemed archaic elements in the form of his thought. It is doubly ironic, then, that precisely for those reasons that led him to be rejected by the moderns he has become useful to us in the postmodern epoch.

Modern political philosophy is based upon a revolution in the theory of natural rights, which were deemed to be rooted in the natural psychology of humanity, and methodological individualism. It is rooted in the liberal principle that the individual is the only atom from which to begin the construction or analysis of civil society. While early modern thought recognized and emphasized that all society is civil society, organized politically from its foundations (in contradistinction to nineteenth century views of the subject which sought the "automatic society" that existed independently of political organization), it also emphasizes that civil society's governmental dimension should be limited; indeed as limited as possible.

We postmoderns understand the truth and vital importance of that revolutionary modern idea. But we also understand that while it may be the truth it is not necessarily the whole truth. We may better understand that, while individual liberty is essential for us all, so, too, are the institutions of family and community so that the public institutions of civil society will rest on the proper foundations; not only in the way that they are constituted but in terms of the private dimension in which they serve to function as they are intended to function. The character of the *res publica* (or commonwealth) depends on the character of the public it serves and just as there can be no *res publica* without a public so does the character of the *res publica* rest upon the kind of public within it.

Prior to modernity it was extremely difficult to separate the public and the private within the community. Modernity made it possible for us to separate them. The postmodern epoch must find a way for them to live together. In this, the biblical approach as developed by Althusius may help.

THE RES PUBLICA OF ALTHUSIUS

In essence, Althusius emphasized that the greatest safeguards for liberty are to be found in the structuring of the body politic into five permanent associations: two private, the family and the collegium, and three public, the city, the province, and the commonwealth. It is through those permanent structures that

individuals are able to function, to be represented, and preserve their liberties. It is important to recognize that Althusius distinguished between public and private associations. That is to say, he provided the basis for civil society without assuming methodological individualism as its underlying premise. The private sphere is real and is protected not by abstract principle alone but by the constitutional authority and political power of the family and the collegium as private institutions. The individual for Althusius (as in the Bible) is a reality because every individual is created in God's image with his or her own soul. But individuals do not stand naked in the face of powerful public institutions, rather, they are protected by being located within families and collegia.

Nor was that deemed sufficient. The public sphere, too, is divided into three arenas, the city, the province, and the commonwealth, each with its own structure that gives each its authority and empowered each to play its role. At first glance this seems to be a variant of the medieval corporatist model and, indeed, some have argued that Althusius was only a modified late-medieval corporatist.[14] A better case can be made, however, for the argument that Althusius developed a different model based on political and social covenants.

Let us be more specific: Althusius' *Politics* is concerned with ordering and communication, both done through the process of association (*consociatio*) — what he terms *symbiotics. Symbiotics* is the art and science of association. Every proper association has its own vocation or calling which is directly or indirectly established by covenant. A proper politics rests on both piety and justice as reflected in the two tables of the Decalogue, the first of which states the fundamental laws of piety and the second the fundamental laws of justice.

Althusius begins the body of his book stating:

> Politics is the art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them. Whence it is called "symbiotics." The subject matter of politics is therefore association (*consociatio*), in which the symbioses (those who live together) 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. The end of political "symbiotic" man is holy, just, comfortable, and happy symbiosis, a life lacking nothing either necessary or useful. (p. 12)

Symbiotics and communication are the central elements of his system. Communication for Althusius is the sharing of things, services, and rights (*jus*, i.e., right as law). Like all covenantal systems it emphasizes relationships, first and foremost, that are secured through their embodiment in proper institutions.

There are two kinds of associations — simple and private and mixed and public. Among the former are the family and the collegium. The family is a natural association that takes the form of a comprehensive union, while the collegium is a limited civil association. There are two kinds of families based on conjugal and kinship relations. A collegium is any private association in

which "three or more men of the same trade, training, or profession are united for the purpose of holding in common such things they jointly profess as duty, way of life or craft" (pp. 28-29). Secular collegia are those composed of magistrates and judges or people engaged in common agricultural, industrial, or commercial pursuits. An ecclesiastical collegium is composed of clergymen, philosophers, or teachers.

Among the mixed and public associations are the city, the province, and the commonwealth, each of which has a civil and an ecclesiastical dimension. While each is autonomous in its own sphere, the commonwealth is the most comprehensive and, as such, is the universal association. There are two forms of universal association — the *res publica* or commonwealth and the *regnum* or realm — with the former preferred. Althusius as a political scientist emphasizes that he deals with the reality of political life; not only with the "ought" as do jurists but with the "is," hence his recognition that there are *regna* as well as *res publica*.

In his twofold division Althusius implicitly recognizes the two dimensions of what he refers to as symbiotics, presented in the Bible, namely kinship and consent. As a natural private association, Althusius sees the family as a permanent union of its members "with the same boundaries as life itself." The collegium, on the other hand, as a civil private association, is more voluntary and "need not last as long as the lifetime of man" even though "a certain necessity can be said to have brought it into existence" (p. xxi). In these associations there is a balance between necessity and volition. However natural the family may be, it is based upon tacit or expressed agreement among its members ordering the manner of its communication and the sharing of things, services, and rights. However strong its roots in kinship, the continued existence of the family is essentially a confirmation of this tacit or expressed agreement. Althusius realistically recognizes that some families do not continue to exist.

For our purposes here the critical instrumentality in Althusius' system is the collegium. The primary civil association is a body organized by "assembled persons according to their own pleasure and will, to serve a common utility and necessity in human life" (p. 28). There can be all kinds of collegia with all kinds of purposes. Althusius cites lengthy examples from the history of Israel, Egypt, and ancient Rome.

Althusius holds that it is in the nature of a collegium that its members "agree among themselves by common consent on a manner of ruling and obeying for the utility both of the whole body and of its individuals" (p. 28). The essence of the collegium for Althusius consists of "men united by their own consent."[15] Essential to the voluntary character of the collegium is its transitory nature; it can be discontinued by being "disbanded honorably and in good faith by the mutual agreement of those who have come together, however much it may have been necessary and useful, for social life on another occasion" (p. 28). Since

Althusius' collegium is outside the family it is a civil association, albeit a private one, unlike that ofBodin who defines all activities outside of the home as the activities of citizenship, referring to members as "colleagues, associates, or even brothers" (p. 29).

Althusius continues, "communication among the colleagues is the activity by which an individual helps his colleague, and so upholds the plan of social life set forth in covenant agreements ... These covenants and laws (*pacta et leges*) of the colleagues are described in their corporate books ... Such communication pertains to (1) things, (2) services, (3) right and (4) mutual benevolence" communicated by the collegium (pp. 29-32).

Because the idea of the collegium at first glance resembles guilds common to the medieval city, many assume that it is merely a restatement of medieval corporatism. This is not the case. Althusius' reform is to emphasize the voluntary, transient, and limited nature of the collegium as distinct from the feudal corporate structure of the guild.

In the case of the collegium, Althusius adds communication of something beyond things, services, and rights — namely, mutual benevolence, parallel to the biblical concept of *hesed* (covenant love) or *re'ut* (neighbourliness). Althusius defines mutual benevolence as "that affection and love of individuals toward their colleagues because of which they harmoniously will and 'nil' on behalf of the common utility" (p. 32). He understands that this kind of brotherly love is necessary for the collegium as a moral community of colleagues. For Althusius, as for all proper covenantal thinkers, covenants are not enough. There must also be a covenantal dynamic as symbolized by *hesed* and *re'ut* which is "nourished, sustained, and conserved by public banquets, entertainments, and love feasts" (p. 32).

Since the collegium develops from a natural need it is not completely voluntary and presumably would not be disbanded unless alternate means existed to meet the needs for which it arose in the first place. While it comes into existence through an act of will and covenant it is this relationship to necessity that makes it more than merely a matter of individual choice. Althusius emphasizes that all five of the associations he describes are rooted in necessity although their existence, form, and means of communication are determined through acts of will and covenant.

Unlike public associations where individual participation is essentially indirect, in the collegium the colleagues can participate directly. Still, they need a leader to administer the affairs of the collegium. That leader is "bound by the purposes for which the collegium exists, and by the laws defined through its corporative processes" (p. xxii).

Public associations are directly constituted by families and collegia, not individuals, with families and collegia constituting cities, cities constituting provinces, and provinces commonwealths. What is critical here is that, while

public associations also exist out of necessity, a public association cannot come into existence or continue to exist without the private associations that constitute it. Again for Althusius this is a matter of reality and not only of right.

There is also another distinction between private and public associations. Public associations are territorial, that is to say they have jurisdiction over specific territory, while private associations are not. Thus the two forms of associations together cover the two principal options for human organization. Private civil associations, in particular, offer means to modify or supplement the territoriality of public associations. Althusius' Latin term for association, *consociatio* has been revived in our times as consociationalism to describe institutionalized political power sharing on a non-territorial basis, that is, a kind of non-territorial federalism. Further than that distinction however, the same general principles of communication and rule apply equally to both forms of association. This is a major departure from medieval Roman law in which public associations were essentially hierarchical and administrative, that is to say, they served an imperial power pyramid. Althusius makes public associations symbiotic, that is, covenantal, of the same general genus as private associations. Basing both on the same sources of legitimacy and modes of operation is a major federal element in Althusian thought.

There are two forms of public association — particular and universal. In the full-fledged commonwealth, the city and the province are particular forms of association while the *res publica* or *regnum* is universal. Sovereignty, which Althusius clearly vests in the people (see below) is vested in the people of the universal public association which, in a sense, is what distinguishes it as universal. In that sense, the question of the locus of popular sovereignty determines what is the universal and what is particular rather than the other way around. Althusius recognizes that city/states like Venice are universal associations since they have commonwealth status. In a sense this unstated reversal is part of a further inconsistency in the status of provinces. The realistic political scientist looking at the Holy Roman Empire of Althusius' time had to take note of its formally feudal structure, whereby princes, dukes, counts or other nobility who ruled provinces were at least nominally subsidiary to the holy roman emperor, the supreme magistrate, rather than chosen by the citizenry, thus partly compromising the symbiotic foundations of provincial rule.

All three public associations are governed through a system of separation of powers, with a senate or similar body representing the people through representatives from their private associations and a chief executive who presides over the communication of things, services, and rights. The task of the senate is to establish, defend, and, if necessary, modify the fundamental laws of the public association. Under certain circumstances it may even remove the chief executive.

Critical in the centre of every public association are the ecclesiastical, civil, and private associations — what we today refer to as mediating institutions — that provide the basis for representation in the public associations. Ecclesiastical associations are not only concerned with piety in the traditional sense but also with public education in both religion and the liberal arts.

CONSTITUTIONAL DESIGN OR THE RULES OF ORDER

Althusius emphasizes that one of the principal rights of a commonwealth is the communication of rights by the citizens among themselves. The basis for this communication of rights is embodied in the *jus commune*, here the common right, fundamental law, or constitution of the association. Althusius uses the term *jus commune* in two senses: as referring to God's divine constitution, the unchanging moral law binding upon all people and their associations (on this larger constitutional meaning see Chapters 21 and 22 of his *Politics*) and, more narrowly, as referring to the constitutional foundations of particular associations.

Voluntary associations may establish their own statutes in the framework of public law and in harmony with their *jus commune* which is customarily written in the association's records. The constitution is best established by the common consent of the colleagues or citizens but (in an allowance for late medieval reality) it may be granted to them as a special privilege by a superior magistrate. Althusius does not distinguish between covenants and constitutions, treating every constitution as a covenant and using the terms almost interchangeably as in his discussion of the "covenant or constitution by which the supreme magistrate is constituted by the Ephors with the consent of the associated bodies..." (p. 118).

Althusius discusses the more comprehensive *jus commune* in his chapters on political prudence.

> The rule of living, obeying, and administering is the will of God alone, which is the way of life, and the law of things to be done and to be omitted. It is necessary that the magistrate rule, appoint, and examine all the business of his administration with this law as a touchstone and measure, unless he wishes to rule the ship of state as an unreliable vessel at sea, and to wander about and move at random. Thus administration and government of a commonwealth is nothing other than the execution of law. Therefore, this law alone prescribes not only the order of administering for the magistrate, but also the rule of living for all subjects ...

> law in the general sense is a precept for doing those things that pertain to living a pious, holy, just, and suitable life. that is to say, it pertains to the duties that are to be performed toward God and one's neighbor, and to the love of God and one's neighbour ...

> law or rights in human society are as fences, walls, guards, or boundaries of our
> life, guiding us along the appointed way for achieving wisdom, happiness, and
> peace in human society. (p. 134)

Basing his discussion on biblical sources (particularly Romans I:19 and
II:14f.), Althusius sees the *jus commune* as "naturally implanted by God in all
men ... In this (*jus commune*) is set forth for all men nothing other than the
general theory and practice of love, both for God and for one's neighbor"
(pp. 134-5). Althusius soon moves beyond that because he notes that this law
is "not inscribed equally on the hearts of all. The knowledge of it is communi-
cated more abundantly to some and more sparingly to others ..." (p. 135). The
next step is the writing down of this constitutional law in the Decalogue. Its
first table deals with love of God and piety and the second, love of man and
civil or political life. Althusius refers to the Ten Commandments as "mandates
and precepts" but indicates that in the Bible they are referred to as "judgements,
statutes, and witnesses." His analysis of each of the commandments sets forth
what he understands to be the general constitution of all humanity. As he says,
"the Decalogue has been prescribed for all people to the extent that it agrees
with and explains the common law of nature for all peoples ..."

> Proper law (*lex propria*) is the law that is drawn up and established by the
> magistrate on the basis of common law (*lex communis*) and according to the nature,
> utility, condition and other special circumstances of his country. [Althusius uses
> *jus* and *lex* interchangeably in this particular discussion.] It indicates the peculiar
> way, means, and manner by which this natural equity among men can be upheld,
> observed, and cultivated in any given commonwealth. (p. 139)

Lex propria has two parts: that which is in agreement with the *jus commune,
(convenientia)*, and that which is different from it (*discrepantia*).

He then focuses more explicitly on Jewish proper law which is divided into
ceremonial law and forensic or civil law, the first designed to aid in the
observance of the first table of the Decalogue and the second designed to make
possible the maintenance of the second. With regard to ceremonial law, he
follows the Orthodox Christian view. It leads to Christ and should now be
viewed through the teachings of Jesus. With regard to civil law, however, "it
follows that the magistrate is obligated in the administration of the common-
wealth to the proper law of Moses so far as moral equity or common law are
expressed therein" (p. 143). At the same time, the proper law of Moses which
is not so directed should not be compulsory in a Christian commonwealth.

Every institution in the commonwealth must have its rules established by
consent of its citizens or members and written down. In other words, they must
be in covenantal form and in harmony with God's original covenant with
ancient Israel as embodied in the Decalogue. As a covenant, the constitution is
a reciprocal contract, binding all parties to it whether equals or unequals, that
is to say, rulers and ruled, and granting powers as determined by the body of

the association. Such a covenant-constitution is designed to prevent any exercise of absolute power within the association. Althusius makes it clear that "power ... is established for the utility of those who are ruled, not of those who rule, and the utility of the people ... does not in the least require unlimited power." Althusius is very strong on the point that "absolute power is wicked and prohibitive ... even almighty God is said not to be able to do what is evil and contrary to His nature" (p. 117).

This brief, structurally oriented description of Althusius' system does not do it justice. Critical to understanding how this structure is to work is Althusius' emphasis on communication as the sharing of things, services, and rights. Institutions exist as means to order and foster communication or sharing in a situation where consent is the foundation of the commonwealth. Althusius is resolutely opposed to tyranny in part because it is unjust and in part because he sees it as ineffective.

As a result of his emphasis on covenant and communication, Althusius has essentially rejected the reified state and with it, statism. His idea of vesting sovereignty in the people through their associations counters the argument of Jean Bodin that there must be a single point in which sovereignty is concentrated: in Althusius' time, the monarch and, later, the reified state. In this Althusius is a precursor of the solution devised by the founders of the United States to resolve the problem of sovereignty by vesting it in the people.[16] The American founders had an easier time of it because of the more homogeneous character of the people to whom they addressed their solution. In the more complex and heterogeneous society of the German Holy Roman Empire, the Althusian idea of vesting sovereignty in the people through their associations offered a role both to soften the impact of the "state" and to preserve the diverse primordial and civil ties that characterize European society.

In all this Althusius has provided a proper application of the biblical model. For the Bible, only God is ultimately sovereign. Politically, however, sovereignty is vested in the people, who possess operational sovereignty within the framework of God's constitution. For the Bible, that constitution is the Torah; for Althusius, it is the Decalogue. Thus, the two expressions of sovereignty come together in a constitutional document that, barring direct heavenly intervention, becomes the actual source of authority, which can be modified by the people within the limits imposed by the laws of piety and justice represented by the two tables of the Decalogue. This constitutional document and the network of associations, symbiotic relationships and communication of things, services, and rights/law are in a sense the best protection against tyranny and, for what we would today call, human rights.

What of the matter of rights? For both the Bible and Althusius, the question of rights is derived essentially from the question of justice and the human obligation of God to act justly. Politics is symbiotic in communication. It

provides the framework and the means to act justly and to do justice. Thus the fundamental associations of political community — public and private, civil and natural — are media for doing justice.

Beyond that, each form of association forms a particular kind of moral community within which justice is to be achieved and right or rights protected in a different way. One of the principal lessons of Althusius' teaching for us today is that humans are organized in different moral communities, and right or rights with regard to each must be treated in a manner appropriate to the right.

The modern world view, by emphasizing the individual standing naked against civil society as represented by government, has increasingly come to emphasize the legal enforcement of legally defined rights. Originally applied to government alone, this approach to rights has been extended to other forms of civil associations and even more recently to natural associations, public and private, because of that overly simplified and limited perception of the political relationship underlying civil society, of what constitutes rights, and of how they are to be enforced.

In a just society, there must be an appropriate conceptualization of right and rights for relationships within each different kind of moral community with appropriate means of enforcement. In ancient and medieval society, much justice was promised without sufficient means of enforcement. Modern political thought successfully attacked that problem by providing means of enforcement but, in the process, rejected a more complex view of what constitutes justice or right, a view based upon an understanding of the different forms of association in which humans are involved, recognizing that all such associations are established on the basis of covenant and include the dimensions of justice and the right to establish, or systematize, relationships upon which appropriate theories of right and rights enforcement can be based.

Trained in theology and jurisprudence, Althusius became a political scientist and indeed makes a strong argument that politics is the equal of the first two disciplines. In his Preface to the first edition, Althusius discusses at length the relationship between political science, theology, and jurisprudence, and the separation between them, summarizing the task of the political scientist as follows:

> A political scientist properly teaches what are the sources of sovereignty and enquires to determine what may be essential for the constituting of a commonwealth. The jurist, on the other hand, properly treats of the right (*jus* or law) that arises at certain times from these sources of sovereignty in the contract entered into between the people and the prince. Both therefore, discuss the rights of sovereignty, the political scientist concerning the fact of them and the jurist concerning the right of them.

While couched in the language of the sixteenth century, the distinction is not foreign to us. In the Preface to the third edition, Althusius elaborates on the

relationship between political science and theology through his emphasis on the role of the Decalogue.

POLITY AND POLITICAL ECONOMY

Althusius' polity is built from the beginning on a political economy since so many of the civil private associations that he has in mind are basically occupational in character. Nevertheless, he does separate politics and economics.

> So therefore economics and politics differ greatly as to subject and end. The subject of the former is the goods of the family; its end is the acquisition of whatever is necessary for food and clothing. The subject of the latter, namely politics, is pious and just symbiosis; its end is the governing and preserving of association and symbiotic life. (pp. 26-27)

In posing this definition Althusius deliberately rejects the notion that economics is exclusively private and politics exclusively public. At least with regard to politics, it is also private. The two are linked in that symbiotic communication or sharing involves things or goods, services, and rights or lawful structures.[17]

Throughout each of the five arenas of association, the civil private association is usually an economic association of one kind or another which nevertheless requires political order within it as well as to be part of the political order of the three public associations. In the relationship between the public associations and the economy, a city has responsibility both for regulating economic life and for providing the public infrastructure necessary for economic life.[18] The province has the responsibility for the support of commercial activity and the care of the public good of the province[19] and also for the education and training of "merchants, farmers, and workmen who are skilled, industrious and distinguished" (p. 56).

The commonwealth, following the fifth commandment, is charged with protecting the system's goods as well as their use and ownership. Althusius understands this as involving not only a citizen's goods, but also his safety and good name, all of which are viewed as property not to be stolen. The commonwealth is also charged with the regulation of commerce and contracts, and for providing an adequate system of coinage. In this respect, the commonwealth is charged with overseeing the means necessary for procuring advantages for social life.[20]

While Althusius does not directly concern himself with what we today define as the problem of individual rights, individuals are recognized in his system as they are in the Bible, by their uniqueness, godliness, and individual moral responsibility. Government for Althusius, as for the Bible, is concerned primarily with justice, though the question is left open as to how much it is concerned with holiness or morality. If we can summarize biblical and Althusian thought

on the matter, public associations must give due recognition to piety, holiness, and morality, but should go easy on efforts to do more than be exhortative in those spheres. In other words, they should make clear what the standards are but limit their role as God's policemen. Liberty is protected by the rejection of the reified state and statism, and the emphasis in its place is on the compound of associations, the separation of powers, and on the right procedures.

NOTES

1. A. de Tocqueville, *Democracy in America*. Eds. J. P. Mayer and Max Lerner, Trans. George Lawrence, (New York: Harper and Row; 1966), pp. 666-669.

2. M. Novak, ed. *Democracy and Mediating Structures: A Theological Inquiry* (Washington, DC: American Enterprise Institute, 1980).

3. D. J. Elazar, *The American Constitutional Tradition* (Lincoln and London: University of Nebraska Press, 1988).

4. E. Huntington, *The Mainsprings of Civilization* (New York: Mentor, 1972) and Geertz, C. *Interpretation of Cultures* (New York: Basic Books, 1973).

5. On ethnic reassertion in Europe, see Michael Burgess, ed. *Federalism and Federation in Western Europe* (London: Croom Helm, 1986); Murray Forsyth, ed. *Federalism and Nationalism* (Leicester: Leicester University Press, 1989); and Hugh Seton-Watson, *Nations and States* (Boulder, CO: Westview Press, 1977).

6. K. R. Popper, *The Open Society and Its Enemies*. 5th rev. ed., (London: Routledge and K. Paul, 1969).

7. On the federal dimension of the biblical world view one of the best available sources is Martin Buber, *Kingship of God* (New York: Harper and Row, 1967). I treated the subject in "Government in Biblical Israel," *Tradition*, Spring-Summer 1973, and in "Covenant as the Basis of the Jewish Political Tradition," *Jewish Journal of Sociology*, June 1978. See also Daniel J. Elazar, ed., *Kinship and Consent: The Jewish Political Tradition and its Contemporary Manifestations* (Lanham, MD: University Press of America and the Center for the Study of Federalism, 1983); Daniel J. Elazar and Stuart A. Cohen, *The Jewish Polity* (Bloomington, IN: Indiana University Press, 1984); and Daniel Elazar and John C. Kincaid, eds., *The Covenant Connection: Federal Theology and the Origins of Modern Politics* (Lanham, MD: Center for the Study of Federalism and University Press of America, 1984).

8. On Jews and politics, see Daniel J. Elazar, *People and Polity* (Detroit: Wayne State University Press, 1989), especially chapter 1; "Kinship and Consent in the Jewish Community: Patterns of Continuity in Jewish Communal Life," *Tradition* 4 (1974): 63-79; and "Covenant as the Basis of the Jewish Political Tradition," *Jewish Journal of Sociology*, June 1978.

9. On the biblical roots of Reformed Protestantism, see Elazar and Kincaid, *The Covenant Connection*; Perry Miller, *The New England Mind*, (Cambridge, MA: Harvard University Press, 1967); and R. H. Murray, *The Political Consequences of the Reformation*, (New York: Russell and Russell, 1960).

10. Johannes Althusius, *Politica Methodice Digesta*. 3d ed., trans. as *The Politics of Johannes Althusius* by Frederick S. Carney. (Boston: Beacon Press, 1964); Preface. Hereinafter *Politics*, 1964.

11. O. van Gierke (1939[1880]) *Johannes Althusius und die Entwicklung der natur-rechtlichen Staatstheorie.* (Published in translation as *The Development of Political Theory* in 1939); and O. van Gierke, *Political Theories of the Middle Ages.* Translated with an introduction by F. W. Maitland. (Cambridge, England: The University Press, 1968).

12. C. J. Friederich ed., *The Politica Methodice Digesta of Johannes Althusius* (Cambridge, MA: Harvard University Press, 1932).

13. *Politics*, 1964.

14. P. Reilly, "Three 17th Century German Theorists of Federalism: Althusius, Hugo Leibniz." Special issue of *Publius*, 5 (3), 1976.

15. J. Althusius, *Dicaelogicae Libri Tres*. Frankfurt, 1618. Photographically reproduced in 1963.

16. D. Lutz and J. D. Warden, *A Covenanted People: The Religious Traditions and the Origins of American Constitutionalism.* (Providence: John Carter Brown Library, 1987) and Elazar, "Covenant as the Basis of the Jewish Political Tradition."

17. *Politics*, 1964, 14 *passim*.

18. Ibid., 42f.

19. *Ibid.*, 48.

20. *Ibid.*, 56, 76, 75, 79-80, and 170 *passim*.

4

Europe and the Federal Experience

EUROPE RETURNS TO ITSELF

1992 is both the anniversary of a momentous date in world history and a momentous date in its own right. Five hundred years after Columbus effectively discovered America and opened the Age of Exploration, which led to the settlement of new worlds in the western and southern hemispheres and transformed the globe, the countries of Western Europe are taking momentous steps forward toward federal unification. The European Union is a centrifugal force in European history which has emerged after 500 years of centripetal pulls that developed as a result of Europe's great frontier and most particularly its colonialist expression.

For 500 years Europe pursued the twin courses of colonization overseas and centralized state-building at home. The two went hand in hand. The rejection of medieval or any other form of pluralism or power-sharing on behalf of the centralized state, hierarchical or parliamentary, was paralleled by the acquisition of colonies overseas by those new states. World War II wrote *finis* to both of those drives, initiating an era of decolonization abroad and federal integration at home for the states of first western and then southern Europe. Today as the 12 members of the EU draw closer together, they are separating themselves further from their ex-colonies and further decentralizing within their own territories. Thus the demetropolitanization of Europe is accompanied by a rethinking of the European state system. Together they are part of the formation

of a new worldwide matrix of regional communities and polities which will be increasingly federal in character.

For Europe, the modern epoch, from the mid-seventeenth to the mid-twentieth centuries, featured, among other things, a struggle between two approaches to nation building, one, resting on a combination of medieval corporatism and American revolutionary ideas, sought national integration on a federal basis — in Germany, in the Austro-Hungarian Empire, in Italy, in Switzerland, in the Low Countries, in Scandinavia, and to a lesser extent in Spain. Opposing that approach was the French ideal of the centralized state which gloried in the location of sovereignty in one, central point, whether monarchic or republican. Portugal and all the other states except Switzerland, and to a lesser extent Germany, followed the French lead, either consolidating into a single centralized state or dividing into a number of smaller centralized states.

The history of Europe has been written as if state building of the latter kind was inevitable. In fact there was a struggle, philosophically, ideologically, and practically, in almost every case.

The rise of fascism and nazism brought about the collapse of the modern epoch in Europe's *Gotterdammerung,* which affected the whole world. The postwar world brought with it the opening of the postmodern epoch which in Western Europe featured a turn in the direction of federal solutions. The European Community, now Union, whose first tentative steps took the form of treaties between sovereign states, slowly began to evolve into a confederation, in the process reviving the possibilities of confederal solutions as realistic ones.

Confederation was the only form of federalism found in premodern Europe. Many of the early modern efforts at federal solutions in Europe rested on the attempt to modernize earlier confederal arrangements. None succeeded. Confederal principles could not be made compatible with the drive for centralized statehood. (The American invention of modern federation, which created the illusion of national statehood, became the only successful modern vehicle for expressing federal principles).

The founders of the European Community developed a new-style confederation, avoiding the problems of establishing a single, overarching general government in favour of a number of single- and multi-purpose authorities serving its member states. Authorities are gradually linking the members together through common institutions, emphasizing administrative and judicial institutions with clearly limited spheres of competence over more comprehensive legislative ones. The more grandiose and comprehensive idea of a United States of Europe was set aside — as the Americans would say, placed on the back burner — in favour of a more original invention designed to fit European realities.

MADISONIAN AND ALTHUSIAN FEDERALISM

Modern federalism, invented by the United States, operates essentially on a Madisonian model which, although itself derived from a variety of sources, draws its conception of civil society from Lockean individualism. Madisonian federalism is based on the idea that polities are comprised first and foremost of individuals who combine themselves into peoples by choice establishing political institutions in the process by means of political covenants and constitutions. While the Madisonian model has much to teach all those embarked on federal experiments, particularly about how polity should be a matrix of substantially independent cells linked through a common communications network rather than a power pyramid or polity with a power centre and a periphery, it has its limits for addressing the European experience.

The European federal experiment is built upon pre-existing states with strong identities which are, in turn, compounded of primordial groups. Indeed, it is the persistence of those primordial groups which contributed mightily to the failure of the modern European state system. The modern state system was to be centralized because each state was to be a nation-state, a state of a single nation. Unfortunately for the theory, the primordial groups refused to disappear, often in the face of the most extraordinary pressures directed against them by the state builders.

The collapse of the old state system has reawakened popular ties to those groups throughout Europe. Hence, they too must be considered in developing European federalism. Indeed, the European Community has made a point of considering many of them, especially those located in what are known as the peripheral regions of the community, in effect developing a de facto alliance with them to balance the power of the member states.

In sum, with all of Europe's new concern for the individual and his or her rights, Europeans do not come to polity-building culturally naked. Thus any successful political solution for Europe needs to be built on a more complex model than that of the United States. Such a model may indeed be available in the federal theory of Johannes Althusius, the first great European theorist of federalism who was one of those on the eve of the modern epoch who tried to foster federal as distinct from statist solutions on the continent.

Althusius was one of the Protestant Christian grand designers who straddled the Reformation and the opening of the modern epoch. He made an effort to synthesize and somewhat secularize Reformed Protestant thought on the ideal polity and to push it in concrete, practical directions. His classic work, *Politica Methodice Digesta,* was the first book to present a comprehensive theory of federal republicanism rooted in a covenantal view of human society derived from, but not dependent on, a theological system. It (along with *Dicaelogicae Libri Tres* or the Decalogue) 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 elite.

The Althusian model directly addresses the complexities of the European situation, taking into consideration families and primordial groups as well as formal political institutions, corporations, and territorial units. In his *Politica*, he methodically constructs a federal system that is both territorial and consociational. Moreover it is one that accommodates the European reality of four or five arenas of territorial governance instead of two or three, the accepted number in modern federations. Several of the European Union member states, indeed an increasing number, are themselves federations, with three (or four) arenas of governance (figure 4). For them the EU is fourth (or a fifth).

Althusius had the misfortune of publishing his great work at the very beginning of the seventeenth century, just at the time when his compatriots were turning towards statism. In the ensuing struggle over the direction of European state building in the seventeenth century, the Althusian view which called for states on federal principles, as compound political associations, lost to the view of Jean Bodin and the statists who called for the establishment of reified centralized states where all powers were lodged in a divinely ordained king at the top of the power pyramid or in a sovereign centre. While Althusian thought had its exponents until the latter part of the eighteenth century, after that it disappeared. It remained for the Americans to invent modern federalism on the basis of modern individualism and thus reintroduce the idea of the state as a political association rather than a reified entity.

In the nineteenth century, one party of German thinkers seeking the unification of Germany on federal principles and led by Otto von Gierke, rediscovered Althusius. There, too, however, Germany's movement toward reified statehood and finally totalitarianism left Althusian ideas out in the cold.

FIGURE 4:   Constitutional Power-Sharing in EU Member States

Federations	*Decentralized Unions*	*Autonomy / Federal Arrangements*	*Unitary States*
Belgium	Denmark	France	Ireland
Germany	Netherlands	Italy	Luxembourg
Spain	United Kingdom	Portugal	Greece

Althusian ideas remained peripheral even to students of modern federalism. Since modern federalism was so strongly connected with the principle of individualism, there was no perceived need to consider the Althusian effort to deal with the problems of family, occupation, and community along with individual rights in establishing political order. Only recently, as we have come to see the limits of unrestrained individualism, both philosophically and practically, have political scientists begun to explore problems of liberty in relation to primordial groups — families, ethnic communities, and the like. Here it was discovered that Althusius had much more to offer contemporary society.

Martin Buber was perhaps the first to suggest how Althusian ideas could serve in the twentieth century, in part basing his political works on Althusius. At the very beginning of his classic study of the Israeli kibbutz as a model for the reconstruction of society along cooperative lines, Buber described the proper social order as a *consociatio consociationum*, deliberately selecting Johannes Althusius' formulation as the starting point from which to develop his own realistic utopia.

Carl Friedrich, the great academic exponent of German liberalism, revived academic interest in Althusius with his publication of the *Politics* in its Latin version with an extensive introduction. More recently, various scholars, such as Frederick Carney (a student of Friedrich's who translated part of the *Politics* into English); Patrick Reilly; and Thomas Hueglin, have explored Althusius' ideas. In his native Germany, there has been a renewed interest in Althusian ideas as a foundation for German federal democracy. In Yugoslavia, Althusian influence has been a powerful counterweight to communism as the basis for introducing a measure of republican liberty.

In 1973, I interviewed Professor Jovan Djordjevic, the doyen of Yugoslav political scientists, a close associate of Marshall Tito and author of the various Yugoslav and republic constitutions during the first three decades of the former Yugoslav regime. In our discussion, Professor Djordjevic indicated how much the construction of that regime had been influenced by Althusian ideas and models.

Somewhere between Buber's utopian vision and the effort to make Althusian models concrete in Yugoslavia is the theory of consociationalism developed by Arend Lipjhart, Gerhard Lehmbruch, and others. Borrowing that distinctively Althusian term, the consociational theorists attempted to explain what is in effect a non-territorial federal division of powers that constitutes a democratic alternative to either Jacobin or majoritarian democracy and to demonstrate how that model has been applied in countries such as the Netherlands, Belgium, Switzerland, Austria, and Israel, among others. Studies of consociational democracy in action have repeatedly demonstrated that consociational arrangements work best and last longest where they are combined with territorial

federalism; in other words, where both dimensions of the Althusian grand design are present.

There is some dispute among scholars regarding the relationship between Althusius and federalism. Otto von Gierke, the first scholar to try to restore Althusius to his rightful place in the history of political thought, saw him as essentially a medievalist seeking to reconstruct medieval corporatism for a post medieval and changing time. Carl Friedrich, on the other hand, the most important figure in the twentieth-century Althusian revival, viewed Althusius as the forerunner of modern federalism. Today, Patrick Reilly and to some extent Thomas Hueglin follow the Gierkian approach, while Frederick Carney and I follow that of Friedrich.

As a student of federalism in all its forms and a federalist, I would suggest that it is necessary to look to Althusius not only in historical perspective as a transitional figure from medieval corporatism to modern federalism, but as a source of ideas and models for a postmodern federalism. Premodern federalism had a strong tribal or corporatist foundation, one in which individuals were inevitably defined as members of permanent, multigenerational groups and whose rights and obligations derived entirely or principally from group membership. Modern federalism broke away from this model to emphasize polities built strictly or principally on the basis of individuals and their rights, allowing little or no space for recognition or legitimation of intergenerational groups.

A postmodern federalism must reckon with one of the basic principles of postmodern politics, namely that individuals are to be secured in their individual rights, yet groups are also to be recognized as real, legitimate, and as requiring an appropriate status. Althusius is the first, and one of the few political philosophers who has attempted to provide for this synthesis based on popular government. Needless to say, his late-medieval thought cannot be transposed whole into the postmodern epoch in the latter part of the twentieth century. But, in part because he wrote in a period of epochal transition, much of his system, its ideas, and even its terminology, may be adaptable or at least form the basis for a postmodern federalism.

Here I can only outline some of the salient points in Althusius' thought.

1.   The foundations of Althusius' political philosophy are covenantal through and through. *Pactum* is the only basis for legitimate political organization. More than that, Althusius develops a covenantal-federal basis that is comprehensive. Not only is the universal association constructed as a federation of communities, but its politics as such is federal through and through, based as it is on union and communication (in the sense of sharing) as expressed in the idea that its members are symbiotes.

Althusius' dual emphasis on federalism as a relationship and on sharing as the basis of federal relationships has turned out to be a basic axiom of federalism. While there can be different forms of a federal relationship and sharing can be expressed in different ways, federalism remains essentially a relationship and sharing its guiding principle. The polity, then, is a symbiotic association based upon symbiosis and constituted by symbiotes.

2.   Althusius deals with the problem of sovereignty, then becoming the critical juridical problem for modern federalism, by vesting it in the people as a whole. On one hand, this is what makes the good polity a *res publica* or commonwealth. On the other, it also makes it possible to be a *consociatio consociationum*, a *universitas* composed of *collegia*, since the people can delegate the exercise of sovereign power to different bodies as they please (according to their sovereign will).

The problem of indivisible sovereignty raised by Jean Bodin was the rock upon which premodern confederation foundered. The modern state system was based on the principle of indivisible sovereignty which, in an age of increasingly monolithic and energetic states, became a *sine qua non* for political existence. Thus the medieval world of states based on shared sovereignty had to give way. It was not until the American founders invented modern federalism that a practical solution to this problem was found enabling the development of modern federation as a form of government. Althusius had provided the theoretical basis for dealing with the sovereignty question over 175 years earlier (no doubt unbeknownst to them) and had given it the necessary philosophic grounding.

Although Althusius himself does not develop a theory of confederation per se, his particular kind of federal thinking, in which he sees his universal association as constituted by comprehensive organic communities, has clearly had something to contribute to an emerging postmodern theory of confederation. Althusius further understands political sovereignty as the constituent power. This is at once a narrower, more republican definition of sovereignty whose plenary character is harnessed as the power to constitute government — a power vested in the organic body of the commonwealth, that is, the people. Moreover, once the people act, the sovereignty is located in the *jus regni*, the fundamental right/law of the realm or the constitution.

This Althusian concept has important implications in contemporary international law, which is grappling with the problem of how to mitigate the effects of the principle of absolute and undivided sovereignty inherited from modern jurisprudence in an increasingly interdependent world. Even where the principle is not challenged, the practical

exercise of absolute sovereignty is no longer possible. There are an increasing number of situations in which even the principle cannot be applied as it was. One way out in such cases has been to vest sovereignty in the constitutional document itself, that is to say, in what Althusius would refer to as the *jus regni*. Vesting sovereignty in a constitutional document is entirely consonant with a covenantal federalism.

3.   Althusius serves as a bridge between the biblical foundations of Western civilization and modern political ideas and institutions. As such he translates the biblical political tradition into useful modern forms. In this he must be contrasted with Spinoza who a few years later in his *Theological Political Tractate* makes the case for a new modern political science by presumably demonstrating that the biblical political tradition applied only to ancient Israel and ceased to be relevant once the Jews lost their state (unless and until the Jewish state were restored). Althusius confronts the same problems of modern politics without jettisoning or denying their biblical foundations. In part this renders him less useful during the modern epoch when his unbending Calvinist emphasis on the necessary links between religion, state, and society encounters the development of the modern secular state.[1]

The Althusian version of the Calvinist model of the religiously homogeneous polity is not likely to be revived in the postmodern epoch. Nevertheless we are beginning to recover an old understanding that in no polity can civil society exist without some basis in transcendent norms which obligate and bind the citizens and establish the necessary basis for trust and communication. The connection between the Decalogue and *jus* as both law and right, while hardly original to Althusius, may offer possibilities for renewed development in our times. Althusius adopts an understanding, conventional in his time, namely that the first table addresses itself to piety and the second to justice, both of which are necessary foundations for civil society.

4.   Very important in this connection is Althusius' development of the concept of *jus regni*, which he derives explicitly from the biblical *mishpat hamelukhah* (law of the kingdom), enunciated in I Samuel 10, to serve as the constitution of the universal association, at one and the same time establishing the constitution as a civil rather than a religious document, yet one which has its source in or at least is in harmony with divine and natural law. While contemporary political scientists emphasize the secular character of modern constitutionalism, examination of most contemporary constitutions reveals that they reflect the same combination of claims, namely linkage to transcendent law, more often divine than natural, and to human artifacts that are civil in character. While in recent years we have made considerable advances in develop-

ing an understanding of constitutional design, in doing so we have neglected this link and its implications for right law that Althusius calls to our attention.

5.   While Althusius was clearly a product of his times and the ideal state of his design reflects the class and reference-group structure of sixteenth-century German society, it is significant that Althusius leaves open the possibility for democracy as we know it, including female participation in public life and office holding, and a more classless and egalitarian basis for participation generally. Since I do not have a sufficient command of the Latin text to properly explore the issue, I cannot say whether Althusius has an esoteric as well as an exoteric teaching, but this suggests that there may be a hidden dimension to be explored in the *Politics* and Althusian thought generally. Nor is the federal aspect insignificant here. Althusius suggests different forms and degrees of participation in the different arenas of government as one possible way to extend participation in public life to groups heretofore disenfranchised in the world that he knew.

A contemporary Althusian politics should address itself to the same possibilities; for example, somewhat indirect democracy for county institutions and republican or representative government for what Althusius would have called provincial and we would call state, land, or cantonal institutions, and for the universal association of general government.

6.   Althusius recognizes the modern distinction between public and private realms, yet also preserves the connection between them. In this respect, he, like the moderns who were to follow him, broke with classic notions of the all-embracing *polis* to recognize the legitimacy of a sphere of private activity that is constitutionally theirs by right, thereby preventing totalitarianism. Yet he recognizes the connection between the simple and private dissociations of family and *collegium*, or civil association in both its secular and ecclesiastical forms, and the mixed and public associations of city, province, and commonwealth. Indeed the relationship between private and public spheres and associations is a major concern of his as it is increasingly to those of us who must reckon with the realities of the postmodern epoch in which everything is tied into everything else.

In the modern epoch, it was possible to more sharply separate the public and private spheres. This is no longer the case as the new communication requires more Althusian communication, that is to say, as everything impinges upon everything else, more sharing is necessary. Althusius' emphasis on the existence of both natural and civil associations in the private sphere reflects his emphasis on what we would call

Only in Africa is the future of federalism unclear. Nigeria remains faithful to the federal principle in words but seems to be unable to avoid military government. All other attempts at federalism in black Africa or North Africa failed early on. On the other hand a federal solution for South Africa now is being implemented and federalism will continue to be part of any democratic resolution of the conflict there.

As the colonial system has disintegrated, the small territories that remain linked to former colonial powers have been transformed into self-governing polities through asymmetrical federal arrangements: federacies or associated state arrangements.

Capping all of this is the growing merger of the world's two state systems: the international system of politically sovereign states and the system of federated or constituent states. This interaction has progressed most fully in the economic realm where the constituent states of federal systems, including those of the older federations, the United States, Canada, and Australia, now are actively engaged in economic development activities in the international market. This interaction is slowly being extended in other spheres as well, diminishing the differences between the two kinds of states. As the international system further limits the sovereignty of even the nominally sovereign states and requires the involvement of the federated states to achieve any semblance of international order, the differences between the two are being progressively diminished.

FEDERALISM AND DEMOCRACY

Federalism, like constitutionalism, is a rich and complex thing, a matter of formal constitutional divisions, appropriate institutions, patterns of political behaviour, and, ultimately, of political culture. Moreover, federal democracy offers a complete and comprehensive theory of democracy which stands in sharp contrast to the theories of democracy regnant in Europe until now — Jacobin democracy and parliamentary democracy on the Westminster model — not to speak of that monstrous development referred to as totalitarian democracy.

Democracy addresses the great questions of sovereignty and powers (competences), the relationships between power and law or right, and the great issues of centralization and decentralization. It does so by vesting sovereignty in the people who constitute the body politic and requiring them to constitutionally allocate competences or powers among the governments of their creation. They must do so in a non-centralized manner that provides for both centralization and decentralization as needed, but always within a non-centralized framework

whereby all exercise of powers is governed by law and related to the rights of the constituents.

Even with the federalist revolution in full swing, there will be those states for whom federal structures will remain inappropriate. Federalism is not a catch-all solution for all problems. Nor should it be looked upon in that way. It is certainly not a panacea.

True partisans of liberty, since the beginning of the modern epoch, have consistently emphasized federal liberty, that is to say, the liberty to enter into a covenant with one's fellows and then live according to the terms of that covenant, whether we are talking of Hobbes' limited covenant of peace or John Winthrop's Puritan Christian notion of an all-embracing covenant in which federal liberty consists of pursuing the right way to salvation. The possibilities between the Hobbesian minimalist covenant and Winthrop's maximalist one are great. It is within that range that we find true liberty. In the last analysis, this may be the greatest contribution of federalism to the development of a peaceful, prosperous, free, and happy world.

In the 1970s, people in Europe were bemoaning the demise of the Community. They were counting the hours, maybe the minutes to its dissolution, waiting for the first state to pull out. A decade later they were discussing problems of overcentralization, of building a single state, and of the state model for Europe. Margaret Thatcher, Jacques Delors, and Wilfrid Martens have, in recent years, very appropriately addressed the question of what approaches will keep a balance when building the European Union. There is a paradox in this, indeed, there are several paradoxes.

First, it is hard not to be struck by the degree to which the European Union was built, both in its positive and in its negative aspects, by Frenchmen. In a sense, it is the victory of the French federalist tradition over French Jacobinism. In France, Jacobinism won: in Europe, the federalists have reasserted themselves and struggled hard to rise above the Jacobin tradition and to speak in the name of Montesquieu, de Tocqueville, Proudhon, and others who represent that latter tradition.

This is a very important aspect of the struggle for the European Union because the sense of a philosophy of Europe is being formulated without being "formulated." It is bubbling up from the Community-building process. The nature of that philosophy needs to be exposed, in the best sense; it needs to be made visible, made understandable, so that it can be determined whether or not it is an appropriate philosophy.

One of the points that strikes the observer here — and I speak here of religious communities only in their cultural sense not in their immediate religious sense — is that the European Union reflects the federalism of the Catholics. If one looks at the member states of the European Union, one finds that the majority come out of the Catholic cultural tradition and that the

Protestant states of Europe, for the most part, have not joined. Therefore the philosophic struggles of the Union are derived from the Catholic intellectual experience.

There is much talk, for example, about subsidiarity, which is a principle developed inside the Catholic Church to modify and moderate its pronounced hierarchical tendencies. After all, the Catholic Church is the oldest existing power pyramid in the Western world. For 1800 years or so it has been a power pyramid which has had to accommodate itself to the realities of a more complex world than mere power pyramids alone can handle. So its leaders developed the idea of subsidiarity. But for those who come out of a different tradition, subsidiarity is a notion that implies a concession to hierarchy that they are not willing to make. One of our Canadian friends mentioned to me: "Try to tell the Canadian provinces that their relationship to the federal government in Ottawa is one of subsidiarity." Try to tell that to the American states.

If anything, federalists elsewhere have been struggling with such concepts as non-centralization: within multiple-centred systems in which there is no hierarchy. Therefore, however valuable subsidiarity is to moderate hierarchies, perhaps the European Union has to take the difficult step of breaking out of the philosophic tradition toward which it can gravitate so easily, so as not to think in those hierarchical terms from the beginning.

But even here there is a paradox. What is this Catholic federalism? Is it a civil reformation of the Catholic countries, let us say a breaking down of their hierarchies, by bringing them together to be part of a larger federal structure, or is it the revival of the old dream of a Catholic Europe; of a universal European state within a secularized power pyramid?

This is a question that is worthy of examination; worth addressing directly in order to better understand where Europe is going. Both federal and unitary ideas are expressed in this debate. There is a great deal of statism expressed in the common academic discourse that European scholars and intellectuals have grown up with. For the first time, some of it has begun to creep across the Atlantic, as those of us who have tried to fight against it are so aware.

It is easy to talk about the "state" as the starting point of discussions because that is what people have known in Europe for so many centuries. Once statist premises are accepted it is very difficult to avoid viewing the European Union as an anomaly; something that has to be turned into a state, even a decentralized state, very soon. This launches Europeans once again on a course that moves them away from their original intent through original confusion and back to what for modernity represents original sin. That is something that needs very close examination.

Connected to this problem are certain issues such as cooperative federalism and citizenship. Cooperative federalism was imported from the United States as an idea. I was connected with the development of this idea some years ago.

It has become a theory. It is not. Cooperative federalism is a technique. It is a mechanism that opens the door to a proper theory. But it is no more than that and it should not be elevated beyond what it is.

Cooperative federalism makes it possible for federalism to exist in a highly interdependent world where, if we relied upon earlier notions of federalism as the separation of governments, there would be no function that would not be seized by the larger, stronger, government in the course of time. Cooperative federalism is valuable beyond that, since it gives us a vision of human cooperation, which is a good thing, but always within a framework within which real differences are recognized. For example, I have argued that in the United States, cooperative federalism existed in the nineteenth century, even when people talked in a different language. It was a kind of federal relationship in which the primary responsibilities for policy action were with the states. The federal government provided certain supplementary assistance primarily in the realm of infrastructure and coordination of national policy and no more.

Cooperative federalism, when the term became popular in the U.S. in the 1960s, became an excuse for federal government coercion. It still seemed to involve all governments, and did, but it represented a slogan, a phrase that the federal government could employ against states that did not want to accept some federal policy prescription — states that did not "toe the line" were denounced as not cooperating. Both kinds of intergovernmental relations fall within the parameters of cooperative federalism, and it was considered better to have that in the 1950s and the 1960s in the United States, than to have a shifting of powers to the federal government. Why? Because in the 1970s and the 1980s, the power could shift back to the states, within the cooperative framework — as much of it has. But, still we are talking about a phrase which must be expanded, which must be analyzed so that we understand what different forms of behaviour can exist within the framework of cooperative federalism.

In any federal system, there must be dual citizenship. Many confederations failed in the past for internal reasons. Here I am not talking about those that collapsed because they were destroyed by conquest — many of the Greek leagues, for example, continued until they were conquered by the Romans. To be destroyed by conquest is a matter of the balance of power in international relations and is not necessarily a reflection of the quality of internal self-government. Many confederations that collapsed by virtue of their own weight were those that did not recognize the dual dimension of citizenship. Thus, even if they maintained the basic premise of a confederation, namely that the general overarching institutions work through the constituent polities, there still must be some notion of dual citizenship. Certainly in a federation that is true. The dual citizenship even may flow, as in the Swiss federation or confederation — where there is really triple citizenship — from the smallest arenas through the intermediate to the largest arena.

In the European Union, as in the United States, citizenship is likely to flow from the intermediate arenas in both directions. It should not be established first and foremost or singly by the largest arena, or singly by the largest arena. At the initial stages there is an advantage to having the focus of dual citizenship. I use the term "dual" to include "multiple" as well. Citizenship flowing from one of the lesser arenas is simply a way to protect those arenas against the claims which the largest arena inevitably will have; that it is protecting the rights of its citizens by intervening in the smaller ones.

Without the largest arena [e.g. the Union] being able to protect the rights of its citizens, we lose some of the most important benefits of federal arrangements. I am not trying to suggest that there is not a task here or that it is not an important role. But to give that as an exclusive power to the largest arena is to severely weaken the other arenas. In a democracy, where citizenship is a key, no doubt that would weaken them irreparably.

There are other issues to be discussed as well. One of them is language. A second is foreign affairs. A third is defence. At the very least, we need to recall that the American defence umbrella is still a critical factor in the formation of a federal Europe that can ignore defence issues. This suggests that NATO is as much a part of the European community (while separate from it institutionally) as any of the EU's other mechanisms. This will not remain true forever, but each problem needs only to be confronted at its time; there is no reason to advance the confrontation of issues and problems before their time. Nevertheless, silences are often as important as what is said and they should at least be mentioned.

I have observed that a proper federal framework involves non-centralization or multiple centres of power. The model that is needed to build the European Union is a matrix or a mosaic and not a power pyramid or a centre-periphery model that is much beloved by many in political science and sociology these days. Those other models suggest that power is naturally concentrated and is only deconcentrated by the good will of those at the top of the pyramid or those in the centre of the circle (see figures 1, 2, and 3 in chapter 2).

This has a marked effect on how people think about the institutional framework they are building and the consequences of their ideas. For example, to the extent that there is a power pyramid, politics will be the politics of a court; between those who seek to get close to the ruler or rulers on the top of the pyramid and who jockey for power among themselves as members of that court. Under such conditions, the lower levels, so to speak, no matter how much power is formally decentralized, will remain the lower levels and the most talented people will always strive to get into that court and to become part of it. Beyond that, the nature of power pyramids is that the people are underneath the pyramid; the whole pyramid sits on top of them. That is hardly the model for a democratic order for Europe or for anybody else (see figure 5). Recall that it was pharaonic

FIGURE 5: Models of Foundings/Regimes

	Conquest	*Organic*	*Covenant*
Founding:	Force	Accident	Reflection and Choice
Model:	Pyramid	Concentric Circles	Matrix
Structure of Authority:	Hierarchy	Centre-Periphery	Frame and cells
Mechanisms of Governance (in rank order):	Administration-top down bureaucracy	Politics-club-oligarchy	Constitution-written
	Politics-court	Administration-center outward	Politics-open with factions
	Constitution-charter	Constitution-tradition	Administration-divided
Apotheosis:	Army	Westminster system	Federal system
Excess:	Totalitarian dictatorship	Jacobin state	Anarchy
Most Common Form of Revolution:	Coup d'état	Civil war among elites	Structural Resort to arms

Egypt that built pyramids as the ultimate monuments to its rulers. It was the best possible symbol they could have selected for the power system they constructed.

The same limitations apply with regard to the centre-periphery model. There the politics in the centre are the politics of a club; somewhat more equal than the politics of a court, but still the closed politics of a club. Those who are admitted to the club can participate in its politics; those who are not, remain on the periphery. While the club might be more open than the court, not everybody can be admitted to the club. So it is also an inappropriate model if only because what is passed to the peripheries in such a model is always at the mercy of the members of the club.

That model works only when the members of the club spend most of their time in the peripheries and only gather at the centre once in awhile to do business. For example, in England before industrialization, the members of the club were the country squires who came to London every so often to take care of their common business and then went back home to sit as justices of the peace in their local parishes. England was still very clubby in its politics and government, but at least there was continuous contact between centre and periphery. But that passed some time ago with the rise of professional politicians and public administrators who sit permanently in Westminster or Whitehall, and it is unlikely in the industrial age or even in the post-industrial age that such clubs will revert to the old model.

So, the only appropriate model is a matrix or a mosaic in which the framing institution is the largest arena and itself is comprised of a number of different arenas. The existence of multiple arenas is the real test of a federal organization and distribution of power. Moreover, we need not think only about two or three arenas; quite the contrary. Europe, appropriately, is made up of more than two or three arenas, thus there must be a place for the constituent states, *Lander*, provinces, cantons, whatever they are called, within the European-Union framework. And one of the most important things that can be done is to have them assert that involvement. They should not wait to ask permission, but they must assert that involvement as part of the overall restructuring of Europe which is taking place. This becomes a possibility because federalism breeds federalism. Once a polity embarks on a course of integration in the federal rather than in the hierarchical or the centre-periphery mode, it is possible to extend the application of the federal principle in many different ways and that of course is the great possibility and the great hope.

This discussion began with the fact that the European Union is a civil or secular extension of Catholic Europe. We also have to be cognizant of the fact that its seat, Brussels, sits on one of the great cultural faultlines of Europe, the point where Protestants and Catholics divided and also the point where the Germanic and Latin traditions met. It is a cultural faultline which has played a special role in Europe at least since Roman times.

In trying to study, as I have tried to do over the last number of years, earlier expressions of the federal idea — the covenant idea in its original form and the federal idea in its political form — within the European political tradition, one comes back again and again to that cultural line, that line of development which runs from Switzerland, up the Rhine Valley, through Belgium and the Netherlands, across the North Sea and into Scotland, that marks the region where the covenant idea in theology and political philosophy and the federal idea in practice (whether it was called that or not) have constantly bubbled forth and reasserted themselves whenever and wherever local populations have been allowed to express themselves.[2] Possibly the line continues even further south-

wards, maybe it even extends into northern Italy.[3] Although we do not entirely know why this is so, one of the reasons clearly must be that where different cultural groups come together and where one cannot conquer or suppress the other, they ultimately must make agreements with each other. Sooner or later — it may take centuries — they acquire certain habits of negotiated cooperation. They get into the habit of giving up conquest and of trying instead to make their decisions and to organize their lives through peaceful agreements.

It is no accident that these cultural borderlands also have become the heartland of the European Union. We will do well, it seems to me, to explore the history of this heartland and to use that history and the peoples of the heartland to the fullest to build the kind of Europe that will be united, federal, and democratic in the best way.

NOTES

1. No adequate discussion of the federal dimension of the biblical world view is presently available. Two of the best available treatments of this point are to be found in the works of Althusius and Buber. See, for example, Johannes Althusius, *Politics*, trans. Frederick Carney (Boston: Beacon Press, 1964) and Martin Buber, *Kingship of God* (New York: Harper and Row, 1967). I have treated the subject in "Government in Biblical Israel," *Tradition* (Spring-Summer, 1973) and "Covenant as the Basis of the Jewish Political Tradition," *Jewish Journal of Sociology*, June, 1978). The Israel-based Workshop on the Covenant Idea and the Jewish Political Tradition sponsored by the Jerusalem Center for Public Affairs and the Bar-Ilan University Department of Political Studies and its American-based counterpart, the Workshop on Covenant and Politics, sponsored by the Center for the Study of Federalism are probing that issue, among others. The principal work on the former is in Daniel J. Elazar, *Kinship and Consent, The Jewish Political Tradition and its Contemporary Manifestations* (Lanham, MD: University Press of America and Jerusalem Center for Public Affairs, 1983). The principal work on the latter is in Daniel J. Elazar and John Kincaid, eds., *Covenant, Polity, and Constitutionalism* (Lanham, MD: University Press of America and the Center for the Study of Federalism, 1984).
2. Daniel J. Elazar, *The Covenant of Abraham* (forthcoming).
3. See Robert Putnam, *Making Democracy Work* (Princeton: Princeton University Press, 1993).

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The Use of Federalism in the Reconstitution of the Ex-Soviet Republics

THE HISTORIC SETTING

It is not unfair to say that federalism in the USSR was a mask for imperialism. Nevertheless, it had a certain reality which was reflected in Lenin's correct assessment that at least a formal federal structure was necessary for the establishment of the Communist empire in the first place; Khrushchev's failure to do away with the federal structure through constitutional change in the 1960s; and the importance of the federal structure in the developments leading to the recent breakup of the empire. Thus, while the USSR may have been a sham as a federation, federalism has played a major role in its history over the past 70 years. Nor can there be a future in the ex-Soviet empire without federalism in some form.

What precisely that form will take is uncertain at this time. It is likely that it will include some combination of confederal and federal arrangements. Confederation and other confederal arrangements, which had some prominence as the original form of federalism in ancient times and in premodern Europe, disappeared with the rise of the modern nation-state. In its place came federation, a form of government by which a country presented itself to the external world as a single nation-state, while internally there was constitutionalized power-sharing among its constitutionally established territorial units.

The essence of modern federation, then, was that matters such as foreign affairs and defence were deemed the exclusive province of the federal government, while most domestic functions were left to the constituent governments. While the federal constitutions of the USSR provided on paper for the possibility of the constituent republics to play a role in foreign affairs, the domination of all units of government by the Communist Party made that provision a sham. In true federations, however, such as the United States, this was a principle modified only at the peripheries, at the intersection of domestic and foreign policy.

Since World War II and the beginning of the postmodern epoch, the world has witnessed the revival of confederal arrangements in the form of new style confederations, *inter alia*. Chief among them is the European Union, a confederation of previously independent or "sovereign" states, among them the mothers of the nation-state idea and ideology. They have confederated not by forming a single overarching government, at least not initially, but through a congeries of specialized single or multipurpose "authorities" established as needed and desired, to which the member states have transferred part of their sovereignty to undertake the tasks which they collectively assigned to them in a kind of co-production arrangement.

The European Union moved slowly in the direction of a more comprehensive confederation. It may even be transformed into a federation, although there are many who believe that being a confederation is sufficient. Other such confederations or confederal arrangements are developing in other parts of the world as diverse as the West Indies and the Association of Southeast Asian Nations (ASEAN).

Once the choice has been made to move in the direction of federalism, the possibilities of enlarging the sphere of federal arrangements become real. We now see this in Europe where overlapping confederal arrangements involving the European Union, the Western European Union, the European Coal and Steel Community (ECSC) and the North Atlantic Treaty Organization (NATO) are all part of the emerging structure of European and Atlantic union. Similar developments are possible among and perhaps even within the ex-Soviet republics in ways appropriate to their situation.

At the very least we can expect that the sham federation of the USSR will be replaced by a true Russian federation following the steps taken recently by the Yeltsin government in negotiating a new federal treaty with 18 of the 20 constituent units within Russia itself. Similar federations could develop in the Ukraine, Georgia, and in one or two other republics.

It is a more open question whether the ex-republics now linked through the Commonwealth (or confederation) of Independent States (CIS) will develop into a real confederation. Despite the expected tensions between them, they still have enough in common to do so, though the passions associated with previous

repression and long-sought independence may prevent such a resolution, which seems to the outsider to be the most rational. In the meantime there are signs that whatever confederal arrangements will be established to link the republics, these arrangements will follow the EU model of single- and multi-purpose authorities rather than a general overarching confederal government. Not only is this reasonable, but it is probably the best possible way to secure the blessings of constitutional government and union through sharing where necessary without threatening the newly won liberties of the individual republics. Moreover, such confederal arrangements will lend themselves to broadened ties with the European states and the confederal arrangements they are developing.

FEDERALISM IN THE UNITED STATES AND IN THE EX-SOVIET UNION

When attempting to compare and learn from the United States and the former Soviet Union, one must begin by noting how different are the conceptions and the experiences of Americans compared with the citizens of the ex-Soviet Union.

For the ex-Soviet Union, now the Commonwealth of Independent States, 15 once Union Republics, now politically sovereign republics, are trying to find a way to maintain some institutions in common, to share those things which they must share or they feel it would be useful to share. This may not be adequate even for Russia, although officially Russia itself was a federation before the breakup and remains a federation. Those federal authorities have had to come to grips with the realities of proclamations of sovereignty on the part of most, if not all, of the constituent units of the Russian federation. The treaty President Yeltsin signed in 1992 to adjust relations between the government of the Russian federation and the units or the governments of those units may have put Russia at least on the way toward preventing the kind of dissolution that has happened in the ex-Soviet Union.

This problem of understanding can hardly be minimized. In general it is very difficult for Americans to understand how Old-World politics is conducted because it is based upon the kind of permanent primordial or intergenerational groups with territorial bases, or at least aspirations for territorial bases, that are absent even from American ethnic politics and runs counter, in most respects, to the territorial politics of the United States. Indeed, the great political change of the twentieth-century United States has been a movement from a territorially based politics, from the smallest precinct and township to the federal government, to a politics that mixes territorial and ethnic elements. Sometimes both sets of elements benefit one from the other. Sometimes they work at cross purposes.

How different is the situation in the ex-Soviet Union, where ethnic politics is so closely connected with territory and with disputes over territory. Moreover, this ethnicity or nationality is permanent. Unlike the United States where people can change identities, in the ex-Soviet Union people see themselves tied to their ethnic group organically, fundamentally, primordially, from generation to generation. No matter where they are, no matter where they might go, no matter what the conditions or their political life or their degree of independence or subordination, these difference are truly great and should not be underestimated. What the United States and the Commonwealth of Independent States have in common is that both need, each for its own reasons, federal solutions.

Russia, and at least some of the other ex-Soviet republics, will have to experiment with federation internally while most of them will be trying to experiment with confederation externally, that is to say, to link what is now called the CIS. They are doing so in a manner that is more reminiscent of, or has greater similarity to, the situation in Western Europe than it does to the American experience, where a clearcut decision was made over 200 years ago to reject confederation in favour of a federation. The ex-Soviet peoples and governments will have to work and experiment in both directions. The situation offers them the possibility of trying different forms including many new forms which may not have been thought of in the United States.

How can Americans help? While the original confederation of the United States may simply have grown out of American experience, the American federal constitution of 1787 was the product of political theory and thought as much as of experience. That is very important precisely because it is what makes the American experience not transplantable per se. On the other hand, American political thought is worth studying and exploring by all.

Every political society, every polity, had to develop its own system of self-government through some combination of its experience and reflection and choice based on that experience. It is that critical factor, reflection and choice, that involves the combination of experience or thought. We cannot control our experiences. They are part of our heritage. We can only try to direct and control their effects after they occur.

Each of the ex-Soviet republics has had its own historical experience. They also have a certain collective historical experience, in may cases forced upon them either as polities or on their residents as peoples. These have already had a tremendous impact on what those polities are likely to become in the future.

With regard to the CIS the point that I would make is that while it is not yet a comprehensive integrated structure, it has elements of becoming, at least a confederal arrangement, if not an actual confederation. It is too early to tell what it will become. But as we have seen in Western Europe, the original home of the absolutely separate sovereign nation-state, since the end of World War II, the idea of confederal arrangements has been revived, initially through a

number of very limited treaties, which very deliberately were described as functional rather than federal so as not to frighten anybody. As recently as the mid-1970s its survival was in doubt. Today the issue with the European Union is not whether it is more or less a real confederation now, but whether it is going to become a federation. There is a dispute about this in Europe that is very real and very legitimate. All this was achieved in little more than a generation.

The CIS is faced with similar problems coming at it from the other direction. That is to say, the CIS tries to link units whose claim to sovereignty may be recent but which have been considered as units for a long time in the minds and hearts of their people. These entities often are hostile to one another, but have a need to undertake certain tasks together. As Professor Jess Choper has said, "Today the world is not given to establishing federations of new states but rather of restructuring political arrangements among old states or states serving old peoples." The CIS will have to work its way out of its present predicament.

SOME ISSUES OF CONSTITUTIONAL DESIGN

The foregoing issues lead us to issues of constitutional design. Here I would like to try to emphasize those principles of constitutional design which are most appropriate for CIS decision-makers to consider. Several are conceptual, others theoretical, and still others very practical indeed. I will try to emphasize what I consider most important from the theoretical perspective of constitutional design. That is to say, I cannot comment directly on the experiences of the ex-Soviet republics except in a very modest way. But, because I know something about the problems of constitutional design, a field in and of itself, I can perhaps suggest some ways to utilize the knowledge accumulated through experience in various parts of the world in that field.

PROTECTING RIGHTS

In our day the first question to be raised in discussing any polity is the question of rights. Which government is the best one to protect the individual and private rights of citizens?

The answer depends on whom you want to protect. The American position, which is not wrong, is that the federal government can best protect people who are different, who deviate from the local consensus. But today there is some question in the United States as to whether needed local consensus is not at the mercy of every deviant who comes along and claims his or her constitutional rights. This is particularly important where national or group rights are involved because people obviously care very passionately about their national rights even if those national rights might be interpreted in another environment as

going against their individual rights. Look today at what was Yugoslavia, not only the former Soviet Union, and one will see this.

People who care passionately about such things will have different ideas of protection. The problem that is faced in the various republics of what was the Soviet Union, as in other parts of the world, is: how do you find a balance in protecting the individual and the collective? The Americans have been able to do that because they have had a very clear feeling — a very dominant consensus — that they are more interested in protecting the deviant individual than they are in protecting any kind of collective rights, a concept which they do not even formally recognize. This is emphatically not the case in the ex-Soviet republics.

QUESTIONS OF TERMINOLOGY

While we should not make ourselves slaves to questions of terminology and many mistakes have been made in both political science and in philosophy by people trying to agree about terminology until they become slaves to the words. Still, unless we correctly understand not only each other but also the things we are talking about, it is very difficult to communicate. There are some issues of terminology that cannot be ignored.

AVOIDING THE REIFIED STATE

First, the peoples of the CIS, especially those involved in the problems of constitutional design, must jettison the idea of "the state" as a reified entity, as something that exists in and of itself, regardless of its people, regardless of its regime. The peoples of the CIS, influenced first by European history and for the last 70 years by its Soviet totalitarian expression, are quite wedded to the idea of the state as a reified entity. In fact, the great revolution in modern democratic republicanism was to get rid of that idea of the state and to see the people as the source of political power.

Proper democratic theory holds that the people, in their various institutional combinations, delegate their powers to governments — in federal systems, to local, state, federal, and special-purpose governments — as necessary. Under democratic-republican theory, especially that animated by the principles of federal democracy, all governments are governments of delegated powers only. None possess powers in their own right, only the powers their peoples delegate to them; and what can be delegated can be reassumed, transferred, reorganized, or shifted.

This is a conceptual matter of immense political importance, as it makes possible the distribution of powers and their separation and the constitutional protection of rights. If a reified state is "sovereign," then it decides if and how power should be distributed and divided — if it so chooses, but in fact it remains the final point of sovereignty where authority and power come together. Thus

the state, which means for all intents and purposes those who run the state, determines who grants or guarantees rights and determines the final organization of powers. Whereas if the people are sovereign, then all rights, authority and power inhere in them and government is merely a vehicle for their exercise. Since rights are inherent, people are inherently protected and rights do not come to them as a gift from some external state. Moreover, it is easier to understand government or governments as consisting of the governors, those who empower them, and the institutions and mechanisms for keeping those governors in their place, than the ostensible majesty of the reified state. To restate matters, the three great elements of democratic republicanism — federalism, the separation of powers, and the bill of rights — are all made possible by the idea of popular sovereignty.

The idea of the reified state is a European invention. According to that theory the only thing that democracy brings to the reified state is the possibility that peoples can change their regimes, sometimes democratically. The idea that there is such a thing as a reified state makes it impossible to properly construct any kind of constitutional regime that will promise democratic republicanism and self-government, much less federalism.

In place of the state, the Americans successfully developed a different approach to understanding how polities are organized. The people as a whole, and in a federal system the people of their respective entities, are the source of political power or, if you will, political sovereignty. (It might be wise to get rid of that term also, simply because of the complications it introduces.) The people are politically sovereign. They are the source of the constituent power (in the words of Johannus Althusius). The people delegate the constituent power to those to whom they choose to delegate it.

Under the doctrine of state sovereignty, as opposed to popular sovereignty, there is one state with its government. All the other jurisdictions are mere "authorities" subordinate to the sovereign state, not governments. The government is in the hands of the state.

Under the doctrine of popular sovereignty, the people can choose to delegate their powers to both general and constituent governments. The people can determine how they allocate the powers to govern themselves; to whom and to what institutions they are willing to entrust those powers. They do not grapple with abstract questions such as where is "the state," who is the state, and what does the state do.

Individuals, people, do things. Even "the bureaucracy" is an abstraction. There are people who are working in a bureaucratic framework with certain consequences because of the framework. But they are still people. Anybody who follows the infighting within and among bureaucracies knows how unhelpful it is to talk about a reified state bureaucracy. There are many state bureaucrats and departments and agencies who fight with each other for power

as much as they fight with outsiders, maybe more. It is misleading to think that there is not real fragmentation even in the most centralized state even if the words of reification camouflage it. The words of reification, by camouflaging the reality, hide the fragmentation from the people and allow bureaucrats to act irresponsibly.

DISTRIBUTION OF POWERS

Look for the distribution of powers to build a political society that is democratic and republican. Whether federal or not, a distribution of powers is necessary. In federal systems, the distribution of powers takes three forms. First of all, there is the form of federalism, the distribution of powers between territorial entities. A large comprehensive entity, which we call the federal government, is constituted by smaller comprehensive entities serving pieces of the territory, which we call states or localities. The total is a matrix of governments with the federal government as the framing institution within which there are areas or states, and within those areas, others called local governments.

A separation of powers within each government is also required: executive, legislative , and judicial. There have been efforts on the part of those inspired by certain forms of democracy to eliminate the separation of powers. They have not worked. Indeed, the trend has gone back to making the structural separation of powers more or less thorough in order to preserve democracy in just about every case. The exceptions are in polities where the democratic tradition is so strong that it is able, to some extent, to substitute for a thorough separation of powers.

A CIVIL SOCIETY

Finally, there is the protection of the private rights of individuals through what we properly call civil society, a term from the age of democratic revolutions in the seventeenth and eighteenth centuries that has gained new currency in the ex-communist bloc. Civil society is a term that teaches us that not all of society is dependent on political arrangements and, that, while framed by the polity, there is a large private sphere rightfully separate from government. Its revival in the East comes in time to remind us in the West, that this is the term that properly describes our own liberties in which there is separation of governmental and non-governmental spheres and a distribution of powers between them.

I cannot overemphasize the importance of the idea of civil society, of limited government. The term itself is a great invention of seventeenth-century political philosophy that teaches us two good lessons: that no society exists without government, without some form for establishing order and security and allocating of powers (as Harold Lasswell said "who gets what, when and how"). At

the same time, that government has to be limited so that there is a sufficient private space.

Indeed, in the most successful democracies, we have come to understand that civil society actually has three pillars: a governmental pillar, a private pillar, and a public non-governmental pillar (a civic sector we call it in the United States), where people voluntarily come together (truly voluntarily, not coerced voluntarism), to do as much as possible on a cooperative basis, on a co-production basis, before turning to government. Government does — or should do — only what cannot be done privately or through the public non-governmental civic sector. So look to the development of those three sectors.

"SOFT" LAW

As you build your institutions, look for what lawyers call "soft" as well as "hard" law. That is to say, law through agreements rather than by the exercise of the coercive powers of governments. The European Community, now Union, built itself initially upon "soft" law. Much of that law is hardening now but the European Union is a model for how such law can be developed and used. There is now an international body of "soft" law through the various economic agreements which hold the world together, even if this law is not the same as the law of politically sovereign bodies. But nevertheless, "soft" law is very helpful especially in the case of the Commonwealth of Independent States.

COMPREHENSIVE FEDERATIONS

The peoples of the CIS will have to choose to build federations within several of the republics. Russia and probably two or three of the other republics — Ukraine, Georgia — will have to divide the whole territory into constituent units and establish internal federations. The situation in Russia today, or the putative situation in the Ukraine, or some of the other republics means that they are not likely to succeed where a good part of the territory is indirectly or directly under the control of the general government and only selected portions have the equivalent of state or provincial or cantonal governments.

Spain, when it made its move to democracy in the late 1970s, very wisely decided not to just grant autonomy to Catalonia and to the Basque country, but to divide Spanish territory into all of its historical regions, and to give each region similar powers so that the whole country would be divided into constituent governments. Spain is not quite a full federation on paper or in theory, but in practice it is, because they successfully made that move. Galicia may not want as much autonomy as Catalonia but that is its choice. And that is a critical element in creating the basic symmetries required in federal systems. Spain is an excellent model because it has developed a semi-symmetrical federation that could answer similar needs in the CIS republics.

CONSTITUENT UNITS WITH REAL POWERS

The constituent units of a federal system need to have real power including real powers of taxation. These may be implemented as they are in the United States where there are parallel federal and state officials in institutions working throughout the country. Or it may be done the way it is done in Switzerland where the federal government utilizes the institutions of the constituent units to implement federal legislation and it has not tried to establish its own institutions throughout the country.

Each system is good in some places and bad in others. For example, in the United States dual structures have worked rather well. In the Latin American countries they have allowed federal governments, with their greater resources, to work locally to effectively pre-empt state and local efforts and has ended up defeating federalism because of the political culture. In Switzerland the other system has worked rather well because of the ingrained federal political culture there. It is somewhat more problematic in hierarchical Austria. This is a topic in and of itself. It is necessary, in either case, for real powers to be constitutionally allocated among governments and protected.

DUALISM AND COOPERATION

Federalism works through a combination of competition and cooperation. A dual structure is necessary in one or another of the forms I have described. But there will always be cooperative relationships within the structure because there are too many things that have to be done cooperatively by the governments involved. The United States learned that very early. Cooperative federalism was the norm in the U.S. within a few years after the adoption of the Constitution of 1787. But in our time this thrust toward intergovernmental sharing has gotten out of hand somewhat, as it has been used by the federal government from time to time for coercive purposes.

A proper balance between cooperation and dualism is critically important but both will always exist. What makes them work is what, in American law, is called comity, that is to say a decent respect for the needs and concerns of the other polity. Comity is protected through open bargaining and open government in addition to formal constitutional provisions. This is critically important. There is no political system in the world that does not have bargaining. Even in the most closed and dictatorial system at least those people who sit at the top bargain among themselves. Democratic systems are successful because their bargaining is sufficiently open and accessible to the vast majority of people who choose to make use of that access, and it is visible so that not too much can be done to strengthen the hands of the governors at the expense of the governed.

SLOWER BUT FIRMER RESULTS

Federalism, because it requires consent, is a slower way to get results but its results are longer lasting. Sometimes a quick fix seems to be possible by the use of force or forceful intervention but in the long run consensus can generate a wider and deeper desire to support the result. The history of the American confrontation with the problem of the rights of blacks and other non-white minorities is a case in point. The Americans used a combination of federal processes and the coercive power of the federal government with the end result that today there is sufficient change of heart among Americans in all parts of the country to make the reality of support for civil rights and rights protection much stronger.

CONCLUSION

I would like to conclude by mentioning three more points. It is obviously easier to build democratic systems, federal systems, where the political culture lends itself to them, and obviously more difficult where the political culture runs in contrary directions. In the latter case, the constitutional designers must find those elements most likely to be in favour of or supportive of democratic and federal institutions. This is sometimes amatter of balancing oligarchies instead of securing broad-based participation. It is a matter of working with what is available.

This is especially difficult when it comes to ethnic federations. Some of the problems of unfavourable political culture can be overcome if there is sufficient political will. Such will is strongest when it can draw from the culture. At times it is used even to modify and moderate the culture.

Fortunately or unfortunately, accidents of history have their role to play as well. Some have to do with the kind of leadership that appears. One wonders whether Yugoslavia would have been plunged into civil war had there not been a certain kind of leader in Serbia at the time. But these are the accidents of history over which we have relatively little control. On the other hand, proper leadership is necessary for federalism to succeed.

No federation freely entered into that has lasted for a least 15 years has ever failed of its own accord. The Soviet Union and Yugoslav federations were imposed by force. The results speak for themselves. What constitutes "freely entered into" may be a matter for discussion but again, no such federation has failed of it own accord. Some have been eliminated by outside conquest, but where the people have chosen this course of political organization they have generally stayed with it. As the ex-Soviet republics make their new beginnings

one can be skeptical but hopeful that, whether internally or in their relations with one another, they will be able to move from the federalisms of force of the past to useful and democratic federalisms of consent in the future.

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Federalism as a Solution in South Africa

In South Africa, ethnic politics is closely connected with territory and with disputes over territory. Moreover, this ethnicity is permanent. People in the United States can change identities; in South Africa people see themselves tied to their ethnic group organically, fundamentally, primordially, from generation to generation. What the United States and South Africa have in common is that both need federal polities, and both, for different reasons, are federal countries. South Africa has had its own historical experience. Its peoples also have had their collective historical experiences, in may cases forced upon them. These have already had a tremendous impact on what its polity is likely to become.

THE TWO FACES OF POLITICS

Human, and hence scholarly, concern with politics focuses on three general themes: (i) the pursuit of political justice to achieve the good political order; (ii) the search for understanding of the empirical reality of political power and its exercise; and (iii) the creation of an appropriate civic environment through civil society and civil community, capable of integrating the first two to produce a good political life. Political science as a discipline was founded and has developed in pursuit of those three concerns. In the course of that pursuit, political scientists have uncovered or identified certain architectonic principles, seminal ideas, and plain political truths that capture the reality of political life,

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or some significant segment of it, and relate that reality to the larger principles of justice and political order and to very practical yet normative civic purposes.

Politics has two faces. One is the face of *power*; the other is the face of *justice*. Politics, as the pursuit and organization of power, is concerned with "who gets what, when, and how." However, politics is equally a matter of justice, or the determination of who *should* get what, when, and how — and why. Power is the means by which people organize themselves and shape their environment in order to live. Justice offers the guidelines for using power in order to live well.

Politics cannot be understood without reference to both faces. Without understanding a polity's conception of justice, or who should have power, one cannot understand clearly why certain people or groups get certain rewards, at certain times, in certain ways. On the other hand, one cannot focus properly on the pursuit of justice without also understanding the realities of the distribution of power. Both elements are present in all political questions, mutually influencing each other.

SOUTH AFRICA AND THE UNITED STATES: SOME COMPARISONS

What do the American founders have to say that would be of use to the founders of the new South Africa? On the surface, the disparity in the two situations is great, especially since the American founders were faced with a situation like that in old South Africa where, with some exceptions, non-whites were excluded from citizenship in the polity. However, even if the American founders were not entirely correct in their assessment of issues in the short run (for example, in their belief that the central political issue of the new federal government would be small states versus large states), they knew what would be right in the long run. In other words, they founded a polity on correct fundamental principles, on a correct understanding of human nature.

Beyond that, the constitution they wrote combines a proper degree of rigidity with a proper use of ambiguity. For example, the times for elections were fixed, unlike in parliamentary regimes. The president, vice president, representatives, and senators were to be elected for fixed terms with no possibility of changing these dates except by constitutional amendment. On the other hand, where interpretation was necessary, a proper ambiguity of language was provided. This ensured that popular government would be maintained and there could be no excuse for holding off popular elections, while at the same time the kind of flexibility that a constitution needs was allowed.

Let me suggest a few comparisons between the United States of America and the Republic of South Africa. In both cases we are speaking of one country. The

United States was perceived, or at least presented by its founders, as homogeneous in population. In part this was because of the exclusion of black slaves and Indians. This representation did not take into consideration the heterogeneity of the European population which was already great by contemporary standards, nor the country's religious heterogeneity, with many Christian sects and with Jews as full citizens. The Republic of South Africa, on the other hand, is recognized as highly heterogeneous in several ways, not only in the divisions between black, white, Asian and coloured, but between those of English and those of Afrikaner background, plus European immigrants of many other groups and deep tribal divisions among the blacks. The United States emphasized territorial democracy from the first. That is to say, citizenship, politics, and government were organized around territories, whether states, counties, townships, and cities, or even less permanent electoral districts. In the Republic of South Africa circumstances have modified its basic territorial democracy with a combination of other forms of democracy as well, principally resting upon the existence of primordial groups. The United States in 1787 did not have organized political parties, hence the constitutional convention was not divided along party lines. The Republic of South Africa in 1992 has well-organized political parties, in most cases reflecting the deepest cleavages in its civil society.

Further, it is well to remember certain points about the U.S. federal constitution. First, it was written by a committee. While there were outstanding figures in the constitutional convention and James Madison more than any other single person shaped the resulting constitution, still, the United States had no one founder. Rather, the Constitutional Convention functioned as a committee and made its decisions with all the differences of opinion that had to be covered within a committee.

Second, the United States Constitution is incomplete without the state constitutions. Donald Lutz has made the point most effectively. The United States Constitution was not meant to be other than an incomplete document, relying upon the state constitutions for the fundaments of government and relating only to the constitution of the federal government and its basic relationships with the states.

Third, the U.S. Constitution has silences that themselves have meaning. For example, the Tenth Amendment was designed to clarify some of the silences with regard to the continuing status of the states in the new federal constitution, though in fact it introduced ambiguities of its own. Similarly, there is no mention of local government in the United States Constitution since that is constitutionally a matter for the states.

Fourth, the United States Constitution has two dimensions. It reaffirms the rights of the states and their people to self-government and also guarantees them a share in the common government. One might refer to this as a combination

of self-rule and shared rule which is, by the way, an excellent definition of what federalism is all about.

Fifth, the citizens of the United States are citizens as individuals; that is to say, they possess dual citizenship: they are citizens of their states and citizens of the United States. This was understood in the Constitution of 1787 but made explicit after the Civil War through the Fourteenth Amendment.

A central idea of the U.S. Constitution was to establish an extended republic, one in which there were no permanent majorities or minorities. Extending the sphere of the republic is the point of Madison's famous *Federalist Paper #10*. The founders perceived that the problem of previous small republics was that a permanent majority of the poor stood against a permanent minority of the rich and believed that with the extended republic, that problem would be solved. In it there would be many interests of which poor and rich would only be one, and that those interests constantly would be forming coalitions with one another to form temporary majorities around specific issues. This would absorb and diffuse conflict by allowing all permanent interests fair expression.

It was assumed that this extended republic would be established by political compact. Its constitution would be established by a pact among its members. Indeed, the Constitution itself is such a pact. If it does not explicitly discuss the compact theory, it is because it follows in the path of the states, many of which did just that when they re-established themselves during the Revolutionary War. Moreover, the Declaration of Independence can be read as the original covenant or compact establishing the United States of America. Elsewhere I have demonstrated the covenant-like character of the Declaration.

SOME QUESTIONS OF POLITY

The United States was founded by uniting separate states that felt themselves to be akin to one another and which had conducted a revolution against the mother country together. The question before South Africa is: Can a unitary, highly-centralized state be transformed into a federation? The record is not unambiguous. Spain, an example to which I will refer frequently and to which I suggest that South African constitution-makers refer, is perhaps the most successful example of such a transformation in our times. After the death of Franco, and as part of its turn toward democracy, the Spanish political leadership made some critically important decisions to accommodate the country's ethnic minorities, at least two of which, the Basques and the Catalans, had become vociferous in their demands to the point of violence.

The Spanish political leadership brilliantly decided to avoid asymmetrical solutions, that is to say, limiting autonomy to those two or perhaps a few more minorities at the country's periphery, so that the issues would always be framed

in the context of Spain versus its peripheral minorities. They determined to divide the entire country into autonomous regions while allowing those that wished to establish their own special constitutional relationships with Madrid to do so through bilateral negotiations. At the same time, the general law of regionalization required each region to establish a basic quasi-federal constitutional relationship in the intervening half a generation. I will not go into the whole story here.

This was decided and embodied in the 1978 Spanish Constitution, drafted in a convention that was highly partisan where the revived political parties of Spain covered the spectrum of political ideologies and attitudes yet were able to negotiate a mutually satisfactory arrangement. In the intervening half generation the system has proven itself as the major secessionist tensions have been eliminated or confined to a less-than-popular terrorist underground in the Basque country. The four unique regions — the Basque country, Catalonia, Galicia, and Andalusia — each negotiated their own constitutional status directly with Madrid and the other regions adopted a common framework for regionalization as they did not seek anything more than that. The plan, while avoiding the use of the word federal because of the objections of the right-wing parties, has become essentially a federal one in all but name because the Spanish constitution and the regional constitutions provide the kind of empowerment and protections that federal constitutions have.

Belgium is trying to do the same but has the problem of a dyadic division between Flemings and Walloons which invariably leads to sharper confrontation. Nevertheless, because of its position in the European Union it may be able to achieve federation. The Federal Republic of Germany has had to undertake this task for its newly absorbed eastern part and, indeed, only accomplished unification by first re-establishing the five *lander* in the east and then reuniting them with the eleven *lander* of the west.

Austria, after it ceased to be the centre of the Austro-Hungarian empire which had some power-sharing features, then had to divide itself internally into a federation which it did along the lines of the traditional provinces. This took place after World War I. Austria has tended to be a very centralized federation, but it is a federation and offers another example to be studied.

Brazil also transformed a unitary state that was quite centralized into a federation in the 1890s, shortly after it had ceased to be a monarchy. Brazilian federalism has had its ups and downs but has remained a powerful means of protecting liberties in that country, if often by unorthodox means themselves fostered by the existence of federalism.

Pakistan also formally transformed itself into a federal system upon achieving independence from the British and partition from India in 1947. Its federation is also based upon ethnic provinces and has been even more centralized than the others. Pakistan has had military government for so much of its history

that the extent of the existence of true federalism within its borders is questionable.

Even in these cases, of course, it should be clear that the advantage of federalism is to allow a variety of ethnic accommodations. This would be true for South Africa as it has been for these other countries mentioned and still others. Moreover, as in the United States, federal protection of individual rights and the free flow of commerce will probably be essential for the achievement of the kind of liberal democracy which the peoples of South Africa seek. On the other hand, there are the Czechoslovakia, Yugoslavia and Soviet examples. There are also the failed efforts in Cyprus and the Middle East.

THE CRITICAL QUESTIONS

Three critical questions for South Africa are: How will federalism affect economic growth; how will it deal with regional equalities; and how will it affect redistributive policies?

As far as the United States is concerned, federalism certainly seems to have served the purposes of economic growth. While such growth always has a tendency to promote regional inequalities, in the long run it has kept those inequalities under control in the United States, in part because each region of the country had a strong political voice in national affairs including national economic affairs. Certainly federalism has had a redistributive role in the United States since the existence of the states has assured that federal government policies would take all states into consideration and thus serve redistributive functions.

The positive role of federalism in this regard may best be seen in the Third World. In unitary states in the Third World economic development has generally meant the development of the capital city and the metropolis surrounding it, which have concentrated the wealth, new and old, in their hands. While the same inequities of concentration may have been present in Third World federations, the existence of state capitals as well as the federal capital has assured that at least these capital cities would become development nodes for their respective regions, offering a better distribution of wealth and addressing the problem of regional inequalities to a greater extent that in unitary states.

The economic dimension is a reflection of the difference between federalism and regionalism. In federalism the subnational units have constitutionally entrenched powers, not easily subject to revocation by the federal government at the whim of those in power in the national capital. This is critically important for all concerned. In that sense federalism is not functional devolution at the whim of the centre but rather a constitutional division of powers designed to protect all citizens.

Federalism is also a way to overcome the disadvantages of metropolitanism in a country like South Africa, dividing the great metropolitan agglomerations, most specifically the great Pretoria-Wittwatersrand-Vereeniging (PVW) metropolitan agglomeration including Johannesburg, among several regional governments. Its governmental structures would serve a redistributive policy that can address major economic inequalities in the overall polity. Indeed, it may be the only way in which such redress can be brought about in fairness. If the PVW agglomeration is divided among several regional governments, either the regional governments will force the federal government to pursue a redistributive policy or there will be an overall metropolitan authority in which each region will be represented and which will have redistributive mechanisms and set-asides built in.

The question may be raised as to how important regional identities would be. Fortunately, South Africa has a basis for regionalization in the nine economic regions established several years ago that cut across the usual racial and ethnic lines sufficiently, where necessary, to establish a measure of fairness. These regions already are recognized. It may be necessary to establish one or two more by further dividing the nine, for example, another region in the PVW area or a predominantly Xhosa-speaking region based in Ciskei-Transkei and the South African territory in the middle. These regions will, once they are empowered, soon acquire an appropriate regional identity through their actions. As regional bodies of law and histories develop, a sufficient amount of regional integrity is established to give them identities, but not identities that work against the common South African identity.

DESIGNING A FEDERAL CONSTITUTION
FOR SOUTH AFRICA

The foregoing issues lead us to issues of constitutional design. Here I would like to try to emphasize those principles of constitutional design which are most appropriate for decision-makers to consider. Several are conceptual, others theoretical, and still others very practical indeed. I will try to emphasize what I consider most important from the theoretical perspective of constitutional design.

Political Will: The main problem to be faced in this regard is how much political will is there to federate, with all that entails — comity, power-sharing, appropriate mutual trust and respect. In my opinion based upon my experiences in South Africa to date, I believe that with appropriate leadership South Africans of all varieties will be able to find the necessary political will, although there are serious problems of trust among certain groups (not only between blacks and whites).

Self-Rule: An equally important question is how much self-rule should be granted to the regions. It seems to me that it should be more rather than less because the best way to encourage mutual trust is through the exercise of responsibility.

What needs to be ambiguous in the constitution and what needs to be rigid? In my opinion, all those procedures that guarantee the preservation of democratic self-government need to be rigid, that is, dates of elections and basic issues of rights protection, whereas the exercise of powers or functions can be more ambiguous.

Powers: A major issue in the South African constitutional negotiations is the entrenchment of regional powers. The ANC wants no entrenchment and the National Party major entrenchment. The interim constitution comes close to being a middle way and even can be considered federal. While there is room for interpretation, basic regional powers can be seen as constitutionally entrenched. Today the trend in most federal states is away from centralization toward greater decentralization because placing too great a burden on the federal government means that nothing gets done.

Terminology: If South Africans need to find a word other than federalism, that should not be the problem. In Spain, for example, the federated states are called autonomous communities. Powers are the real issue. We should not make ourselves slaves to questions of terminology, but there are some issues of terminology that cannot be ignored. For example:

Protecting Rights: People who care passionately about such things will have different ideas of protection. The problem that is faced in South Africa as in other parts of the world is: how do you balance the rights of the individual and those of the group?

Avoiding the Reified State: The peoples of South Africa, especially those involved in the problems of constitutional design, must jettison the idea of "the state" as a reified entity, as something that exists in and of itself, regardless of its people; regardless of its regime. South African political language, influenced by European models, seems quite wedded to the idea of the state as a reified entity. In fact, the great revolution in modern democratic republicanism was to get rid of that idea of the state and to see the people as the source of political power.

WHAT ABOUT EFFICIENCY

One question that is almost certain to be raised is that, while federalism may be nice for accommodating pluralism and while it may even be helpful in initially promoting democracy, liberty will only survive if democracy can efficiently cope with the serious problems most of the newly liberated countries face. Is

federalism not by definition inefficient? Even if justifiable for normative reasons, can it be at all justified when it comes to efficiency, namely the minimum application of resources for the maximum results? Many claim that federalism, with its duplications, complexities, and redundancies, is a machine designed for waste.

This view is based on a widely accepted but erroneous understanding of what constitutes efficiency in government. That understanding is based on hierarchical thinking about governmental organization. We are now coming to realize that such thinking is not only outmoded but simply wrong. The hierarchies that appear to be so neat on paper do not work in practice. Sometimes the application of a great deal of coercion works for a while but we have seen the result as neither fair nor efficient by any reasonable standard.

The development of cybernetics has given us a newer and truer understanding of how to achieve efficiency, one that has proved itself by revolutionizing the world. According to the cybernetic model, redundancies are vitally needed to achieve complex goals. At the very least, in a world where people and machines are fallible and inevitably make mistakes or break down, fail-safe mechanisms and alternate channels are needed to keep things moving efficiently. Beyond that, such mechanisms are vital to promote creativity and imagination.

As Martin Landau and Vincent Ostrom have pointed out, the American federalists discovered this principle in patterns of government 200 years ago. Now their "new science of politics" (as they put it) has been confirmed by the new science of cybernetics.[1] As a result, it is now beginning to be possible to talk about a federalist definition of efficiency.

The first step toward joining the issue is with a clarification of normative positions. If one begins as a monist, assuming the desirability and feasibility of achieving one pattern of thought and behaviour for everyone, then federalism is indeed inefficient and even wrong because it enables the perpetuation and even the entrenchment of differences. If one begins as a pluralist, seeing the world as a heterogeneous place and properly so, then one must make a different evaluation of federalism as a means to protect and entrench liberty. Thus, monistic Jacobin and Marxian views constantly have rejected federalism as wrong in principle even if they have had to compromise with reality and accept the temporary existence of pluralism. Federalist views, by contrast, embrace pluralism and seek means to protect it — one might say efficient means to do so — of which the constitutional division and sharing of power through a combination of self-rule and shared rule is primary. That is the federalist dialectic.

That dialectic starts with the human condition, both psychologically and sociologically, namely that every individual and individual institution has his/her/its own goals, only partly shared with others. Recognizing that, the best

way to move from A to B is to identify common goals and find a way for those same individuals and institutions to express those shared goals while allowing them to maintain and pursue their individual goals. That, indeed, is what federalism seeks to do.

A few years ago, as part of the effort to break through the paralysis of budgets rendered inflexible by cumulative previous commitments, the idea of zero-based budgeting — of starting from scratch every year — was introduced. To implement this new form of budgeting, proponents of managerialism in public administration came up with the idea of Planning-Programming Budgetary Systems (PPBS). The premise of PPBS was that it was first necessary to identify agreed-upon goals, then it would be possible to evaluate all budget items in light of their efficiency in the pursuit of those goals. PPBS failed precisely because in the public framework there is likely to be insufficient agreement on common goals to do that. People come together to pursue different goals which at best can be harmonized so that they can be pursued through common effort and enterprise. That, indeed, is the federalist way. When forced to try to define a single comprehensive set of common goals, people could not do so and PPBS could not be implemented except marginally.

Thus, in relatively complex public arenas, efforts to bulldoze directly, which would be termed efficient in other systems, might be the least efficient and might create great static and friction that will greatly waste resources, while the existence of multiple channels penetrating through multiple cracks may be a far more efficient way to achieve even the most common goals. The authors of *The Federalist* understood this.

Right now all signs indicate that democracy and federalism have become closely intertwined and that together they represent the greatest opportunity that humans have yet had to achieve liberty and prosperity. But, as is always the case in human affairs, the problems are great and the issue remains in doubt. One of the ways in which scholars of federalism can help resolve the issue in the right direction is by developing a federalist theory of efficiency that can be applied to assist the peoples and countries of the world in their application of the principles of federal democracy to secure life and pursue liberty and happiness.

NOTE

1.   Martin Landau, "Federalism, Redundancy and System Reliability," *Publius* 3, no. 2 (1973): 173-195; Vincent Ostrom, *The Political Theory of a Compound Republic* (Lincoln, NB: University of Nebraska Press, 1971) (revised edition, 1987).

Can Federal Arrangements Serve the Cause of Middle East Peace?

A PERVERSE REGION IN A CHANGING WORLD

It is rather sad to note that the Middle East is, by contemporary standards and political expectations, a perverse area. There was a time when the Middle East was like other areas of the world. The communist bloc, authoritarian Latin America, parts of Europe outside of either, or much of Africa, were areas that could be defined by their lack of civil society, and the domination of polities that were authoritarian or even totalitarian ruled by hierarchies usually led by one person. Those in power did not aspire to democratic self-government or civil society. The aspirations of the people of the Muslim world were and are rooted in Islamic civilization which is as complete and comprehensive for its people as Western civilization is for those who live in the West and as totally satisfying. Its truths are taken for granted as conventional wisdom by its people in the same way that the truths of Western liberal democracy are taken for granted by the people who live and are raised within it. Thus, the Islamic world was not that different in its manifestations from other disturbed parts of the world. Even in having a different world view it was not particularly different from other societies.

But this is no longer the case. In recent years, we have witnessed in those parts of the world a general desire to build civil society, to develop a social order in which private spheres are clearly legitimate by nature and not by

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government grant, in which the civil society has a government that plays a limited, not a total role, where the private sphere is considered to be the most worthy of development, and in which there is a strong public non-governmental or voluntary sphere that bridges both and provides a way to mobilize private desires for the public good without resorting to the powers of government, and which serves as a link between both.

This idea of civil society, especially democratic civil society, the desire for democratic republicanism, has, in the last while, spread throughout the world. The breakdown of the communist empire actually led in the direction of the revival of the concept of civil society as a meaningful one. But even before the communist empire broke up, those European states that stood outside of the Western democratic tradition began to re-enter it and to make strenuous and successful efforts to do so. Authoritarian regimes in Latin America gave way to a very serious ongoing effort to provide for a democratic republican civil society. The Latin Americans have great difficulties; we hope that they will be successful. If they are not it will be because they face very difficult problems. At least we can say that they are striving for this kind of democratic republican civil society. Even in Africa where authoritarian rule was diagnosed by many as being an absolutely necessary part of African political culture, we see an effort to try to move in a different direction. And in East Asia where there is perhaps less visible effort, there certainly is a sympathy, if not an active movement, even in those countries which have not joined the general movement in that direction.

Only the Middle East remains as a perverse region, a region in which there seems to be little or no desire for democratic civil society on a broad basis (I am not saying there are not individuals who desire it, no doubt there are), no capacity, it seems, for developing the desire at this moment with matters going in other directions, and indeed a whole complex of forces that are working, that still work, in the opposite direction. So in looking at the Middle East, one has to look at the region as a kind of pathology, or at least as an exception to the direction that the world has been taking in this generation.

The Middle East still continues to be a region in which states are governed by dictators. Often these dictators are no strangers to cruelty against their own populations, nor are they afraid of exercising their powers as fully as necessary. President Assad of Syria, for example, who is now acquiring a certain reputation in some circles as being a moderate, had no problems levelling the city of Homs a few years ago with his artillery and killing between 5,000 and 20,000 (the numbers are in dispute) of his own citizens in the process. And this is not to speak of Saddam Hussein in Iraq or the Ayatollahs in Iran or Khadafi in Libya. Dictators, even if they are benign, are dictators. These dictators are not benign.

The Middle East is a region in which religious fundamentalism is very closely involved politically, and in which fundamentalists see their political role

as a necessary role, a vital one. It is an integral part of Islamic and all other middle-eastern religious cultures that there should be close relations between religion and politics, so much so that where there have been efforts to have democratic elections in the Middle East, the more democratic the elections, the more often the fundamentalists have won. Again, it is perverse. Democrats offer a democratic election and they knew that there will be a military coup afterwards so that another Islamic country will not turn into a fundamentalist totalitarian regime after having been a dictatorial authoritarian one. We saw this in Algeria very visibly in 1991 when that is exactly what happened, but it is happening throughout the region. It is happening in Jordan, it will happen in Egypt unless the Egyptian benign authoritarianism of Mubarak and company can hold. In short, no civil society.

Of course, since federalism and the federal idea are so closely tied to civil society, the Middle East is not a hospitable home for federalism. Certainly not for the more orthodox forms of federalism — federation or confederation in the Western mode — which were indeed products of the development of the idea and practice of civil society in the modern epoch in the West, beginning in western Europe and North America in the seventeenth century and coming to a certain kind of fruition in the great modern revolutions of the eighteenth and nineteenth centuries. Indeed, there is only one functioning regime that can be called federal in the Middle East, and that is the United Arab Emirates which has survived over 15 years, more than half a generation, apparently successfully as a federation.

With this rather dismal background, we need to turn to the individual problem areas where federal ideas have been considered, or are likely to be considered, as possible options in the search for solutions to current and existing problems. The problem areas I discuss here are Afghanistan (partly in the Middle East, partly in South Asia); Iran; Iraq; the territory the Kurds claim as "Kurdistan" located in Iran, Iraq, Turkey and in Syria; and the Israeli-Palestinian-Jordanian conflict.

EXPERIMENTS IN FEDERATION

Let us begin by reviewing what has happened to federalism in the Middle East. Libya was born as a federal constitutional monarchy. I recall that early in my teaching career, it must have been about 1960, at the University of Illinois, I had a student from a prominent Libyan family, who had been sent to study in preparation for assuming a major role in the Libyan regime. He took my course in American federalism because that was the only course in federalism offered at the university, and he wanted to make Libyan federalism work. One day he told me with great pride that the Libyan supreme court had declared an action

of King Idris, who was the ruler at the time, unconstitutional, and how proud he was of the supreme court and this move to strengthen federalism. The next time the class met he came to me very humbly and said that he was sorry to have to tell me that the king had dismissed the entire supreme court. The next time I saw him, the following year, there had been a revolution. Libyan federalism had been abolished and he was reassigned to study library science because the new governors were not interested in people who knew about federalism. They wanted him to come back and direct the National Library of Libya, which he did.

That was an example of an effort to establish a true federation that failed early in the game. There were also certain pseudo-federations such as the United Arab Republic, where Gamal Abdul Nasser of Egypt extended his rule to Syria and was in the process of extending it to Lebanon. Then he became engaged in a civil war in Yemen (where he introduced the use of poison gas). Had he won, he would have tried to absorb Yemen to build the kind of Arab unity which is a very powerful myth the Arab world is now in the process of abandoning.

Sudan also has experimented with efforts to transform itself into a federation. It is a special case in that it was much more strongly influenced by outside forces in choosing this course than any of the other examples. Sudan consists of a northern two-thirds which is primarily Arab, and a southern third which is primarily black African. The Arab two-thirds is Islamic and the people of the southern one-third are either animistic or Christian. When Sudan was the Anglo-Egyptian Sudan, even the British Colonial Office was plagued with the problem of building some national unity with Sudanese territory. At one point somebody in the Colonial Office suggested that what they needed in the Sudan was a common language and that it should be Latin. Wiser heads quickly prevailed and Latin was left to the Vatican and a small scholarly community elsewhere and not imposed on the Sudan, but sometimes the search for federalism seems to result in something of the nature of this hope to develop Latin as a common language. Today Sudan has a federal structure on paper, in the southern regions there is a never ending tribal revolt and the rest of the country is always at the mercy of the current revolutionary central government.

There is, of course, the United Arab Emirates, which as I mentioned, is a successful federal system. Its secret seems to me to lie in the fact that it is a modern recreation of a Bedouin confederation. There are seven emirates, each with its own emir. These rulers of their respective states have not built a general or federal government, but have divided the task of common governance among themselves and their emirates so that one emirate handles foreign affairs, another one handles the organization of internal commerce, and the principal responsibilities for defence are in the hands of another. The seven emirs sit together as a council and manage to negotiate what needs to be done. This is a modern modification of the one true example of the application of federal

principles that can be found among the Arab traditions in that part of the world, the tradition of the Bedouin tribes. Bedouin tribes did form and reform confederations. They did so by finding a putative common ancestor. All tribes would claim descent from that ancestor and then together as members of the same family, as cousins as it were, could find ways to enter into pacts that would be relatively secure until some disruption came along. Bedouins after all did not leave archives, so there is some question as to how long these pacts lasted, how much they fluctuated, and what institutions they generated, but this was the way of doing more than simply keeping the peace, but of providing for mutual cooperation as well. As a tradition, it is pre-Islamic and with the coming of Islam, it was substantially repressed as tied to the old idolotry. Islam, in order to establish itself and its authority, moved to a more hierarchical tradition. Because the forces of Islam were doing this in a world of Bedouins, they had to compromise with the Bedouin tradition in the rural areas; the urban areas quickly moved in the other direction.

AFGHANISTAN: RECONCILING THE TRIBAL SYSTEM WITHIN A STATE

Afghanistan, which is somewhere between the Middle East and South Asia, has been much in the news since the Soviet invasion. At this point, it is in the process of trying to find a form of government appropriate to its post-civil-war situation. The Afghanis, with outside help, have for the third time in their modern history done the unbelievable as they expelled a world super power that tried to take them over. Twice in the nineteenth century, with Russian help, they expelled the British, now with Western help they have expelled the Russians. But they are faced with the problem of having fought the war of expulsion on a very fragmented tribal basis, within an Islamic religious context as well. Now they must re-establish a common government.

Even prior to the Soviet invasion, the Afghani state was simply a frame within which a kind of Bedouin confederation of tribes held the real domestic governing power. For example, there were provinces in Afghanistan, but the provincial governors were essentially the mediators between the tribes and the tribal leaders in each province when they needed a touch of outside intervention to help them to get together and to work out their own arrangements. Whenever there was a breakdown in the system, a grand general council of the leaders of all the tribes would be called, and they would arrive at a new agreement, like an amended constitution if one wants to use a Western term for it (they would not have described it quite in that way), and then things would move on again. So Afghanistan was a *de facto* federation. Now it seems to be moving back in that direction, and the reports indicate that they are on the track toward restoring

a modified version of this historic and traditional arrangement, based upon some new factors which make the result somewhat chancy: the interjection of the hierarchy or several hierarchies of leaders who emerged during the civil war, the emergence of more overt influences on the part of Iran and Pakistan in the internal processes of Afghanistan, and finally, the emergence of powerful religiously oriented Islamic fundamentalist leaders from the civil war.

The old political-social order allowed this "federal" process to take place rather unself-consciously because the peoples of Afghanistan had done it from time immemorial, and they never thought much about it. The only modern question about the system was reconciling the tribal system with a state, and since there was a strong feeling of being Afghani throughout the country, even though it is a multiethnic society, adopting a state framework has not proved to be difficult — except that the character of that system underwent change by civil war, and a coup, and various other transformations. So the Afghanis are perhaps in the best position to draw upon federal ideas to move ahead. The more they can go back to draw upon their own tradition, the more likely they are to be able to use the institutions of that tradition to advance a kind of federal or confederal unity for the country. But the more self-conscious they are about the effort, the more problematic it is likely to be.

IRAN: POWER SHARING IN AN ISLAMIC REPUBLIC

Iran proper is not a country with any kind of federal tradition, even a quasi- or pseudo-federal one rooted in tribal traditions as in Afghanistan. Iran has been a centralized monarchy (state is probably not the right word) or, as an empire, a partially decentralized imperial monarchy since biblical times. One can go back to a period before Cyrus the Great, who ruled more than 2500 years ago, and find that there was a system of tribal arrangements, or interrelationships, which may or may not have been similar to the Bedouin confederal style. The Iranians are not Arabs. They are Iranians, a very different people, and so they do not necessarily have that tradition, but they may have had something analogous to it then. We simply do not know enough about it.

Since Cyrus the Great, no matter what the regime in power, what the dynasty, the empire has been centralized with a certain amount of deference to the provinces beyond Iran's boundaries in the form of cultural autonomy for minorities. That, indeed, is a great Iranian invention in the world. The Iranian invention, which we know goes back to about the time of Cyrus the Great, who formed the original empire of the Medes and Persians, was based upon the idea that minorities should have substantial cultural autonomy and, if territorially based, home rule so that they would have a stake in the regime. Perhaps the best account of this regime is in the biblical Scroll of Esther where there is the

description of the empire as including 124 states (in the sense of federated states) from India to Ethiopia that were under the rule of the Persian emperors, each having its own cultural autonomy and internal self-government.

To a greater or lesser degree, depending upon who was ruling and when, this system of balancing off ethnic minorities by allowing cultural autonomy continued in Iran until modern times and in some ways through the time of the shah who was overthrown in 1979. There are some eight large ethnic groups in Iran, all of whom have claims of self-preservation. Now these claims of self-preservation generally were satisfied in a benign way within the imperial Iranian regimes until the ayatollahs took power. The ayatollahs, being militant Shiites introduced a militant Shiite regime and wished to impose a degree of cultural hegemony and orthodoxy on the whole country that had not been demanded in many previous regimes. Such an action could be called counter-historical in postmodern times. As a result, under the present regime in Iran, there is a cauldron boiling of ethnic communities that have found that, in order to provide for their self-preservation, they must demand self-determination.

What forms these demands will take when they burst forth, five to ten years from now at the most, no one can tell. If by that time there is a more benign central regime, the rulers might suggest some form of federal power-sharing that could draw upon a traditional framework of general government plus regional cultural economy, and this may indeed take effect. If not, there is going to be an outburst of violence encouraged by Iran's neighbours: Pakistan in the southeast, Turkey in the northwest, Iraq in the west. They all will be fomenting local aggressive activity against any central regime when the time comes.

IRAQ: A MISSED OPPORTUNITY

Iraq in a sense is a missed opportunity. Iraq's minorities are basically tribal or ethnoreligious and are also territorially based. West of Iraq, there are many minorities in the Middle East but they are intermixed in their settlement patterns. Therefore, it is almost impossible to think of making territorial arrangements without major concessions of one kind or another. It is very difficult to talk about federalism which, in modern times, and in conjunction with the aspirations of modern self-determination, requires relatively well-demarcated territorial boundaries.

But Iraq still has the necessary ethnoterritorial separations. Had the Allied forces at the end of the Gulf War not only stimulated the Kurds and the Shiites to revolt but also insisted on a federal settlement that would have come with the ouster of Saddam Hussein, it would have been relatively easy to turn Iraq into three ethnoterritorial or religioterritorial units, a unit of Arab Shiites in the south, a predominantly Sunni Muslim unit in the centre of the country, and a

Kurdish Muslim unit in the north. All would have been Muslim. Where Islamic beliefs divide Shiites and Sunnis, they divide people who all are Arabs, and the Kurds, though not Arabs, are Muslims.

It was an opportunity that was not seriously considered, apparently because the United States in matters of foreign affairs is true to the heritage of Jacobin France much more than to its own heritage of federalism. The State Department follows the European notion of the state system and is scared to death of any efforts to develop power-sharing unless the power-sharing is a part of an effort to fight against some otherwise dominant power. The United States once again betrayed the lessons of its own heritage by attempting to topple Saddam Hussein by a military coup, in other words to replace one dictator with another or with a dictatorial oligarchy, rather than by working with popular movements within the country to bring about a democratic regime.

Saying this, of course, does not guarantee that federalism would have worked. In fact, both the Shiites and the Kurds indicated that they wanted a federation, indeed they were committed to one. The Kurds have been more or less committed to some kind of federal arrangements within the several host countries in which they find themselves. On the other hand, we all know that such a commitment when they have nothing is very different from what it might be when they may have something. So it remains a matter of some speculation as to whether it would have worked, but at least there was a chance, and it is very unlikely that the Shiites, the Sunnis, or the Kurds would have been worse off by giving it a try than they are now. There will be no try without outside intervention, and I do not expect another opportunity for outside intervention for a long time to come, especially since Saddam Hussein has outlasted George Bush and has made sure that everybody in Iraq knows about it.

This does not dispose of the issue of the Kurds. In the great division of the Middle East after World War I, the Kurds were among those peoples who, although they clearly demonstrated a national identity, were left out of the process of statebuilding for imperialist reasons. The Turks under Kemal Ataturk did not want to give up eastern Anatolia and the British did not want to give up the oil fields in the Kurdish parts of Iraq, around Mosul, to any group other than their client Iraqis. So the Kurds lost, and the Kurds have paid very dearly for that loss. They are in a situation in which the three or four states that rule over parts of what they call Kurdistan have been particularly unhesitating in trying to repress Kurdish aspirations even as the Kurds have been rather unhesitating in fighting back as best they could. As a result of the Gulf War and yet another Kurdish revolt, the Kurds now have a temporary ostensibly protected area in northern Iraq where they are trying to build institutions. What its future will be is anybody's guess.

Turkey, one of the West's prime allies at least since the Korean War, is so afraid of Kurdish demands in southeastern Turkey that they insisted, until

recently, that there are no such people as Kurds in Turkey, that they are "mountain Turks." Since the time of the Gulf War, they have granted "the mountain Turks" the right to learn or teach their own language; even that was denied them previously. Any talk about granting the Kurdish people in Turkey any kind of self-rule, even the most limited kind of decentralization, is looked upon with great disfavour by the Turkish political class.

I do not think the Kurds can look toward any kind of power sharing at this moment, much less a federal solution from the Turks. If there is a general ethnic explosion in Iran, the Kurds will certainly be part of it. Their territory has always been among the most volatile sections of Iran, but again it will not depend upon them. In Iraq, because George Bush rather belatedly established the protective zone above the 36th parallel, there is a kind of embryonic Kurdish entity, but it is not in line to become a federal or constituent unit within Iraq because of the nature of the Iraqi regime, which has no space for any kind of self-rule much less federal self-rule.

ISRAEL, THE PALESTINIANS, AND JORDAN

One place in the Middle East where there has been continuing talk about some kind of federal or confederal solution — there has been sustained talk, although on a low level, intermittently since at least 1917 — is in the territory of the old British mandatory Palestine. That is, what is today Israel in the west; Jordan in the east; and a disputed territory in the middle principally inhabited by Arabs called Palestinians, which has acquired the strange name of "West Bank" in some quarters; plus the Gaza region.

The British Mandate came about because of the growing Jewish presence in the area after 1840, and the British and Allied (including the U.S.) recognition of that presence as a legitimate national presence during World War I. Thus all or part of mandatory Palestine was to be set aside as a Jewish national home without prejudicing the rights of the other people living there. The existence of massive Jewish in-migration side by side with an indigenous Arab population that also grew by in-migration in the twentieth century, generated a situation where some accommodation was necessary. Because most of the Jews were Western-influenced if not from the west, they came carrying some knowledge of federalism — usually rather vague as they emigrated from the Russian, the Austro-Hungarian, or the Ottoman Empire. None of these three were particularly good places to learn the lessons of federalism, though in all three federal ideas were discussed to some extent at the turn of the century.

Since 1917 there have been any number of proposals to establish relations between the two peoples, Jews and Arabs, and more recently between the two states and two peoples based upon federal or confederal arrangements. At the

Jerusalem Centre of Public Affairs, at the very beginning of our work in this field in 1976, we had a graduate student compile a list of all the federal proposals that he could find. In the 60 years between 1917 and 1976 over 60 proposals had been made. Many of these were nothing more than an article somewhere claiming that there should be the federal solution without spelling it out, but some were detailed, or fairly detailed, plans. By far, the most came from the Jewish side, but there were a few that came from the Arab side as well.

After 1967 and the Six-Day War, there were proposals involving the reunification of Jordan (the "East Bank") with the Palestinians (the "West Bank") based upon a federal arrangement in which Israel was left out. King Hussein of Jordan himself suggested that the way to reunite was not in the oppressive manner that the Hashemites used prior to 1967, but by federation. I do not think that they were more oppressive against the people now called the Palestinians who lived west of the river than they were against those Palestinians who were citizens of Jordan east of the river, which meant just about everybody because even the people who were not refugees from the 1948 war, and are considered old-line Jordanians because they arrived before 1948, are generally Palestinians, or their descendants, who took jobs or founded businesses in the Hashemite Kingdom after it was separated by the British from western Palestine in 1922. But it was particularly rankling to the people on the west bank to have the Hashemite regime as their ruler. The latter, for obvious reasons of state, wanted to build up the east bank at the expense of the west bank. After 1967, Hussein had to find some new proposals and he suggested a federal solution.

Prior to the mid-1970s federal proposals were given short shift. From the mid-1970s on they began to take on a certain seriousness. Certainly the Jordan-Palestinian possibility was taken seriously by a substantial number of Arabs in both countries. But proposals to develop federal or confederal arrangements between Israel and the Palestinians or Israel, the Palestinians, and Jordan also began to take on a certain significance.

We may be on the threshold of the first real opportunity for Israel-Arab peace since the talks between Chaim Weizman, president of the Zionist movement and King Faisal, King Hussein's great-uncle, back in 1919. Everybody has their claims which, if taken whole, are indeed mutually exclusive, but all are coming to recognize that they will be unable to exercise them exclusively. At the same time, all long have realized that the territory including Israel, Jordan, and the lands in between is part of one country from the Mediterranean to the eastern desert. All are coming to realize that the peoples there are going to be staying indefinitely and each will have its own power to resist displacement in one way or another for the foreseeable future. That is why there seems to be a general movement towards some kind of use of federal principles, or at least federal practices or arrangements, to find a solution.

There seems to be a narrowing in on confederation or confederal solutions. All three partners have called for a confederal solution of one kind or another. There is a reason why confederation or a confederal solution has come to take precedence over any discussion of federation. Federation, as we know, involves establishing one new entity in which the old entities are constituent parts, whereas confederation is a means of constitutionalizing certain kinds of permanent, cooperative, shared-rule relationships among entities that continue to maintain their own very separate political standing. The peoples in the area, all of them, want to maintain as much distance as possible, as much separation as possible from their neighbours in matters of political organization. Only necessity brings them to even think in federal ways, and therefore confederation is a preferred option.

Now the very fact of coming toward recognition of this need for confederal arrangements is a movement toward making them possible. Take the example of Cyprus, a near neighbour also with an intractable ethnic conflict. Since 1974, in Cyprus, the Greeks and the Turks each have their own state, de facto. Both have agreed that a solution in Cyprus has to be a federation of the two states, but each has different views of what that federation should be. The Turks want federation to establish greater separation and distance between them and the Greeks, to protect themselves as a minority. The Greeks want federation because they want to reassert control over the Turks. That is why, beyond the declaration that they are all for federation, there has not been any progress toward a concrete solution. But the fact of the declaration also has stopped any deterioration of the situation toward additional conflict.

In the conflict with which we are concerned, we see Jordanians loyal to the Hashemite regime having a first preference for a federation or confederation with the Palestinians which will enable them to return, at least in a limited way, to the territories they held before 1967, and if necessary, confederal arrangements with Israelis, though they do not even talk about that openly. They will if they need to because that is the only way they can get back in the game. The Palestinians really do not want to be part of a confederation with Jordan, but some are talking about it as a means to get out from under the Israeli occupation. Some are also talking about confederation with Israel because they recognize that Israel is not about to evacuate the territory for nothing, and they think that by suggesting confederation they will make their demands more palatable. But when pressed, it turns out that their ideal "confederation" is like that of the Benelux countries, really a customs union and nothing more, and they know that.

Two camps of Israelis are talking about confederation. There are those who do not want to withdraw from the territories, but do recognize the need to give the Palestinians as much self-rule as possible, and believe that confederation will allow them to have their cake and eat it too. And then there are others who

see the security need of retaining some Israeli presence in the territories, but are willing to let the Palestinians go their own way on most matters, and who think that confederation is the constitutional bridge that will make this possible. Under these circumstances there is a certain discussion, now almost a ground-rule discussion, about moving towards some kind of confederal solution as part of any peace settlement.

Prime Minister Rabin went public on this in the late summer of 1992. He was not the first Israeli to do so but that was the first time he had done so. I originally suggested the idea to him in 1976. At the time, his answer to me was in two words (in Hebrew one) — "We'll see." He did not say another word about it until last August, as far as I know. Then he said that either a federal or a confederal solution should be seriously considered and that Israel is willing to enter into either with the Palestinians and Jordan, or just the Palestinians. The Palestinians have made similar statements throughout the last two or three years, but with the proviso that a separate Palestinian state first be declared that will then have certain kinds of (limited) permanent ties with Israel. The problem, of course, is not only to negotiate an agreement on the principle, and not only to negotiate the institutional arrangements that will make it work, but to develop an environment, which, as I indicated, has not been conducive to federal thinking, to build a political culture that can sustain the kind of institutions and agreements that make possible the combination of self-rule and shared rule which is the best definition of federalism.

REQUISITES FOR FEDERALISM BETWEEN ISRAEL AND ITS NEIGHBOURS

At least three things have to be present if any federal solution is to work; all of them are in short supply in the Middle East. One is the will to federate. That seems to be growing because all the sides have begun to recognize that this is the direction in which they must go. The second is the trust necessary to make federal arrangements work. That is something which has not grown nearly as much as the will, if at all, and even the will has not grown all that much. It may even have declined in some quarters in the last while. The third is a culture which includes cooperation and sharing. For example, one of the things that the Russians have discovered about the United States is that Americans have a high tolerance for what they consider anarchy. What does that mean? It has to mean mutual decision-making by a multiplicity of bodies rather than orders or commands to arrive at federal arrangements. To the Russians, that is anarchy. And so for them to devise workable federal arrangements is extraordinarily difficult because of that basic conceptionalization.

Much the same is true, for different reasons and in a different way, when it comes to the political culture of the Arab peoples involved. It is much less difficult for the Jews because the Jews as a people have adopted federal principles and practices from their first founding well over 3000 years ago. What the Arabs do have is what a Kashmiri Muslim colleague once told me many years ago. He said, "You have to remember that the Arabs are a federal nation," that is to say, they are divided into peoples depending on the geographic area involved, but even though they cannot get together on any institutionalized basis with any meaning, they see themselves as a federal nation. And he is right. The terms they use to refer to themselves collectively and their territorial links and commitments reflect that. Until now it has been a way to contain civil wars; I do not say to prevent them but to contain them — and that is not sufficiently conducive to federal arrangements. If that orientation ever turns into something more than what it has been, they may be able to develop federal possibilities. If not, that will be extremely difficult. They have to think federal, and thinking federal is something more difficult than trying to design formal federal institutions on paper.

What kind of institutuions are required? A confederal arrangement is likely to be like that of the European Community, that is to say, a number of joint authorities. The European Community, now Union, after all, has no single general government. It has a network of joint authorities which have expanded over the years and that link the member states and are, in turn, linked by the EU Council and the EU Commission. In recent years, it has added a parliament with a certain limited, mostly advisory, status. The beginnings of the European Union, for the first 25 years or so, were to be found in these joint authorities. Practically speaking that is the way confederal arrangements would come to the Middle East, however those arrangements unfold. My recommendation is that there should be a Jordanian/Palestinian federation that is, in turn, confederated with Israel. The Jordanian/Palestinian federation will have a federal government and the confederal links will be developed through joint authorities that are established to conduct certain specific functional tasks.

With regard to civil rights, in Israel it is generally demanded that the society would have to be a rights-based society. Exactly in what form those rights would be constitutionally entrenched would depend on the kind of confederal arrangements developed. It will be up to each state or entity involved in the arrangement to have its own rights protections, but there will have to be a certain amount of reciprocity because, after all, people will be moving back and forth and they must have some kind of protection. This discussion has not come up either among the Palestinians or in Jordan in the same way because Jordan does not have Western-style rights protection for its own people even now. The Palestinians in the territory are generally protected under Israeli Law.

How to get there? It will probably be a step-by-step process that would be designed to develop appropriate institutions and appropriate cooperative methods and trust between the parties involved over a period of perhaps 10 or 15 years until it is finally in place. I do not think that it can be done any other way. I do not think that the present fighting is necessarily a sign that it cannot be done, partly because that is the other quality of the Middle East; the peoples there can kill each other until they suddenly reach an agreement and the next day they stop. It does not happen often, but if it does happen it is a characteristic that is less common in the modern West. Even in the West, after World War II, the reconstitution of Germany and its introduction into the European Community and NATO was a step-by-step process that took place over a shorter period of time — seven or eight years. So, if things work out, the nature of the step-by-step process would be to let things move at their own pace, faster if they turn out to be moving faster and slower if they turn out to be slower. That is the best way to make peace and also generate the right incentives.

Having only two or three units compounds the difficulty. When there are too few units, then possibilities for confrontational polarization are increased. That is why, had it been possible right after the Six-Day War to get agreement on this among the peoples in the territories administered by Israel and the Israelis as well, it would have been good to introduce a cantonal system with 8 to 12 cantons, some of which would have had an Arab majority and others a Jewish majority. At the time, neither party was interested and that moment passed, unfortunately. There have been other possibilities that would have avoided these problems, that also have passed.

The three entities have to be treated as two for certain critical purposes so the Israelis will not be outnumbered. A five-, six-, or seven-unit federation would be much easier, but that is not going to happen. In fact, the tensions between Hashemite Jordan and the Palestinians are such that they both can use Israel as a guardian against the threats of the other just as much as Israel needs an arrangement with both in order to guard against their threats. So, that kind of mutual balancing may be of some help. This is not the best possible design but necessity requires trying.

If the truth be told, each of the three parties involved would like the other two to go away, to just simply disappear. That would be their preferred solution. Since that is not going to happen, and by now there is a greater realization on the part of all of them that it is not, the question is: "What next?" For Israelis, the second best solution clearly would be to retain all the territories occupied in 1967 without having to absorb the Arab population. For the Palestinians, their second choice would be that Israel get out of all territory it occupied in 1967, indeed everything that was not allocated to Israel in 1947 when the United Nations partition plan was adopted, and that they establish a Palestinian state and do the best they can. The third in the hierarchy of preferences probably is

reflected by those Palestinians who say, "We will accept Israel with larger borders, we will not get back everything that was Jordanian-occupied territory until 1967 but we will get enough so we can establish a state." And, by those Israelis who say, "We will have a repartition of the area under Jordanian occupation until 1967. We will give up areas that are precious to us to let to the Palestinians have a state there, but we will have somewhat better security boundaries than we did." The fourth option is confederation.

Now what are the probabilities of each of the four options being adopted. The first one is out. The second one also seems to be out for everybody. The third one is still possible, but has almost no chance of implementation at the moment because it does not provide for proper space for Jordan. If Jordan is left out of the equation, then redrawing boundaries will be difficult, although it still can be done. The fourth is probably more satisfying as an option when all the consequences are considered. In other words, none of the parties will have to give up control but only exclusive control of the territories that they will have to share in any adjustment. They will have some say in matters affecting them in those territories even beyond the limited powers of their state or entity or whatever.

Achieving a successful peace negotiation depends to no little extent on avoiding accidents. But the fact that everyone is talking about a settlement opens up a chance for further momentum in a way that changes attitudes. One element that reduces chances of a settlement is the issue of sovereignty. There has been a lot of talk about sovereignty. This is the result of more than a century of European influence. In the search for a settlement, the best of such talk is a dry hole. The parties should get away from sovereignty talk, but they do not. Some have suggested vesting sovereignty over the territories in the constitutional document of settlement itself. There are historical precedents for this, but so far this idea remains on the periphery of negotiations. When they really begin to talk at that level of concreteness it will mean that the idea itself has gained a certain momentum. It will still be accidental whether the negotiations make it to the end of the course intact or whether they are derailed in the process.

The worst thing you can do when discussing the Middle East is to try to make predictions because something always happens to cross them up.

The critical issue in the Middle East is the absence of the concept of civil society as we have come to understand it in the modern way. It is very difficult to transform leanings for power sharing towards self-rule and shared rule; what we would consider federal principles and practices, unless there is first of all the concept of civil society. That is, the idea of a society in which there is both private and public space, the public space is divided between governmental and non-governmental institutions and power is organized institutionally and otherwise through some kind of combination of self-rule and shared rule of which a major component is the protection of critical individual rights. These

are the elements that constitute civil society in the West and need to have some kind of a meaningful echo in the Middle East. If civil society can develop there, perhaps now, 300 years later than it did in the West, there is a chance that out of civil society these sparks of federal linkages may grow.

   Note: Toward the end of the year following this presentation, through secret negotiations in Oslo, Norway, the Israeli goverment and the Palestine Liberation Organization speaking for the Palestinians, reached agreement on a declaration of principles for settling their conflict and granting the Palestinians in the West Bank and Gaza autonomy, which the Palestinians see as the first step toward an independent Palestinian state confederated with Jordan and which the Israelis see as an autonomous Palestiniam entity tied to Israel through an interlocking network of joint authorities. The Declaration of Principles provides for this kind of combination of confederal arrangements, but it is vague and ambiguous on almost every point which will have to be negotiated between the two parties. Nevertherless, it is a major step and perhaps a breakthrough toward peace in what has been the most attention-getting conflict in the Middle East and that peace is based upon federal principles and arrangements, as my original lecture and my work and that of the Jerusalem Center for Public Affairs has suggested would be the case for well over 20 years. The agreement was signed on 13 September 1993 and the negotiations over the interim settlement began in October of that year. As of this writing they are still underway and the results are not known, but the direction seems to be clear, and both sides, at least initially, seem to have the will to make some kind of federal arrangement, no doubt on confederal principles, work.

8

Covenant and the American Founding

On his way to Washington to take the oath of office as president of the United States of America, which itself seemed destined for dissolution, Abraham Lincoln pointedly stopped in Philadelphia to visit Independence Hall. Standing before that historic landmark on 21 February 1861, Lincoln emphasized to his audience that he had come "to listen to those breathings rising within the consecrated walls where the Constitution of the United States, and I will add, the Declaration of Independence was originally framed." Lincoln continued:

> I have never asked anything that does not breathe from those walls. All my political warfare has been in favor of the teachings coming forth from that sacred hall. May my right hand forget its cunning and my tongue cleave to the roof of my mouth, if ever I prove false to those teachings.[1]

AMERICA'S COVENANTAL VOCATION

Lincoln's paraphrase of the fifth and sixth verses of Psalm 137 is one of many manifestations of a view of the American experience that paralleled that of biblical Israel. If Americans were not *the* chosen people, they were at least, in his eyes, "an almost chosen people." Every cadence and sentence of Lincoln's remarks at Independence Hall and on similar occasions suggest that his sense of the American vocation was similar to that described by Governor John Winthrop of Massachusetts, the foremost of the American Puritan founders.[2] In his *Model of Christian Charity,* delivered aboard the *Arabella* on the Atlantic

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Ocean in 1630, Winthrop summarized the enterprise upon which the first Puritan emigrants from England had embarked in the New World: "We are entered into Covenant with him for this work, we have taken out a Commission...."

In January 1965, Lincoln's and Winthrop's statements found an echo in President Lyndon B. Johnson's inaugural address:

> They came here — the exile and the stranger, brave but frightened — to find a place where a man could be his own man. They made a covenant with this land. Conceived in justice, written in liberty, bound in union, it was meant one day to inspire the hopes of all mankind; and it binds us still. If we keep its terms, we shall flourish.

> The American covenant called on us to help show the way for the liberation of man. And that is today our goal. Thus, if as a nation there is much outside our control, as a people no stranger is outside our hope.[3]

Thus, almost 3000 years after the covenant at Sinai, when the Israelites ratified their exodus from pharaonic bondage and signified their consent to Moses with amens, the Pilgrims, who saw themselves as new Israelites embarked on a venture into their own "hideous and desolate wilderness," likewise consented to a covenant with their signatures and amens.[4]

In doing so, the Pilgrims introduced into North America a major stream of thought derived from the biblical idea of covenant. While often more latent than manifest since the days of the Puritans, and partially submerged within other streams and eddies of American thought and culture — especially secular constitutionalism — covenant ideas not only formed a significant part of the foundation of the United States, but have continued to influence American life in various ways.

Thus, from their earliest beginnings, the people and polities comprising the United States have bound themselves together through covenants to erect their New World order, deliberately following biblical precedents. The covenant concluded on the Mayflower on 11 November 1620, remains the first hallowed document of the American constitutional tradition:

> In the name of God, Amen. We whose names are under-writen, the loyall subjects of our dread soveraigne Lord, King James, by the grace of God, of Great Britaine, France, and Ireland king, defender of the faith, etc., haveing undertaken, for the glorie of God, and advancemente of the Christian faith, and honour of our king and contrie, a voyage to plant the first colonie in the Northerne parts of Virginia, doe by these presents solemnly and mutualy in the presence of God, and one of another, *covenant* and combine our selves togeather into a civill body politick, for our better ordering and preservation and furtherance of the ends aforesaid; and by vertue hearof to enacte, constitutions, and offices, from time to time, as shall be thought most meete and convenient for the generall good of the colonie, unto which we promise all due submission and obedience. In witnes wherof we have hereunder subscribed our names at Cap Codd the 11. of November, in the year of

the raigne of our soveraigne lord, King James, of England, France, and Ireland the eighteenth, and of Scotland, the fiftie fourth. Ano: Dom. 1620.

A classic covenant, it explicitly created a community and the basis for its subsequent constitutional development.

With more pride than accuracy, John Quincy Adams once referred to that Mayflower Compact as "perhaps the only instance in human history of that positive, original social compact which speculative philosophers have imagined as the only legitimate source of government."[5] In fact, there were many such covenants at the time of the settlement of British North America. His point is an important one, however. The Mayflower Compact occurred at least 30 years before the speculative philosophers imagined it. By the time that Hobbes and Locke formulated their compactual theories, there already had been many compactual civil foundings in the New World.

For the patriots of Samuel Adams' "solemn league and covenant" against British oppression; for the framers of the constitutional Compact of 1787; for Jefferson who referred to the young republic in his first inaugural address as a "chosen country"; for Lincoln who often characterized the American union as "a regular marriage"; for Johnson; and for millions of ordinary Americans, the concept of covenant has been reflected in real experiences from Jamestown to the present whereby individuals and families have come together to establish governing arrangements by covenant or compact.

THE PURITANS: COVENANT COMES TO THE NEW WORLD

The first political principles systematically enunciated in America were extensions and adaptations of the Puritans' federal theology which saw all society as an outgrowth of the basic biblical covenants between God and His people.[6]

Winthrop referred to the good commonwealth as one committed to "federal liberty," or the freedom to freely hearken to the law of the covenant. The Puritans sought to place all relationships between people on a covenantal basis. Their congregations were covenant-formed partnerships of "saints" that came into existence only when potential members covenanted with each other, and survived only so long as the covenantal act remained valid (potentially but not necessarily forever). Similarly, civil government among the Puritans was instituted by civil covenant among the residents (or potential residents) of virtually every town in most of the New England provinces.[7]

The Mayflower Compact (originally known as the Plymouth Combination) was the first of these covenantal acts. Subsequently, the same mode of town formation was extended to virtually every settlement established in New England and to many established in the other colonies as well. Connecticut and Rhode Island, for example, were formed by their towns covenanting together.

John Clarke and his Narragansett Associates expressed the basic idea in their Plantation Agreement:

> It is agreed by this Present Assembly, thus Incorporate, and by this Present Act declared, that the Forme of Government Established in Providence Plantations is Democraticall; that is to say, a Government held by ye Free and Voluntarie Consent of all, or the greater Parte of the Free Inhabitants.[8]

As Henry Steele Commager has observed: "All through the colonial era Americans went from compact to compact — the Fundamental Laws of Connecticut of 1639, the 'Solemn Compact' at Portsmouth of 1638, and its successor the Charter of the Providence Plantations of 1647, the Pennsylvania Charter of Privileges of 1701 (not quite so clear a case, to be sure), and thereafter a score of compacts and agreements on one frontier after another."[9] As Richard Neibuhr observed some years ago: "one of the great common patterns that guided men in the period when American democracy was formed...was the pattern of the covenant or of federal society."[10]

As Winthrop and his colleagues, such as Thomas Hooker, the Mathers, and other Puritan divines, reveal in their works, the Puritans who settled in New England combined a fundamental conservatism with an unhesitating radicalism in a way that was to become as paradigmatic for Americans as other aspects of their approach to life. That combination was no doubt directly related to their covenantal ideology which saw humans bound to God through predestination, yet through that binding, free to live according to the constitution He provided for their salvation. To implement that constitution required a revolt against existing society, but the goals of that revolt were to restore prelapsarian harmony to the world. The Puritans came to the New World to build a new society, but never lost sight of human weakness in trying to do so.

The synthesis did not always hold together. Those who leaned more to the radical side, such as Roger Williams and Ann Dickinson, almost immediately broke away. Williams established his own covenantal commonwealth of Rhode Island and Providence Plantations that was just as firmly grounded in covenant in matters civil and political in order to guarantee openness in matters religious, something that the Puritans believed was impossible for the attainment of salvation.

Others allowed the conservative dimensions of Puritanism to overwhelm them; hence the Salem witch trials in which the continued Puritan emphasis on the deviltry in human souls got out of hand. But for the most part the synthesis held, spinning off different versions. Thomas Hooker, for example, moved his flock from Massachusetts to what became Connecticut to develop a more egalitarian Puritan Commonwealth, but one no less faithful to combining conservative and radical dimensions. Here his supporters wrote the first full American constitution, *The Fundamental Orders of Connecticut*, which adopted the Mosaic law as the basis of Connecticut law, by reference.

Puritan federalism expressed itself socially through the concept of "federal liberty" which John Winthrop articulated in his Address to the General Court in 1645. For Winthrop and the other Puritans, federal liberty stood in contra-distinction to natural liberty:

> There is a two-fold liberty, natural (I mean as our nature is now corrupt) and civil or federal. The first is common to man with beasts and other creatures. By this, man, as he stands in relation to man simply, hath liberty to do what he lists; it is a liberty to evil as well as to good. This liberty is incompatible and inconsistent with authority and cannot endure the least restraint of the most just authority. The exercise and maintaining of this liberty makes men grow more evil and in time to be worse than brute beasts: *omnes sumus licentia deteriores*. This is that great enemy of truth and peace, that wild beast, which all of the ordinances of God are bent against, to restrain and subdue it. The other kind of liberty I call civil or federal; it may also be termed moral, in reference to the covenant between God and man, in the moral law, and the politic covenants and constitutions between men themselves. This liberty is the proper end and object of authority and cannot subsist without it; and it is a liberty to that only which is good, just and honest. This liberty you are to stand for, with the hazard (not only of your goods, but) of your lives if need be.[11]

Others who came to America were attracted by the openness of a wild land and sought natural liberty. The tension between the two has been a continuing one in American society.

Politically, Puritan federalism culminated in the New England Confederation which in the end was destroyed by the British as a threat to the empire. Organized originally by the four New England colonies of Plymouth, Massachusetts Bay, Rhode Island, and Connecticut for defensive purposes, it followed the style of earlier ancient and late medieval confederacies of communities in which the real locus of power and commitment remained in the constituting units, but went beyond a mere military alliance.

Although the New England Puritans remained the most eloquent articulators of the covenant idea, they were not the only ones to bring it to America. The Scotch-Irish of the mountains and Piedmont from Pennsylvania to Georgia; the Dutch of New York; the Presbyterians; and to a lesser extent, the Quakers and German Sectarians of Pennsylvania and the Middle States; and the Huguenots of South Carolina were all nurtured in churches constructed on the covenant principle. The first ministers in Virginia — usually cited as the antithesis of New England — were also Puritans.[12] Indeed, the tradition became so wide-spread that by 1776 over half of the new nation's church congregations were based on covenant principles.

Initially, the basic covenants of town and congregation united individuals and families. Parallel to those covenants there developed the network of voluntary associations — commercial, social, church, and civic — which represent the non-governmental aspects of a society founded on the principles

of freedom of association. From the first, networks of communities were united as colonies, then states. Ultimately, the network of states was linked in a federal union, always paralleled by a similar network of associations.

COVENANTS AND OTHER BONDS

The American federal system is very much an outgrowth of both the theological and philosophic streams of thought that converged about covenant by the late seventeenth century. If covenant ideas were first brought to the New World by the Pilgrims and Puritans who settled New England, another set of covenant-related ideas entered America through the teachings of the new political science, especially those of Locke and Montesquieu. That is why federalism in the United States is more than a political device for dividing and sharing power among the state and federal governments but, rather, the *form* of the American polity in the eighteenth century sense of the term, that is to say, it is the principle that *informs* every aspect of the polity.[13]

As the form of the American polity, federalism has its roots not only in the political dimension of American society, but in the economic, social, and religious dimensions as well. As we have seen, the political and religious dimensions are closely linked. Significantly, the economic roots of American federalism also have a compactual base. They can be traced back to the early trading companies that sponsored British and Dutch settlement in North America and to the system of governance encountered by those settlers on the voyage over.[14]

The trading companies, each with its royal monopolies, were organized on a shareholding basis, so that both ownership and control were spread among the shareholders. In some cases, the shareholders remained in Europe and tried to hold the actual settlers within their grasp on the basis of their control of the company. Invariably, this failed for political reasons. In a few cases, the settlers or some significant portion of them were themselves shareholders and, as such, combined political and economic control. In either case, the pattern of shareholding led to a corporate structure that was at least quasi-federal in character.

In the very earliest days the line between the political and economic aspects of the charters establishing the colonies was not at all clear. As the companies lost their monopolies, charters turned more in the direction of political constitutions, pure and simple, thereby reinforcing the theopolitical covenantal dimension where it was present or providing a complementary, compactual alternative where it was not.

Even the voyage over contributed to the covenantal experience of the colonists. The governance of ships had a contractual character that at least involved federal principles to the extent that every member of a ship's crew was

in some respects a partner in the voyage. By signing the ship's articles, a crew member was entitled to an appropriate share of the profits of the voyage while at the same time he formally submitted himself to the governance of the captain and the ship's officers. Since every ship that ventured forth on the ocean was, in effect, leaving civil society for a state of nature, every voyage had to be based upon a prior compact among all participants that would determine the political arrangements that would prevail for that voyage and the distribution of the economic benefits that would result. Two centuries later, this sytem resurfaced in a slightly different form in the organization of the wagon trains that crossed the plains; they also left civil society for a land voyage through the state of nature, and their members also had to compact with one another to provide for their internal governance during the long trek westward.

These religious, political, and economic elements combined to socialize Americans into a kind of federalistic individualism. That is to say, not the anarchic individualism of Latin countries, but an individualism that recognized the subtle bonds of partnership linking individuals even as they preserved their respective integrities. William James was later to write about the federal character of these subtle bonds in his description of a pluralistic universe.[15]

Indeed, American pluralism is based upon the tacit recognition of those bonds. Even though, in the twentieth century, the term pluralism has replaced all others in describing them, their federal character remains of utmost importance. At its best, American society becomes a web of individual and communal partnerships in which people link with one another to accomplish common purposes or to create a common environment without falling into collectivism or allowing individualism to degenerate into anarchy. These links usually manifest themselves in the web of associations we associate with modern society but which are particularly characteristic of covenanted societies such as that of the United States.[16]

In a covenanted society the state itself is hardly more than an association writ large and endowed with exceptional powers but still an association with limited means and ends. Were Americans to adopt a common salutation for some farfetched reason, like "comrade" in the old Soviet Union or "citizen" in the days of the French Revolution, in all likelihood the American salutation would be "pardner," the greeting of the archetypical American folk figure, the cowboy, who embodies this combination of individualism and involvement in organized society and who expresses the character of that involvement through the term "pardner."

THE REVOLUTION AND THE DECLARATION
OF INDEPENDENCE

The Revolutionary era required a new round of covenanting as the colonies reconstituted themselves as independent civil societies. Invariably they followed the customary patterns albeit in the new secularized forms of declarations of rights in constitutions. Thus, according to the Virginia Bill of Rights (1776):

> All men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of property, and pursuing and obtaining happiness and safety.

The Vermont Declaration of Independence of 1777 holds that:

> We...the inhabitants [of the New Hampshire Grants] are at present without law of government, and may be truly said to be in a state of nature; consequently, a right remains to the people of said Grants to form a government best suited to secure their property, well being and happiness.

All followed the dictum from Leviticus inscribed on the Liberty Bell, rung for the reading of the Declaration of Independence: "Proclaim liberty throughout the land and to all the inhabitants thereof."

These Revolutionary-era documents reflected the influence of the "new political science" which had become prominent by that time. They also reflected the increasing secularization of covenant that had begun to occur after 1690 along with the Puritan decline in Europe and America. By 1776, the word *covenant* had been largely, though not entirely, superseded in political affairs by the words *compact* and *constitution*. It was during this period, for example, that the Plymouth Combination became known as the Mayflower Compact.[17]

As the original Christian and communitarian solidarity associated with the idea of covenant (i.e., both kinship and consent) became more elusive in the face of growing populations, new generations, and rising manufacturing, the old Puritan communities tended to become more legalistic and contractual, often along the kinds of "oppressive" lines which many contemporary Americans associate with "Puritanism." Where, for instance, a handshake might have sealed a business relationship in 1630, a written contract with "fine print" enforceable by secular courts was more likely to seal a relationship in 1730. Consequently, in a movement paralleled in the "new political science," there tended to be a greater division of secular and religious affairs, with the formal language of covenant being more confined to private-sector congregationalism and a secularized language of constitutionalism being more prominent in public-sector affairs. In short, the emphasis shifted from communitarianism toward individualism — a movement capped by the disestablishment of churches in all but the most religiously covenantal states during the immediate

revolutionary era. The shift was not complete, of course, and tensions between these conceptions of civil society have persisted.

Some of these tensions are also reflected in the Declaration of Independence, the founding covenant of the American people. Whatever Jefferson's and Congress' indebtedness to Locke, which is a subject of much debate, the concept and intention of the Declaration is more covenantal than compactual in the American context. As Jefferson remarked nearly 50 years later:

> Neither aiming at originality of principles or sentiments nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind.[18]

There is little resemblance between the Declaration and the Hobbesian compact. While many of the fundamental principles and basic ideas of Hobbes with regard to human nature and natural right are present, the Declaration is prudential but not pessimistic about the possibilities of human self-government, hence it does not accept the idea of an absolute king of a leviathan state required by the Hobbesian compact. At the same time, the Declaration is more comprehensive than the Lockean compact and even drops the word "property," which is so essential to Locke's system, in favour of "the pursuit of happiness." Since the Declaration is the statement of a people that has already emerged from the state of nature, it does not use that starting point. In that sense, it is presented as a revision of an earlier compact and appeals to the Laws of Nature and of nature's god.[19]

The Declaration shares many of the characteristics of the classic biblical covenant at Sinai.[20] Central to this similarity is that the Declaration established the Americans as an organized people bound by a shared moral vision as well as common interests. The sense of an American identity, which had been emerging during the previous generation, was formalized and declared to the world much like the Sinai covenant formally set out the moral vision of the people of Israel whose sense of shared identity and common destiny had emerged earlier and was concretized during the Exodus. Thus, the opening paragraph of the Declaration asserts that Americans are no longer transplanted Englishmen, but a separate people entitled, like all peoples, to political independence. There is, then, a separation of one people from another and a flight from tyranny. The Americans, moreover, are held to be a single people made up of individuals bound in partnership in a common enterprise.

Like the classic Sinai covenant, the Declaration is not a constitution. It does not establish a particular form of government. That is left open to subsequent constitutional action on the part of the people established by the Declaration. Instead, the Declaration sets forth the fundamental principles that define the character of the American people, their basic purposes, and the nature of good government for such a people.

Perhaps this is why Abraham Lincoln appealed so often to the Declaration during the Civil War. The Constitution had already been torn asunder by a bloody war between the states which threatened to destroy the American people as well. While constitutional matters could be dealt with in due time, there is the more fundamental promise of peoplehood contained in the Declaration of Independence. This promise has the character of being perpetual and irrevocable. As Lincoln said in several of his addresses, there can be no divorce. The American people cannot separate and go away from one another.

While the Declaration does not have the force of law in the American system, it is part of the higher law background of the United States Constitution and serves as the standard against which particular constitutions are to be judged by Americans. As such, like a classic biblical covenant, the Declaration invokes God as both a witness and guarantor. This sets it apart from a simple compact.

Neibuhr's description of this dimension as understood by early Americans seems to capture the essential thrust of the Declaration. Covenant meant that political society was neither purely natural nor merely contractual, based on common interest. Covenant was the binding together in one body politic of persons, families, and communities who assumed through unlimited promise responsibility to and for each other and for the common laws, under God. It was government of the people, for the people and by the people but always under God, and it was not natural birth into natural society that made one a complete member of the people but always the moral act of taking upon oneself, through that promise, the responsibilities of a citizenship that bound itself in the very act of exercising its freedom. For in the covenant conception the essence of freedom does not lie in the liberty of choice among goods, but in the ability to commit oneself for the future to a cause and in the terrible liberty of being able to become a breaker of the promise, a traitor to the cause.[21]

The Declaration also follows the classical covenant formulary to a great degree. First, there is a statement of who is doing the covenanting, namely, "the Representatives of the United States of America, in General Congress assembled," 4 July 1776. Second, there is a prologue and historical section detailing the prior relationships of England and the American colonies. These establish the setting for the Declaration and give reasons for its writing and promalgation. Third, there is a set of stipulations and obligations containing the basic agreements of the American people. These begin as a statement of self-evident truths. Fourth, there is a provision for its public proclamation to mankind; copies were to be sent to Parliament and distributed throughout the newly independent states. While there are no provisions for depositing the Declaration in a temple, it was eventually enshrined and elevated to a hallowed position. During the nineteenth century, moreover, the Declaration was given annual public readings on the Fourth of July in many communities, "repromulgations" often are a feature of covenantal communities. Fifth, there is an invocation of a divine

witness, namely, "the Supreme Judge of the world" and "Divine Providence." Sixth, there are indirect statements of blessings and curses. The blessings for performance are national independence and individual life, liberty, and pursuit of happiness. The curses for non-performance are tyranny, oppression, and even death.

FROM COVENANT TO CONSTITUTION

The anchoring of the American covenant in an appropriate constitution occurred over a period of 12 years. The states were the first to write constitutions. The Massachusetts Constitution of 1780 — the oldest written constitution in the modern world still in effect today — is as close to being an example as any.[22]

Drafted largely by John Adams, it weaves together the elements of covenant, compact, and constitution quite nicely, as reflected in the Preamble:

> The body-politic is formed by a voluntary association of individuals. It is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them, that every man may, at all times, find his security in them.

Similar statements, though usually less eloquent, appear in almost all of the 50 state constitutions.[23]

It should not be surprising, therefore, that the Americans established a federal system of government with sovereignty divided and shared between the states and the federal government. This often is treated as an anomaly or as a product of unique circumstances. Yet the governmental outcome of the Revolution could have been very different. The states could have separated as independent nations. They could have been united in whole or in sections by conquest. The Americans could have erected a monarchy. Indeed, given earlier experiences with the governance of large territories, these were much more likely outcomes than the actual one. Instead, the Americans, within their states, sent representatives to a convention, ostensibly to improve the Articles of Confederation, and then ended up ratifying, under pacific conditions, a wholly new constitution that employed federal principles to establish the first continental federal republic in world history. Whereas, historically, large territories (as well as most small ones) were invariably ruled from an imperial centre, the United States became governed through a system of dispersed democratic majorities coupled with nationwide representation of both individuals and constituent states.[24]

Although it is impossible to determine definitively the influences upon the minds of the framers of the Constitution who created the American federal

system, the most overlooked, yet perhaps most important, source of ideas is the covenant tradition, which found its first political expression in the federation of tribes of ancient Israel. One of the few political scientists to recognize this possibility was William C. Morey in the late nineteenth century. Morey saw the sources of American federalism in "the reappearance of democratic and federal institutions in the Puritan colonies."[25]

Although he did not mention federal theology, he regarded the federative system of New England as the model of federalism. After all, there were no indigenous models for the framers of the U.S. Constitution except New England. Furthermore, representatives from New England, especially Connecticut and Massachusetts, were influential in the Constitutional Convention. The principal compromise of the Convention, The Connecticut Compromise, was initiated by those delegates accustomed to the New England legislative system in which one house provided for the representation of towns. This compromise lies at the heart of the federal system and makes it, in the words of James Madison, a "compound republic" partly national and partly federal (in the earlier sense of confederal). In addition, the most covenantal of the state constitutions, that of Massachusetts, was among the most influential of the state models for the framers.

Supplementing the New England regional influences were the ethnoreligious conduits of covenant ideas, especially Congregationalism and Presbyterianism, the two largest denominations in 1787. A majority of the delegates to the Convention were affiliated with covenant-based churches, while most of the delegates were no doubt familiar with the covenant idea, given their Protestantism and attention to the Bible as a source of wisdom and literary enjoyment, if not always spiritual inspiration. The English and Scottish backgrounds of many of the delegates also may have accounted for covenantal influences. The Congregationalists were certainly grounded in covenant ideas, though their propensity for localism and local control made them somewhat hesitant to leap into large-scale arrangements. The Presbyterians, however, were already moving toward full-scale federalism. As Arthur Schlesinger, Sr., noted: "More than either the Congregationalists (or Anglicans) the Presbyterians in their reliance on federalist and representative institutions anticipated the political makeup of the future United States."[26]

Indeed, as the first government came into office under the U.S. Constitution in 1789, the Presbyterians held their first nationwide General Assembly. In the Presbyterian system, congregations in a local area formed a presbytery; several presbyteries in a region formed a synod; and then came the General Assembly. As a result, the system of federal democracy established by the U.S. Constitution has often been referred to as Presbyterianism writ large for civil society.

Moreover, James Madison of Virginia, the principal architect of the theory of federal democracy, was a Scotch-Irish Episcopalian who had studied under

and been greatly influenced by the Scottish Reverend, Donald Robertson, and the prominent scholar-divine John Witherspoon at the Presbyterian-oriented College of New Jersey (now Princeton). Indeed, six of the delegates to the Constitutional Convention had studied under Witherspoon. As a strong supporter of independence and a signer of the Declaration of Independence, Witherspoon's influence was substantial enough that Horace Walpole is alleged to have commented that: "There is no use crying about it. Cousin America has run off with a Presbyterian parson, and that is the end of it."[27]

The comment may be fictitious, but the sentiment is not. Institutional structures and cultural traditions that served as carriers of covenant ideas were still strong in 1787, though increasingly in secular forms. The framers, however, were engaged in a wholly secular enterprise. By 1787, the theological stream of covenant ideas and the philosophic stream of compactual ideas had become so intermingled in the concept of constitutionalism that it is difficult to separate their effects. Albeit, given that the federal system established by the framers bears a much greater similarity to the political systems proposed by the federal theologians and implemented in their church polities, than the political systems proposed by Hobbes and Locke, and given that Americans were already covenanting into civil societies well before the speculative philosophers adopted the idea, it is difficult to avoid the conclusion that covenant ideas had, in the final analysis, a more decisive influence than those of the "new political science."

Furthermore, the systems of the English philosophers could not be directly applied to America because, even in 1787, the country was simply enormous compared to tiny England. While such prominent revolutionary ideas as "natural rights" certainly belong to the Lockean tradition, they were also grounded in the covenant tradition and were further adapted to the federal framework of American constitutionalism rather than the monarchical framework of Hobbes or parliamentary framework of Locke. Thus, it is inaccurate to describe America as simply or even primarily a Lockean nation.

POPULAR GOVERNMENT AND THE FEDERAL SOLUTION

For all intents and purposes, federalism as moderns know it is an American invention. As the literature of the constitutional ratification campaign (both Federalist and Anti-Federalist) indicates, federalism was designed by the founding fathers to be more than a pragmatic structural compromise devised to make possible the unification of the several states under a single national government. It was also to be more than a geographic division of power for the sake of expediency. Federalism, to its American creators, represented a new political alternative for solving the problems of governing civil societies, an alternative that was developed from the political theories, institutions, and patterns of

behaviour developed out of the various applications of the covenant idea to the colonization of the eastern seaboard from the beginning of the seventeenth century onward.

The federalism of the founders was designed to provide substantially new means for the development of a viable system of government, a successful system of politics, a reasonable approach to the problems of popular government, and a decent means for securing civil justice and morality. Moreover, its inventors conceived of federalism as a uniquely valuable means of solving the perennial problems of any civil society seeking to transform itself into a good commonwealth, particularly one which is built on the rock of popular government — the problems of balancing human liberty, political authority, and governmental energy so as to create a political system at once strong, lasting, democratic, and just. They believed that their invention was capable of solving those problems because it was based on valid fundamental principles and was constructed to employ proper, if new, political techniques necessary to at least approximately effectuate those principles. They were convinced of this and were soon joined in this conviction by the American people as a whole — not only because their invention directly solved important substantive questions which they anticipated would confront the United States. The essence of their solution was the application of the federal principle not only to relations between governments but to the overall political relationships of groups ("factions" in Madison's terminology) and individuals to government.

Their own sources try to justify their stand by telling us why the founders felt as they did. Unfortunately, current myths prevent many from considering those sources on their own terms. For one thing, there are too many who believe American federalism is the product of circumstances alone, that Nature itself (or at least prior experience) dictated that the American Republic be built on the rock of diffused governmental powers so that any discussion of a "federal principle" is an *ex post facto* attempt to discover a unique or original political invention when common political considerations actually sufficed. Pointing to the vast expanse of land under the American flag even in 1787, the great diversity of peoples gathered together under its protection, the general commitment to popular government prevalent in the land, and the pre-existence of the 13 colonies, many people conclude that formal distribution of power among "central" and "local" governments was inevitable if there was to be any union at all and that the founders of the Republic simply worked out the mechanisms needed to make the *status quo* politically viable.

This view has become widespread in the twentieth century because it is particularly useful to those who accept two companion views of American federalism current today. One is the notion that the framers of the Constitution were hostile to popular government and used federalism to limit "democracy" by distributing powers undemocratically. This school views subsequent Ameri-

can history as the struggle to establish popular government against the will of the founders' Constitution. Accordingly, they believe that the Constitution's system for the distribution of power becomes increasingly obsolete as the nation becomes more "democratic." The other notion accepts the premise that the founders were anti-democratic but "excuses" them on the grounds that problems of communication over such a vast and diverse area then required the federal distribution of powers. Their claim is that as problems of communications are lessened, this distribution of powers becomes increasingly obsolete.[28]

Superficially, history appears to support the current myths. The implantation of settlements on the American shores under different regimes and charters had led to the emergence of at least 13 firmly rooted colonies-cum-states by 1776. The new nation did inherit the basis for some type of federal plan and, it might even be said, had no choice in the matter. Recent research has heightened the plausibility of this view by indicating the extent to which the American colonies enjoyed a *de facto* federal relationship with the English king and parliament prior to independence.

The existence of states, however, was no guarantee that they could be united under one government. Moreover, there was no guarantee that unification could take any form other than loose confederation so long as the states remained intact as politically sovereign civil societies, or any form other than consolidation if they did not. In this respect, the factors of size and diversity were in no way determinative. Distribution, as opposed to concentration of power, is not a function of size and diversity *per se* but a function of republican political inclinations.

Students of comparative government — from the days of Aristotle to our own and including the generation of the founders of the Republic — have been fully aware of the possibilities for centralized government in even the largest and most diverse empires. In Aristotle's day, the Persian empire extended for over 3000 miles "from India to Ethiopia" and included over a 100 different nationality and ethnic groups, each located in its own land, yet throughout its 200 years of existence, it was governed by a despotism which, while maintaining a benevolent attitude toward the maintenance of local laws and customs, carefully concentrated as much political power as possible in the hands of the emperor.

Locke, Montesquieu, and the founding fathers were acquainted with the similarly organized Ottoman Empire. They, like our own generation, also encountered one of the greatest centralized despotisms of all time in the form of the Russian Empire. When Cortez was viceroy in Mexico, the Russian empire under Ivan the Terrible already covered an area larger than the original United States (888,811 square miles in 1789). The Russians began their march eastward in the sixteenth century and at the time the Puritans were settling New England, they reached the Pacific. By the year of the Glorious Revolution and the establishment of parliamentary supremacy in England, the Russians had

consolidated their centralized rule over some seven million square miles and dozens of nations, peoples, and tribes. An eighteenth-century Russian, if asked about the political consequences of a large domain, would have been likely to say that an expanse of territory is useful in protecting absolutism since the difficulties of internal communication that it fosters help prevent popular uprisings on a nationwide scale.

A Frenchman of the same century, if asked the best method of forming a nation out of a number of smaller "sovereignties," would undoubtedly have recalled the history of France and advocated the complete political and administrative subordination of the entities to be absorbed under a central government and the elimination of all vestiges of their local autonomy so as to minimize the possibilities of civil war. Even an eighteenth-century Englishman, aware of the centuries-old problem of absorbing Scotland within Great Britain, would have been likely to approach the problem of national unification in a somewhat similar manner, except that he might have added a touch of decentralization as a palliative to libertarian sentiments. Thinking Americans were aware of all these examples in 1787. It is no accident that *The Federalist* had to concentrate heavily on refuting the argument that a stronger national government would inevitably open the door to centralized despotism.

Closer examination of the situation between 1775 and 1801 provides convincing evidence that, regardless of the factors present to encourage some form of division of power between a general government and the state governments, the development of a federal system stronger than that embodied in the Articles of Confederation was by no means foreordained. What such an examination does reveal is the extent to which the founders of the United States were committed to the idea of popular government and were really involved in a search for the best form of organization — the best constitution — for the republic, one that would secure the liberties of the people while avoiding the weaknesses of past experiments in popular government.

Even here the founders had little precedent to guide them. Not only were there no extant examples of the successful government of a large territory except through a strong centralized government, but there were few small territories governed in a "republican" manner and none offered the example of federalism as Americans later came to know it. The two polities then existing that had come closest to resolving the problems of national unity without governmental centralization were the United Provinces of the Netherlands and the Swiss Confederation, both of which served covenantal societies. Not only were both very small republics indeed, about the size of Massachusetts and New Jersey, but the failure of the former to solve its constitutional problems and its consequent lapse into government by an incompetent executive and an anti-republican oligarchy was well-known, while the latter was hardly more than a protective association of independent states with little national consciousness.

Neither could be an attractive example to the American nation builders who were committed to both republicanism and the common nationality of all Americans.

In one sense, then, the founding fathers had only two contemporary models to choose from, both of which showed great weakness and promised little for the perpetuation of popular government. They could have attempted to bring the several states together into a single unified but decentralized state on the order of the government of Great Britain, or they could have been satisfied with a loose confederation of sovereign states, united only for purposes of defence and foreign relations which, while barely able to govern adequately even in the areas of its responsibility, would offer minimal opportunities for national despotism.

There were those who advocated the former course, particularly among the younger officers of the Continental Army. At various times, they urged Washington to establish a constitutional dictatorship (which possibly could have led to a political system akin to the kind of totalitarian democracy established by Napoleon in France in the 1790s) or to assume the crown as a constitutional monarch (which presumably would have led to a political system akin to the kind of aristocratic oligarchy that existed in eighteenth-century England). While Washington effectively subdued most of them on several occasions during the war itself (the most famous of which was his confrontation with them at Newburgh, N.Y.), one of their number, former lieutenant colonel Alexander Hamilton, continued to advocate the latter position as much as he dared right through the Constitutional Convention.

The second course was the one followed during the war as a natural outgrowth of the Continental Congresses assembled from 1765 through 1775. If the founders had been content with a "foreordained" system, one "dictated" by the actual status of the United States in 1776, they would have accepted this alternative and retained the Articles of Confederation which were adopted to ratify just that kind of confederacy. That system has been most frequently compared to the various Hellenic leagues that united several city-states only insofar as they shared a common purpose — invariably that of defence. Such leagues embraced small despotisms as well as small democracies. They had no role to play in determining the internal regimes of member states and were in no sense protectors of human liberties or popular government.

Among those who advocated this course of action were some of the most notable patriots of the early Revolutionary struggle. Above all, they feared despotism in large governments and distrusted any notion that a national government with energy could be kept republican. Whatever their views about the potential tyranny of the majority, they were more willing to trust smaller governments with supervision of the people's liberties on the grounds that they

were more accessible to the people. Patrick Henry was the most outspoken of this group. He held his ground to the bitter end, uncompromising in his belief.[29]

As we all know, the founders chose neither alternative but, rather, invented a third one. Their alternative was animated by a desire to perfect the union of what they believed to be an already existing nation, to give it the power to act as a government while keeping it republican and democratic. In developing their solution, they transcended the limits of earlier political thought in order to devise a way to protect the people's liberties from every threat.[30]

Their alternative reflected a great step forward in thinking about popular government because, while accepting the same idea of covenant and compact that animated the Articles of Confederation, they refused to accept the simplistic notion that the possibilities for despotism increased in direct proportion to the size of the country to be governed. They were fully convinced by history and personal experience that small governments, in their case the states, could be as despotic as large ones — that the issue was on what principles and along what lines was a civil society and its government structured. Moreover, the founders were convinced by history and experience that democratic governments could be as tyrannical as autocratic ones if they are based on simple and untrammeled majoritarianism. Pure democracies, in particular, were subject to the sway of passion and hence to the promotion of injustice, and even republics were susceptible if faction was allowed to reign unchecked. As friends of human liberty and popular government, they felt it necessary to develop a political system that would protect the people from despotic governments whether they be large or small, democratic or not.

Their solution, federation — an operationalization of the covenant idea — was designed to deal with all these contingencies by balancing them off against one another so as to create a number of permanent points of tension that would limit the spread of popular passion or governmental excess; break up or weaken the power of factions: and require broad-based majorities to take significant political actions. Locating all sovereignty in the people as a whole while dividing the exercise of sovereign powers among several governments — one general, the others regional — was, to the founders, a means of checking the despotic tendencies, majoritarian or other, in both the larger and smaller governments, while preserving the principle of popular government. The interdependence of the national and state governments was to ensure their ability to check one another while still enabling them to cooperate and govern energetically. In the words of *Publius*, they advocated republican remedies for republican diseases.

In organizational terms, the perennial tug of war between centralization and decentralization was to be avoided by the introduction of the principle of non-centralization. The difference is a crucial one. Decentralization, even as it implies local control, assumes the existence of a central authority which has the

power to concentrate, devolve, or reconcentrate power more or less at will. Non-centralization assumes that there is no central authority as such but that power is granted to several authorities, general and regional, directly by the people and, even though the national authority may enjoy an ultimate preeminence that is very real indeed, that those authorities cannot legitimately take basic power away from each other.

True federal systems must be non-centralized systems. Even when, in practical situations, there seems to be only the thin line of the spirit between non-centralization and decentralization, it is that thin line which determines the extent and character of the diffusion of power in a particular regime.

The American people and their leaders were to extend this aspect of federalism, which is partially described in common parlance as the "checks and balances" system, into most other areas of their political life. Both the state governments and the national government have powers which cannot be taken from one another, even when both share in their exercise. The principle was further applied to relations of the various branches of government — executive, legislative, and judicial — within each plane even before the invention of federalism. It was subsequently applied to the structure and organization of the party system which consists of two national coalitions of substantially independent state and local party organizations further checked by the independence of action reserved to the "congressional parties" within each of the two coalitions. It was applied to the other processes of politics and even to the nation's economic system in ways too numerous to mention here.

The federal principle sets the tone for American civil society, making it a society of balanced interests with egalitarian overtones, just as the monarchist principle makes British civil society class- and elite-oriented despite democratic pressures, and the collectivist principle sets the tone for Russian civil society, making it anti-individualistic even when egalitarian. In political terms, this is because the federal principle establishes the basic power relationships and sets the basic terms for the processes of distributing power within American civil society. The founders understood the role of such central principles in setting the framework for the development of a political system. They knew that, while the roots of the central principle of every civil society are embedded in its culture, constitution-makers do have a significant opportunity to sharpen the principle's application and the direction of its future development.

In sum, federalism as the founders conceived it was an effort to protect human rights by consciously establishing institutions and procedures that would give government adequate powers while, at the same time, forcing the governors to achieve a high level of consent from all segments of the public they served before acting in other than routine ways. Requiring extraordinary majorities for great actions, the Constitution was based on the idea that there is a qualitative difference between a simple majority formed for a specific issue

and the larger consensus that allows governments to continue to function from generation to generation.

NOTES

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Cooperative Federalism in the United States

Cooperative federalism has been the dominant operational theory of American intergovernmental relations at least since the days of Franklin D. Roosevelt's New Deal (1933), if not from Woodrow Wilson's New Freedom (1913). It was the regnant normative theory from the Kennedy-Johnson Administration (after 1961) to the Reagan years, but it has come under increasing criticism during the past decade. That criticism is based, for the most part, on confusion between operational and normative theory and a simplistic assessment of the theory of cooperative federalism as presented by its proponents. In this chapter, I, as one of the prinicipal proponents of cooperative federalism, present a brief history of the theory, distinguish between it and the simplistic formulations of its critics, and assess the utility and implications of the theory of cooperative federalism today.

SOME POINTS ON THE HISTORY OF AN IDEA

One of the first, if not the first, scholars to use the term cooperative federalism was Edward Corwin. Indeed it was he who popularized the term in the 1930s, contrasting the new cooperative federalism of the New Deal with the older dual federalism of the first 150 years of the American federal union.[1] Corwin was particularly interested in describing the change in the theory governing U.S.

Supreme Court decisions, but as many constitutional lawyers tend to do, he tended to equate the theory animating the Supreme Court with American federal theory in general and seemed to be describing the prevailing views in American society, not only on the Court.

In fact, Austin Macdonald preceded Corwin in describing the new federal system of the twentieth century as cooperative in his book *Federal Aid*. Nor was he the first to recognize the phenomenon. In 1915, Mathias N. Orfield, a member of the political science department at the University of Minnesota, published his book *Land Grants to the States with Special Reference to Minnesota*, which explored a major aspect of intergovernmental collaboration in the nineteenth century. Orfield's was simply the most comprehensive of a number of monographs to appear between 1885 and 1915 dealing with intergovernmental cooperation as then practised. Moreover, between Macdonald and Corwin, the Social Science Research Council's massive study of American society, *Recent Social Trends,* also suggested that this was the new trend in American intergovernmental relations.[2]

Corwin's great contribution is that he was the first to present cooperative federalism as a theory of intergovernmental relations. His theory was rapidly taken up by other students of the federal system and in the late 1930s a number of important books were published presenting the theory and demonstrating its empirical validity. These included Jane Perry Clark's *The Rise of a New Federalism* and V.O. Key's *Federal Grants to the States*.[3]

It was not until the 1940's, however, that a systematic effort to study the new cooperative federalism was launched by William Anderson, who had joined the University of Minnesota faculty at about the time that Orfield was publishing his book and who became America's first full-time student of federalism as intergovernmental relations. Anderson, with his younger colleague, Edward Weidner, set out to systematically study the full range of intergovernmental administrative cooperation in one state, Minnesota, but within a framework that would permit the maximum amount of generalization. Their effort led to an extraordinary group of monographs published between 1946 and 1960 when the final one, *Intergovernmental Relations in Review,* by Anderson himself, presented a synthetic view of the entire effort. The true climax of Anderson's work came in 1955 with the publication of *The Nation and the States: Rivals or Partners,* a book developed out of Anderson's dissent to the Kestenbaum Commission report (of which more below) in which he presented his comprehensive theory of cooperative federalism.[4]

The monographs in his series and Anderson's book constitute probably the single most important statement of his generation on the subject. *The Nation and the States* is a book of enduring worth. Unlike many of his colleagues who treated federalism as if it were no more than intergovernmental administrative relations, perhaps set within a framework of constitutional law or at least

Supreme Court decisions, Anderson had a broader view of the federal system, although even he tended to concentrate on the administrative dimension since that was the most visibly important one at the time.

Perhaps the first public body to take notice of the then-new theory of cooperative federalism was the Commission on Intergovernmental Relations appointed by Dwight D. Eisenhower upon his accession to the presidency and headed by Chicago businessman Meyer Kestenbaum. The Kestenbaum Commission, as it became known, presented its report early in the Eisenhower Administration in an effort to shape the new president's federalism policy. In a sense the commission was the first to separate operational and normative theories. It recognized cooperative federalism as the new mode of intergovernmental relations, and in its accompanying studies did much to document the reality of the times. Normatively, however, it rejected cooperative federalism and called for a return to dual federalism, albeit recognizing that there would be a considerable amount of intergovernmental cooperation out of necessity.[5]

The third major contribution to the development of cooperative federalism as an idea, if not a theory, in those years was *Federalism Mature and Emergent*, Arthur MacMahon's edited volume of the proceedings of a Columbia University conference on federalism which included several major articles setting forth the operational rules of cooperative federalism, including David Truman's discussion of the importance of America's non-centralized party system, Edward Weidner's discussion of the critical role of the states in the administration of intergovernmental programs, and Henry Hart's discussion of the central importance of state law and the interstitial character of federal law. In many respects, MacMahon's volume came closest to providing an articulated theory of the workings of cooperative federalism.[6]

The Anderson and MacMahon books were limited in that both were essentially responding to the earlier dual federalistic understanding of federalism and the spate of books bemoaning the demise of American federalism with the passing of dual federalism. Thus, they were less interested in articulating a comprehensive theory of cooperative federalism than in explaining how cooperative federalism was still federalism.

While they were making this point, an obscure appendix to the first Hoover Commission report published in 1949 advanced a sharper thesis.[7] The mandate of that first Hoover Commission had been to study the workings of the executive branch of the federal government, but Herbert Hoover, concerned as he was about the gradual demise of American federalism, turned to the Council of State Governments (CSG) to prepare a report on the state of intergovernmental relations as part of the Commission's overall effort. Frank Bane, then executive director of the CSG, commissioned a young University of Chicago political scientist, Morton Grodzins, to prepare the background report. In it Grodzins first advanced the thesis for which he was to become famous, including the very

important point that intergovernmental sharing of functions did not necessarily come at the expense of the state and local governments, that the non-centralized party system meant that Congress represented states and localities more often than not and therefore defended state and local interests — and hence federalism — even when it enacted cooperative programs, and that the setting of standards for those programs was also an intergovernmental act, not simply a matter of federal dictation. Perhaps as one of his most important points, Grodzins advanced and began to document the thesis that intergovernmental cooperation was not a product of the New Deal or even of the New Freedom, but had been part and parcel of the American federal system from the very beginning.

Grodzins' report was published as an appendix to the larger Hoover Commission Report. The Commission's recommendations embodied classic dual federalism and entirely ignored Grodzins' effort. Nor was the form of the publication conducive to bringing it to wider attention, academic or public. Nevertheless, in that report were sketched out the theses that Grodzins was later to develop and study through his Workshop in American Federalism established at the University of Chicago in 1955 with a Ford Foundation grant. Through the Federalism Workshop Grodzins, his colleagues Jacob Cohen, Lewis Anthony Dexter, and Charles Quick, and his graduate students, especially R. Bruce Carroll (intergovernmental administration), Kenneth Gray (Congress and the states), E. Lester Levine (intergovernmental relations from the state perspective), Dennis Palumbo (the states and foreign affairs), Douglas St. Angelo (intergovernmental relations from the local perspective), Mark Kesselman (intergovernmental relations in France), and I (intergovernmental cooperation in the nineteenth century), tackled the issues raised in that 1949 publication, studying each in depth.[8]

Let me emphasize that the task of the Workshop was to study operational realities, not to develop normative judgements. On the other hand, there is no question that Grodzins and most of the members of the Workshop did endorse activist government even while supporting federalism, and wanted to find a way to combine the two. That is how the results of Grodzins' efforts became part of the public domain.

In my introduction to *The American System*, Grodzins' *magnum opus*, I presented a distillation of the Grodzins' thesis:

> Stated broadly, his hypothesis views the American system of government as functionally analogous to a marble cake of shared activities and services even though it is formally structured (like a layer cake) in three planes. Despite the great increase in the velocity of government in the twentieth century, the American system remains decentralized, democratic, and responsive to the public because there is a little chaos built into it. At one level, this chaos promotes sharing because it prevents any single government or governmental plane from gaining exclusive jurisdiction and power in any area of governmental concern. At a second level, the chaos allows citizens to utilize multiple cracks (in the double sense of wallops

from outside the system, and fissures in the system itself) to gain their ends. This has the consequence of involving (at least potentially) governments at every plane in the same problems. On the national plane in particular, the existence of a public-private continuum, which is used to mobilize local influence, helps translate citizen benefits from the multiple crack into benefits for the states and localities. The sharing system is maintained in large measure by the nation's undisciplined political parties which are almost caricatures of the system they serve. The constitutionality of the sharing system has been ratified by the decisions of the United States Supreme Court which tend to divert questions about the precise measures and forms of sharing to the political arena. The sharing system is effective because there exist channels of sharing that bring some order to the process. These include the constitutionally defined mechanisms of federalism and the mixture of laws which lie at the root of the sharing process. (pp. v-vi)

In a system of this kind, there are perpetual tensions and problems including a perennial search for balance among the centres of power, a constant problem of dealing with squeak points in the system, and a continuing search for the harmonization of special interests with the general (or national) interest. These problems can lead to antagonistic cooperation between governments (and other elements) in the American system, but it is inevitably cooperation, or sharing, nonetheless. The existence of these problems is not a sign of the system's deficiencies but, rather, a reflection of its vigor and health.

In the aftermath of the Kestenbaum Commission report, President Eisenhower proclaimed an effort to return functions to the states. This, in turn, triggered the Democratic-controlled Congress to establish a Subcommittee on Intergovernmental Relations under the chairmanship of Congressman L.H. Fountain (D.N.C.) to provide an alternate view of what should be done. That Subcommittee gave Grodzins his first opportunity to argue that cooperative federalism was not damaging to the federal system but rather enabled it to adapt to a new age. This was an argument that Grodzins was to make for the remaining decade of his life in various forums.

Perhaps the most widely known presentation of that argument was his chapter in *Goals for Americans*, the report of the President's Commission on National Goals, chaired by Nelson Rockefeller, which appeared at the end of the Eisenhower years and served as a programmatic launching pad for Rockefeller's efforts to win the presidency. Grodzins' success in presenting his ideas was in part attributable to the force of his own personality and the felicitous quality of his writing, but also to the fact that he was describing a reality which thoughtful public figures understood to be their own. Thus, Rockefeller was "converted" to the idea of cooperative federalism and echoed the theme in his Harvard lectures.[9]

In the meantime, accidentally through my good offices, I reunited Grodzins with an old friend, Arthur Naftalin, a Minnesota political scientist who was then serving as Minnesota's Commissioner of Administration under Democratic-

Farmer-Labor-party Governor Orville Freeman. Naftalin and Freeman recognized how Grodzins' work would be helpful in defining the basis for the Democratic policy response to the problems of the postwar generation. Together, Naftalin and Grodzins developed an article published in the *New York Times Magazine* under Freeman's name laying out the idea that cooperative federalism could be a way to solve America's problems of governance.[10]

Thus going into the Kennedy years, leading figures in both political parties presented arguments for cooperative federalism as a normative grounding for increased federal activity to assist and even lead the states and localities to more effective responses to current social problems. Meanwhile, the Eisenhower effort had failed. While everybody agreed rhetorically that the states should be strengthened, his concrete proposals for federal turnbacks were rejected.[11]

All that came out of his effort was the establishment of the Advisory Commission on Intergovernmental Relations (ACIR) in 1960 as a standing federal-state-local body with representatives from all arenas and branches of government to examine issues of intergovernmental relations on a continuing basis and advise the federal, state, and local governments as to the best courses of action that would take federalism into consideration.

No doubt cooperative federalism was already the implicitly dominant view in the Kennedy years, but Kennedy's own preoccupation with foreign policy meant that no coherent policy of federal action was enunciated by him on the domestic front. It remained for Lyndon Baines Johnson, who had followed the 1950s debate, to proclaim cooperative federalism as the right theory, which he did early in 1964.[12]

Under Johnson, cooperative federalism became the justification for massive federal intervention based on the idea of national policies to which the states and localities would have to conform. In other words, whereas up to the Johnson Administration the federal government felt compelled to go to great lengths to justify federal intervention in areas of domestic policy previously reserved to the states because dual federalism was the regnant theory, Johnson and the chief figures in his administration were able to demand state compliance with federal demands on the grounds that cooperative federalism was normative and that if the states did not comply they were not cooperating. Thus early on cooperative federalism became a cover for coercive federalism. The principal statement of this new theory of cooperative federalism was to be found in James Sundquist's *Making Federalism Work* published in 1968.[13]

Meanwhile, the literature on intergovernmental cooperation was expanding as younger scholars like Richard Leach and Deil Wright began to produce solid empirical studies of the intergovernmental system and state leaders like Governor Terry Sanford publicly endorsed the cooperative federalist approach.[14]

Grodzins, who had been battling cancer for over a decade, died at the age of 46 in 1964 and his *The American System,* was published posthumously two

years later. He had delayed publication as he wrote and rewrote the chapters, searching as he always did for perfection of expression. This meant that when his book came out, many of the ideas in it were already well established in the public domain and it was not the revolutionary document that it would have been had he published it, say, in 1962 when it was essentially ready. Thus, he was remembered more for the catchy phrases he used in his shorter articles, such as "the marble cake," than for the more fully articulated theory he presented in *The American System.*

In the interim, I had completed and published my study of American inter-governmental relations in the nineteenth century as *The American Partnership* (1962). In it I not only demonstrated the extent of federal-state collaboration prior to 1913, but also set out a theory of cooperative federalism built on the work of Anderson, Grodzins, Hart and Wechsler, Truman, and Weidner. The theory was set forth in Part III of the book. In it, I deal with the original constitutional provisions for the allocation of powers, the role of the architects of American federalism, the various periods of federalism (an argument which I extended through the 1960s in "The Shaping of American Intergovernmental Relations in the Twentieth Century"), state loyalties and cooperative federalism, control over grant programs, other resources for federal aid, cooperative federalism as the result of the necessity to serve a frontier society, the criteria for sharing (including the nature of the issue involved, the desire to preserve and develop the entire nation, the desire to preserve and develop the states, and assessments of efficiency), dealing with separatist tendencies, and the relationship between cooperative federalism in action and dual federalism in theory.[15]

I elaborated on each of these themes in subsequent publications beginning with *American Federalism: A View from the States,* whose first edition was published the same year as *The American System* and where I provide criteria for systematizing some of the elements of Grodzins' theory which he glossed over in his effort to make his larger point.[16] Two subsequent editions of this work have been issued, the last by Harper and Row in 1984. In the following two decades, I built upon that systematization to develop a more abstract and comprehensive model of federalism, of which more below.

In the meantime, widespread acceptance of cooperative federalism as a norm was no better reflected than in the Nixon Administration. The Republican president, following in the wake of the Great Society and benefitting from public reaction to federal overreaching, announced a "New Federalism" which, in essence, accepted Johnsonian views of intergovernmental collaboration with a new twist. Nixon's implicit theory was that the White House should decide what the federal government would do and what would be left to the states and localities based on what was politically helpful or potentially harmful to the president.[17]

This was to be the regnant view in the 1970s, to be changed only when Ronald Reagan became president and called for a return to the pristine principles of dual federalism. (In practice, Reagan continued this aspect of Nixon's policy as reflected in his actions preempting the states in banking and trucking regulation, and pressing them on the minimum drinking age, among other issues.)

In the scholarly community, this period witnessed a refocusing on cooperative federalism. Political scientists such as A. Lee Fritschler and Morley Segal, Donald Rosenthal, Martin Landau, Thomas J. Anton, Richard Nathan, Aaron Wildavsky, Frederick Wirt, Vincent and Elinor Ostrom, and Samuel Beer each contributed to the evolving theory of cooperative federalism. Firtschler, Segal and Rosenthal concentrated on identifying different models of intergovernmental cooperation. Beer elaborated a theory of political conflict within the intergovernmental system. Anton, Nathan, Wildavsky, and their colleagues explored the implementation of cooperative programs. Landau and the Ostroms linked federalism to higher level theory of organizational interaction and constitutional design.[18]

In 1967 I established the Center for the Study of Federalism at Temple University as the heir and successor to the Grodzins workshop. In 1971 it initiated the publication of *Publius, the Journal of Federalism*, which became the principal arena for discussing federalism issues as well as the voice for articulation of most of the theoretical developments and empirical studies that accompanied them. Furthermore, a fruitful collaboration developed between the academic community and bodies such as ACIR and the various public interest groups, particularly the International City Management Association and the National Governors Association who conducted or sponsored useful applied research into intergovernmental relations. David Walker and John Shannon at the ACIR took the lead in bridging the academic and public affairs communities in their writings for the Commission.

Several textbooks appeared dealing with the American federal system from a cooperative federalism perspective, beginning with *American Federalism: A View from the States* and including those of Danielson, Glendening and Reeves; Leach; Reagan; Riker; Walker; and Wright.[19] By the end of the 1970s, however, some of those who were committed to the operational validity of the theory of cooperative federalism were sufficiently concerned about federal officials using it to introduce a strong element of coercion of the states to raise the question of the confusion evident between coercion and cooperation. The result was a special issue of *Publius* on "Federalism and Prefectorial Administration" (10, no. 2, 1981), published to coincide with the beginning of the Reagan Administration.

It was approximately at that point that a certain disillusionment with the simplistic and pollyannaish expectations of some with regard to cooperative

federalism led to a reaction against the theory, with some dismissing it as simple-minded. By and large they took Grodzins' marble-cake formulation as their straw man. As William Stewart has demonstrated in *Concepts of Federalism*, the so-called theoretical discussion rapidly became a contest for the invention of new metaphors for cooperative federalism rather than attempting to develop systematic theory.[20]

Moreover those who were developing systematic theory were ignored amidst the polemics. As a result, many today dismiss cooperative federalism as a passing fad, an explanation of federalist principles and processes designed as an apologia for New-Deal and Great-Society centralization, inadequate operationally as well as normatively. I submit that if they seriously confronted one of the systematic theories of cooperative federalism, they would have great difficulty in maintaining their position.

A SYSTEMATIC THEORY OF COOPERATIVE FEDERALISM

Let us begin by setting to rest several simplistic assumptions.

1. "Marble cake" is not a theory. Grodzins never used it as a theory but only as a metaphor and I have rarely used it even as a metaphor, certainly not since 1966.

2. The adjective "cooperative" in cooperative federalism does not imply that all is peaceful and friendly. Grodzins invented or, at the very least, used the phrase "antagonistic cooperation" to describe situations in which governments had to work together but did not do so willingly or in a friendly spirit, or where they were pursuing different and contradictory goals. "Cooperative" refers to the fact that they must cooperate, that is to say, work and function together. It is not a statement of how they work and function together. There can also be coercive cooperation, which is the antithesis of a normative view of cooperation as a matter of mutuality among partners.

3. Cooperative federalism is not a theory that, *ipso facto*, endorses big government. In principle, it does not relate to the velocity of government (the amount of government relative to the total activities of the civil society) *per se.*

4. The sum and substance of federal theory is not embodied in either dual, cooperative, or any other of the current slogans.

What then is a proper theory of cooperative federalism? I will present my theory, first formulated in a comprehensive manner in January 1970 in *American Federalism: A Working Outline*, published by the Center for the Study of Federalism, and subsequently expanded and modified.[21]

within the matrix, how permeable the boundaries between the cells are, and the character of the communications between and among them.

The matrix model lends itself to a cybernetic understanding of federalism which, as Martin Landau has argued, is far more accurate than any other in describing how a federal system works. In a cybernetic model, what counts are the channels of communication which link the cells. In sum, the federal system is a matrix, not a marble cake; there is real separation between the cells or arenas but, because the smaller cells are within the larger ones, there also is permeation and intermixture.[23]

THE ELEMENTS OF COOPERATIVE FEDERALISM

Cooperative federalism additionally rests upon the idea that within the American federal system more interests are shared than not. A dynamic society such as that of the United States generates shared public demands. In seeking governmental action, people do not easily distinguish among governmental arenas. Moreover, the nature of the American division of powers almost inevitably requires shared governmental responses if anything is to be done. The alternative would be unilateral action by one arena of government or another. Experience tells us that the arena likely to assert itself most vigorously is the federal government. For a whole host of reasons, were federalism not cooperative, the states and localities would have little defence. That this has not happened is because cooperative federalism has been the norm.

Also central to the idea of cooperative federalism is the idea that cooperation is negotiated. If there is not negotiated cooperation, it becomes either coercive or antagonistic. Negotiated cooperation has two dimensions — sharing and bargaining. The sharing dimension reflects the assumption that intergovernmental cooperation is a good thing and, in many cases, public-private cooperation is as well. It also assumes that sharing should be patterned and not random. The way to achieve proper patterns of sharing is through bargaining.

In other words, cooperative federalism introduces into a system of government, which like all governments ultimately rests on its ability to resort to the exercise of coercive powers, a marketplace dimension which functions to minimize the amount of coercion exercised and, through negotiation, maximize the degree of consent. Under such circumstances, the establishment of intergovernmental programs and their funding through intergovernmental transfers are bases, almost licences, for bargaining. Viewing the American federal system as the game of games, it is possible to determine how each governmental arena "pays the ante" to sit in on the game. The federal government uses its superior resources and better ability to attract public attention, the states use their constitutional position as the keystones in the governmental arch, and local governments use their ability to exist as constituted governments, normally with

taxing powers, and their direct connections with the citizenry. Once having paid the ante, these governments have the right and the duty to bargain over what is to be shared and how. They are, in essence, "licensed" and expected to do so.

A further word may be helpful here on the role of local governments and private interests. Much governmental business in the United States is conducted on a public-private continuum — what we may call a complex linking governments, public non-governmental bodies, and even private bodies to a point. Locally these are united through the civil community, the bundle of institutions and actors organized to promote and defend the local value system. Local civil communities function within and parallel to the state and federal civil societies.[24]

In describing the relationship between all these elements, another Grodzins metaphor is useful. For the citizen, the system is one of "multiple cracks" in which open access as well as representation is a vital part of the formal as well as informal process. All political systems, even the most hierarchical and rigid, have some room for negotiation and bargaining, even if only through "court politics." (The differences are graphically portrayed in figure 5). A key aspect of the American system is that negotiation and bargaining are accepted as legitimate and put on the table — out in the open to increase equality of access to the maximum.

The drawback here is that through sharing and bargaining, cooperative federalism can become cartelistic. Governments working together on a continuing basis, try to establish monopolies or oligopolies in different games. In reality, these cartels are limited by the existence of the multiple cracks which continually open new doors for access and influence, frequent elections that change the people involved, and the formal "fences" of separation of powers and arenas.

What is striking about the American system is its essential consistency in this respect since the inauguration of the federal government in 1789. That consistency manifests itself in the pervasiveness of sharing as provided by the constitutional framework with its emphasis on concurrent or cooperative functions — the former open to sharing and the latter requiring it. So pervasive is sharing that even so-called exclusive functions have become shared functions.

Sharing is accomplished through politics, through professionalization, and through proximity, as well as by design. While observers tend to focus on the last, the formal intergovernmental programs, as the most visible form of sharing, the other three are at least equally important. Today, sharing by design is probably the safest form with regard to the health of the federal system. It is where politics, professionalization, and proximity are involved that coercive elements are sometimes introduced, precisely because less attention is paid to the necessity to systematize and constitutionalize the sharing that takes place in those areas.[25]

In the *Garcia* decision, the United States Supreme Court formally endorsed sharing through politics as the only way to protect the states in matters of interstate commerce. While in making this decision the Court may have abdicated its constitutional role, adopting the empirical reality as its normative position (which is always a dangerous thing to do), in fact it was correct in its assessment of the empirical reality. Politics, especially congressional politics, has been a major arena for shaping the character of American federalism.

Until the 1960s, the political influence of the states meant that Congress would favour and protect them in any federal legislation, even in seemingly unilateral federal programs. Subsequently, the political power of local, especially big city and private bodies in Congress, led to a weakening of the states' position in this respect. Lately there seems to have been a reversal in the state-local-private balance, but it is accompanied by a Congress that is more assertive of federal powers because members of Congress are less likely to come out of state-oriented political environments and have experience in state government and politics prior to entering Congress. Thus sharing through politics has undergone possibly substantial changes in the past generation.

On the other hand, one way or another the cooperative system has reinforced intergovernmental sharing within politics. Thus if the state political parties have lost power in choosing presidents through the primary and caucus sytem, the people as citizens of their states have become very influential.

Sharing through professionalization was particularly important during the days of governmental expansion beginning with the New Freedom and accelerating with the New Deal. In recent years, it has become more routine, but remains an extremely important dimension of cooperative federalism as professionals in various fields share experiences and standards regardless of the governments they serve, or whether they serve in governmental, public non-governmental, or even private frameworks.

Sharing through proximity ranges from the simplest kind of sharing of services by adjacent governments (e.g., fire fighting equipment and services) to state involvement in foreign affairs. Thus the states became involved with foreign economic activity because, in their efforts to maintain jobs and strengthen their economies, they found themselves willy-nilly in proximity to Washington in dealing with foreign trade and investment issues. The federal government has recognized this and encouraged further state involvement.[26]

With regard to the varieties of sharing, we now have several typologies which help us to refine our understanding of cooperative federalism. The simplest division is simply to examine forms of cooperation as informal collaboration (e.g., conferences and consultations), channels for simple sharing (e.g., crop reports), interchange of personnel (e.g., police), interdependent activities (e.g., regulation of elections), transfers of payments, grants-in-aid, tax offsets, and shared revenues. On a different level, we have the typology of intergovernmen-

tal political relationships developed by Fritschler and Segal as shown in figure 6.[27]

Donald Rosenthal has suggested yet another way to look at bargaining relationships within cooperative federalism by examining the values inhibiting bargaining, the distributive and regulatory aspects of bargaining, the existence and influence of zones of indifference, the indeterminacy problem, and the floating actor as a factor.[28]

THE REQUISITES OF COOPERATIVE FEDERALISM

Cooperative federalism in the United States is based upon four principal requisites:

1. There must be a federalist *theory* of government. It must emphasize a non-centralized approach to governance that combines broad national legislative and appropriation powers and maximum local control.
2. There must exist a dualistic governmental *structure* with separate government institutions for each plane, sufficiently comprehensive so that the states as well as the federal government can be complete governments in their own right. These must be reinforced by a non-centralized, non-disciplined party sytem which strengthens the non-centralized distribution of power and prevents the *de facto* concentration of power in a *de facto* centre. Finally the states and localities must be the primary managers of domestic programs, whether intergovernmental or not.
3. Cooperative federalism must be manifested through specific cooperative *programs* developed through a system of contractual relations. In the United States this has led to a smorgasbord of specific cooperative programs that is, in many respects, distinctly American. Other federal systems are able to maintain cooperative relationships through general revenue-sharing devices. These have not worked in the United States. Rather, they have led to greater centralization of general fiscal assistance to set general conditions binding on state and local governments beyond the specific conditions required for specific programs. It is the smorgasbord of programs, so often criticized by those who would reform the system, that gives American cooperative federalism its flexibility.
4. Finally, the system rests on a set of administrative *techniques* for collaboration, including regular intergovernmental consultation and negotiation, routinized legislative "interference" in program administration, and the development of new or revised programs on a cooperative basis.

FIGURE 6:   A Typology of Intergovernmental Political Relationships

Type of Political Relationship	Attitude of Actors	Actors and Levels of Decision-making	Scope of Participation	Nature of Bargaining	Nature of Administrative Guidelines
Joint Policy-making	Cordial and friendly	Bureaus	Functional hierarchies	Routine	Understood and accepted by all parties
Mutual Accommodation	Competitive	Bureaus, special interest groups, congressional sub-committees, aid coordinators	Subsystems	Negotiated bargaining	Flexible
Innovative Conflict	Manipulative-defensive	Department heads, special interest groups, congressional sub-committees and non-committee members, aid coordinators White House staff	Subsystems with "outside" interventions	Non-negotiated bargaining followed by negotiated bargaining	Less flexible
Disintegrative Conflict	Hostile	Department heads, special interest groups, congressional committees and delegations, local political actors, courts	Macro (System-wide)	Non-negotiated bargaining	Inflexible

The combination of these four requisites makes cooperative federalism viable in the United States.

While cooperative federalism has been a constant, the character of the federal system has shifted at various times in American history. Any proper theory of cooperative federalism must have a dynamic dimension; in other words, it must be able to track the sources of change in the system. Four basic internal sources of change can be identified: (i) increases or decreases in the velocity of government; (ii) the growing complexity and interconnections of government activities; (iii) the progressive routinization of administrative procedures; and (iv) shifts in the character of recruitment into political life. Taken together, the foregoing shape the relative importance of the several planes of government at any given time.

The basis for determining the character of federalism in any particular time is through an examination of the basic trends in American political life and the forms and fields of intergovernmental collaboration. With this general formula we can identify four principal periods, each two generations in length: the formative period (1789-1848); the era of national infrastructure development (1848-1913); the period of federal intervention (1913-1977); and a period beginning in 1977 whose character is not yet clear. Each responded to the basic economic, social, political, and intellectual trends in American life at the time, especially as shaped by the then-dominant frontier of development. Each developed its own forms of and devices for intergovernmental collaboration. Each emphasized certain specific fields of cooperative activity as principally important.

THE CONSTITUTIONAL BASIS OF AMERICAN FEDERALISM

So far, I have not emphasized the constitutional basis of American federalism, not because it is not important. On the contrary, one of the principal characteristics of the American system is its emphasis on constitutional design. One of the virtues of cooperative federalism as a theory is that it goes beyond simple concern with constitutional law to treat larger issues of constitutionalism and constitutional design.

A proper theory of cooperative federalism rests on the understanding that a constitution has three components: (i) the frame of government dealing with the governmental and political structure and component institutions; (ii) the socioeconomic distribution of power as reflected in the system of games and complexes; (iii) the moral basis of the constitution as reflected in the political culture and norms that shape the people's conception of justice. With this in mind, the theory addresses the problem of constitutionalism in a dynamic

system, including the role of institutions and structures as related to political behaviour, the problem of measuring constitutional change, and the differences between perception and reality. Cooperative federal theory understands that the American constitution consists of the federal and state constitutions together, that the federal constitution is incomplete without the state constitutions upon which it rests, and the latter are incomplete without the former.

The sources of American constitutionalism are to be found in the colonial charters, covenants, and constitutions, and the early state constitutions adopted at the time of the Revolution, as well as the Articles of Confederation which established the principle that the United States of America came into existence with independence and reflected the permanent federal linkage of the states. In the case of both the Articles and the Constitution of 1787, the motives of national constitution-making were to make a more perfect federal union. Both reflected the founders' understanding of this as coming about through necessary intergovernmental collaboration. The Articles of Confederation required such collaboration in order to function at all since the Confederation government could only operate through the states. To the extent that the Constitution of 1787 deliberately provided for direct connections between the federal government and the citizens of the United States, it introduced a dimension of dual federalism absent in the Articles. But since it provided that so many powers were to be cooperative or concurrent, that dual federalism should not be exaggerated.[29]

With regard to constitutional interpretation, cooperative federal theory notes several dimensions. In many cases the various branches of government simply apply the plain text, as for example, in the conduct of regular elections as specified in the U.S. and state constitutions which require no interpretation. Much of the Constitution is interpreted through the statutes enacted to translate constitutional provisions into ordinary law. While statutes can and are challenged by the courts, most legislation is not, and even where such challenges are made, they usually relate to some small part of the legislation at hand.

Most widely noted is judicial review or interpretation by the United States Supreme Court. Here it can be said that in most cases affecting federalism, the Court addresses the federalism issue only marginally, emphasizing instead other constitutional issues. Moreover, Court opinions tend to reflect abstract principles of law rather than accepted realities. That is both their strength and their weakness. To some extent courts other than the United States Supreme Court, are also involved in constitutional interpretation — state supreme courts certainly, especially in recent years. Third in line are federal appellate courts that bear much of the responsibility for giving tone to U.S. Supreme Court decisions.

Another source of constitutional development is through administrative interpretation. These ordinarily include presidential actions and executive orders, administrative rules and regulations. Most important are the ideas and actions of those I have elsewhere termed the architects of American federalism

— men like Albert Gallatin, John C. Calhoun, Abraham Lincoln, Franklin D. Roosevelt, and Lyndon B. Johnson who set long-term patterns for shaping American federalism and intergovernmental administration.

Finally, there is interpretation through popular understanding. Here would be included the struggle in intellectual circles between federalist and Jacobin understandings of the nature of democracy and popular government. Within the federalist camp, there is the struggle between Marshallian and Jeffersonian views of the proper role of the federal government. Every generation has its struggle between "strict constructionists" and "reformers." All of these have contributed to the development of what may be called "legitimate constitutional heresies." These include nullification and interposition on one side, and civil disobedience and protest on the other.

PERCEPTIONS OF THE FEDERAL SYSTEM

Any proper theory of cooperative federalism must also reckon with the perceptions of the system on the part of the general public, political and civic leaders, and disciplined observers. In the case of each of these groups, perceptions come in both abstract and concrete forms and the two are often contradictory. Thus among the general public there is an abstract perception of what Li'l Abner used to call "the gummint" out there without distinction as to plane or arena. On the other hand, there are concrete perceptions derived from political interest which are almost invariably developed under conditions of conflict. This leads to a perception of the system principally through a conflict model whereby individual governments may appear principally as separate entities striving for autonomy or blocking some worthwhile governmental activity.

The abstract perceptions of political and civic leaders tend to be more sophisticated but, at any given time, to be drawn from the currently conventional model. Thus in the days of dual federalism they perceived the system as one in which the federal and state governments each functioned within its own sphere with a minimum of contact and overlapping. Once the cooperative federalist model became the norm, they began to view the system as a marble cake in which there were no separations between the federal and state governments. When their concrete interests are involved, their perception tends to shift to one of intergovernmental interaction to a greater or lesser extent, depending on the nature of the issue and the degree and character of the interaction affecting it. Their involvement enables them to see this and also to see that the system has elements of both cooperation and conflict.

The disciplined observers were once drawn almost entirely from selected political leaders whose special abilities or interests led them to develop disciplined views of the federal system, such as James Madison, Gallatin, and Calhoun. Today this group generally consists of academics or quasi-academics

such as the senior staff of the Advisory Commission on Intergovernmental Relations. They tend to perceive the system as it is in light of their detached observations but these observations often rest on a conception of what the system ought to be, based on some normative theory explicit or implicit. Sometimes they confuse the two. Nor is there any guarantee that they accurately see the system as it is.

COOPERATIVE FEDERALISM AND THE FUTURE OF THE FEDERAL SYSTEM

Were cooperative federalism the simplistic theory its critics make it out to be, they would certainly be correct in suggesting that it is inadequate to explain the workings of a federal system. A more sophisticated understanding of cooperative federalism, however, shows it to be a dynamic theory that can take into account changes in the situation and resultant changes in political and administrative behaviour and constitutional interpretation. Any appropriate theory must be able to deal with the current problems affecting the system's structural integrity — even if these problems are exacerbated by the fact that most decisions affecting the structural integrity of the federal system do not make federalism their primary concern.

These current problems include: (i) constitutional interpretation, as in the case of the *Garcia* decision; (ii) legislative actions as in the case of federal statutory preemption of fields in which powers are otherwise concurrent; (iii) administrative actions, particularly in the form of administrative regulations restricting state and local activity; (iv) judicial action, principally in the form of judicial intervention into state governmental procedures and functions; (v) fiscal problems such as the removal of federal exemption of state and local municipal bonds; (vi) legal issues such as they expansion of federal jurisdiction, thereby transforming federal law from being interstitial to being dominant in an increasing number of areas.

Curiously enough, after cooperative federalism became the dominant theory, the question of separate and concurrent powers took a new turn leading to a new kind of dual federalism. Fields previously deemed to be concurrent were preempted by the federal government and reciprocal tax immunity was limited.

Where does this leave us with respect to the contemporary distribution of the great constitutional powers? In matters of commerce, the U.S. Supreme Court has abjured any role in determining the boundaries between the federal government and the states. Under present Court doctrine, Congress has plenary powers in matters of interstate commerce which have been extended to include essentially all commerce. More problematic, it has in many cases become a preemptive policy, preempting fields for the federal government even where Congress

has not indicated any indication to do so. This is a clear and undesirable shift from the policies that were dominant from the New Deal to the Great Society, and it moves the system to a kind of dual federalism. On the other hand, the changing situation of the United States on the world scene has led the states to become increasingly involved in matters of foreign commerce in barely anticipated ways. In summary, there seem to be few if any barriers to federal intervention in state affairs in matters of interstate commerce and there are progressively fewer limitations on state involvement in foreign commerce and economic development.

In the field of individual rights, the Warren Court inaugurated a period of protection of individual rights against all governments, grounded on a doctrine that closely resembled the substantive due process of the Fuller Court in matters of commerce. That absolutist position has been somewhat eroded in the past two decades but, by and large, the court still stands behind the restriction of all governments in matters interfering with individual freedom, even to the point of preventing the adoption of certain otherwise useful social policies on a collective basis. In this respect, one might say that neither the federal nor the state governments have the powers they once had, since those powers have flowed to the courts, particularly the United States Supreme Court.

With regard to the general welfare, after a generation and a half of federal dominance, a redistribution has been taking place in favour of the states as the federal government has lost the initiative. In part this was by public choice, reflecting a strong sense that federal initiatives had been wasteful and unsuccessful, and in part it came about through the more focused and deliberate efforts of President Reagan and his administration. While this could simply be a cyclical matter (the late 1970s and 1980s are parallel in the cycle of American politics to the late 1940s and 1950s when state and local activity was more important than federal activity in meeting new challenges), there are signs that it may be more far reaching, that, with the growth in the size and resources of the states and the excessive size of the federal government, the states may simply be more capable of responding to new challenges, provided they are not shackled and prevented from doing so. This indeed would be a sea-change in American government.

On the other hand, the adoption by the federal government of the practice of mandating the states and localities to undertake certain programs without funding represents a radical departure from previous limits on federal power. In the past, when the federal government sought to act in fields in which its authority was constitutionally ambiguous, it "bought into" programs through grants of various kinds. This need to provide funds acted as a brake on federal activity. The accepted ability to mandate removes that control. Whatever will happen in that regard, it seems to be inevitable that the basic federal-state-local relationship will continue to be cooperative. Ronald Reagan did his best to

reintroduce dual federalism of the kind he perceived (correctly or incorrectly) as operative in the towns of northwestern Illinois in his youth, when the nineteenth century was giving way to the twentieth. While he did succeed in reducing many of the coercive elements introduced by his immediate predecessors, the end result was to restore a more truly cooperative federalism than to separate functions as he had intended. This was no mean achievement. On the contrary, it has given new life to American federalism. It has also demonstrated the basic truth of the theory of cooperative federalism.

Today American cooperative federalism is again more like it was intended to be — namely a means for encouraging nationwide efforts to meet particular problems without national government dominance, the use of the federal government as a backstop for state efforts rather than making the states administrative arms of a dominant Washington. These indeed are the two great operative principles of a properly cooperative federalism.[30] As such, they should be encouraged since dual federalism does not seem to be achieveable except in limited ways.

Americans should develop a more sophisticated understanding of cooperative federalism, one that does not allow the call for cooperation to justify concentration of power in Washington or the employment of coercive measures by the federal government against states and localities. While empirically we can describe that as antagonistic or coerced cooperation, in normative terms it is not cooperation. Here we enter the realm of normative theory.

I said earlier that one can hold and develop a theory of cooperative federalism as a description of empirical reality while normatively endorsing something else. While that approach does not eliminate normative theory, it is different from a normative approach. On the other hand, one can accept cooperative federalism on normative grounds and build normative rules for intergovernmental collaboration.

These rules would include the maintenance of the four-fold elements of theory, structure, programs, and technique; the two principles of state initiative and federal backstopping; and perhaps most of all, the principle of federal self-restraint, especially where constitutional barriers have been lifted or substantially reduced by the courts. This includes presidential self-restraint in the face of the perennial demand for a politics of activism; congressional self-restraint in the competition for program control, and, above all, judicial self-restraint in the face of the tendency toward positivistic jurisprudence whereby judges believe that since people make laws to suit their interests, courts should make laws based on the principles they fancy. It is this lack of comity which most threatens federalism in the United States, not the existence of cooperative federalism.

Beyond that, a proper theory of cooperative federalism that can be used for normative as well as descriptive purposes must recognize the problem of

diversity in a nationalizing society and the social forces that shape political life. If the mass communications media are centralized, then it is very difficult to get public attention focused away from Washington, indeed away from the White House (except for the never-ending presidential campaigns). If the tendency in education, religion, commerce, and industry is toward consolidation, then the states may become even more important bulwarks against the concentration of power than in the past, but harder to maintain as such. These factors contributed greatly to bringing about the centralization which was a feature of the first two generations of the twentieth century.[31]

In the third generation, however, there seems to be a reversal or a shifting of all these trends, a decentralization of power, and a growing pluralism in every one of these areas. That pluralism, however, is less territorially based than it was in the eighteenth and nineteenth centuries. It consists more of layers upon layers or circles adjacent or overlapping with other circles within the same more densely populated territory.

In some cases, it is clear that what is happening is reinforcing federalist diversity. Thus, for example, the state of Vermont is no longer dominated by rock-ribbed Republican independents who use state government to maintain their own way of life. They have been replaced by equally independent left-liberal individuals who find Vermont congenial for the same political purpose, even if they desire a very different way of life. Certain states — California, Minnesota, Texas, and Virginia come to mind — seem to have that quality and to maintain it for generations on end. Others such as North Carolina and even New Jersey may have acquired it more recently. In each case, these states have made their peace with the new pluralism and have provided an environment for fostering and encouraging it. As such, they have become leading forces in shaping the governmental response to contemporary situations, all within a cooperative federalistic framework.

Along with the new pluralism is a new participation, a new desire on the part of the activist stratum in society to be involved in governmental decision-making in every arena. This new participation has led to everything from more active involvement in local affairs to an expanded use of constitutional-choice mechanisms in state affairs. These activists prefer to hold things in their hands, which probably is another force favouring present trends, especially since involvement in presidential politics has become a parallel form of national activism, but it is increasingly confined to a narrow segment of those just about to become voters or in their first decade of voting life, after which many are burned out.

All of this has led to a new academic and government interest in theories of public and constitutional choice to support new participation. Not surprisingly, there has been a growing integration of theories of cooperative federalism with those of public and constitutional choice for the mutual benefit of both. The

emerging synthesis is giving cooperative federalism a theoretical foundation and philosophic justification that it has never had in quite the same way, and which critics of cooperative federalism have hardly begun to perceive.

NOTES

1.   Edward S. Corwin, *The Twilight of the Supreme Court* (New Haven, CT: Yale University Press, 1934); *Commerce Power Versus States Rights* (Princeton: Princeton University Press, 1936); and "National-State Cooperation — Its Present Possibilities," *Yale Law Journal*, 46 (1937): 599-633.

2.   Austin Macdonald, *Federal Aid: A Study of the American Subsidy System,*(New York: Crowell, 1928); Mathias Orfield, *Federal Land Grants to the States With Special Reference to Minnesota* (Minneapolis: University of Minnesota Press, 1915); Social Science Research Council, *Recent Social Trends* (New York and London: McGraw-Hill Book Company, Inc., 1933), pp. 1274-1331.

3.   Jane Perry Clark, *The Rise of a New Federalism* (New York: Columbia University Press, 1938); V.O. Key, *The Administration Federal Grants to the States* (Chicago: Public Administration Service, 1937).

4.   See the series: *Intergovernmental Relations in the United States as Observed in Minnesota*, edited by William Anderson and Edward W. Weidner (Minneapolis: University of Minnesota Press). See especially William Anderson, *Intergovernmental Relations in Review* (Minneapolis: University of Minnesota Press, 1960). See also, William Anderson, *The Nation and the States: Rivals or Partners* (Minneapolis: University of Minnesota Press, 1955); and *Federalism and Intergovernmental Relations: A Budget of Suggestions for Research* (Chicago: Public Administration Service, 1946).

5.   Commission on Intergovernmental Relations, Washington, DC, June 20, 1955.

6.   Arthur MacMahon, ed., *Federalism Mature and Emergent* (Garden City, NY: Doubleday and Co., 1955).

7.   Commission on Government Organization, Washington, DC: U.S. Government Printing Office, 1949. The Federal System Appendix prepared by the Council for State Governments.

8.   The principal publications of the Workshop include Morton Grodzins, *The American System: A New View of Government in the United States*, edited by Daniel J. Elazar (Chicago: Rand McNally, 1966); Daniel J. Elazar, *The American Partnership: Intergovernmental Cooperation in the 19th Century United States* (Chicago: University of Chicago Press, 1962); and Daniel J. Elazar, R. Bruce Carrol, E. Lester Levine, and Douglas St. Angelo, eds., *Cooperation and Conflict* (Ithasca, IL: F.E. Peacock, 1969). The first of these volumes states the Grodzins thesis in full, documented and elaborated; the second examines the pre-1913 background; and the third includes, *inter alia* the results of the research of the other participants in the Workshop, mostly through articles based upon their doctoral dissertations.

9.   Morton Grodzins, "The Federal System," chapter 12 in *Goals for Americans*, the Report of the President's Commission on National Goals (New York: Prentice-

Hall, 1960), pp. 265-284; Nelson Rockefeller, *The Future of Federalism* (Cambridge, MA: Harvard University Press, 1962).

10. Orville L. Freeman, "Needed: A New Approach to Federal-State Relations," *New York Times Magazine*. (Index)

11. In a classic statement, republished as chapter 12 of *The American System* Grodzins explains why.

12. See Max Ways, "Creative Federalism in the Great Society," *Fortune*, January 1966, pp. 120-123ff. for an examination of Johnson's approach.

13. James Sundquist, *Making Federalism Work* (Washington:Brookings Institution, 1969).

14. Richard Leach, *American Federalism*, (New York: W.W. Norton and Company, Inc., 1970); Deil S. Wright, *Understanding Intergovernmental Relations (Second Edition)*, (Monterey CA: Brooks/Cole, 1982); Terry Sandford, *Storm Over the States* (New York: McGraw Hill, 1967).

15. Elazar, *The American Partnership*, pp.304-339; see also Daniel J. Elazar, "The Shaping of Intergovernmental Relations in the 20th Century," *Annals of the American Academy of Political and Social Science*, May (1965).

16. Daniel J. Elazar, *American Federalism: A View from the States*, 1st ed., (New York: Thomas Y. Crowell, 1966).

17. The president presented this theory in a paper co-authored with William Safire that was circulated early in his administration as "New Federalism Paper No. 1" under the classic pseudonym "Publius." It, and the three responses it drew were published in *Publius* 2(1) 1972.

18. See the following: A. Lee Fritschler and Morley Segal, "Intergovernmental Relations in Contemporary Political Science: Developing an Integrative Typology," *Publius*, 1, no. 2 (1972): 95-122; Arnold Rosenthal, "Bargaining Analysis in Intergovernmental Relations," *Publius* 10, no. 3 (1980), 45-76; Samuel Beer, "The Modernization of American Federalism," *Publius*, 3, no. 2 (1973): 49-96 and "Federalism, Nationalism, and Democracy for America," *American Political Science Review*, 72, (1978): 9-21; Richard P. Nathan, *Monitoring Revenue Sharing* (Washington, DC: The Brookings Institution, 1975); Thomas J. Acton, "Decay and Reconstruction in the Study of American Intergovernmental Relations," *Publius*, 15, no. 1 (1985): 65-99; Martin Landau, "Federalism, Redundancy and System-Reliability," *Publius*, 3, no. 2, (1973): 173-196 and "On the Use of Metaphor in Political Analysis," *Social Research* 28(1961): 331-53; Vincent Ostrom, "Can Federalism Make a Difference?" *Publius*, 3, no. 2 (1973):197-238; "The Study of Federalism at Work." Special issue of *Publius*, 4(4), (1974); "Operational Federalism: Organization for the Provision of Public Services in the American Federal System," *Public Choice*, 6(1969): 1-17; *A Political Theory of the Compound Republic* (Lincoln: University of Nebraska Press, 1972, 1987); Elinor Ostrom, "Size and Performance in a Federal System," *Publius*, 6, no. 2 (1976):33-74.

19. Parris N. Glendening and Mavis Mann Reeves, *Pragmatic Federalism: An Intergovernmental View of American Government* (Pacific Palisades: Palisades Publishers, 1977); Richard Leach, *American Federalism* (New York: W.W. Norton and Co., 1970); Michael D. Reagan, *The New Federalism* (New York: Oxford

University Press, 1972); William Riker, *Federalism: Origin, Operation, Signifi-cance* (Boston: Little Brown and Co., 1964); and David B. Walker, *Toward a Functioning Federalism* (Cambridge, MA: Winthrop Publishers, 1981); Michael N. Danielson, et al., *One Nation: So Many Governments* (Lexington, MA: Lexington Books, 1977); Deil S. Wright, *Understanding Intergovernmental Relations: Public Policy and Participants, Perspectives in Local, State and National Governments*, lst ed., (North Scituate, MA: Duxbury Press, 1978).

20. William H. Stewart, *Concepts of Federalism* (Lanham, MD: Center for the Study of Federalism and University Press of America, 1984).

21. Cf. Daniel J. Elazar, "Our Thoroughly Federal Constitution," in Robert Goldwin and William Schambra, eds., *How Federal Is the Constitution* (Washington: American Enterprise Institute, 1987).

22. On games and complexes, see Daniel J. Elazar, *American Federalism: A View from the States*, 3rd ed., (New York: Harper and Row, 1984).

23. On the matrix model, see Elazar, *American Federalism*; and Daniel J. Elazar, *Exploring Federalism* (University, AL: University of Alabama Press, 1987), where it is also contrasted with the other models.

24. On civil community, see Daniel J. Elazar, *Cities of the Prairie* (New York: Basic Books, 1970). On civil communities and civil societies, see Elazar, *American Federalism*, chapter 1.

25. Grodzins deals with this in great detail in *The American System*. While his research is now 30 years old, the picture he paints still stands, except in the case of the political parties where the weakening of the parties qua parties requires modification of his analysis.

26. The first comprehensive examination of the role of the states in foreign affairs was that of Denis Palumbo, "The States in the Conduct of American Foreign Relations," in Elazar et al., *Cooperation and Conflict*, pp. 377-387.

27. For a more recent analysis, see John Kincaid, *Political Culture, Public Policy and the American States* (Philadelphia, Institute for the Study of Human Issues, 1982) and Fritschler and Segal, "Intergovernmental Relations in Contemporary Political Science."

28. Rosenthal, "Bargaining Analysis in Intergovernmental Relations."

29. For a list of cooperative and concurrent powers in the constitution, see Elazar, *The American Partnership*, p. 309.

30. See Daniel J. Elazar, *Building Cities in America: Urbanization and Suburbanization in a Frontier Society* (Lanham, MD: Hamilton Press, Center for the Study of Federalism, 1987).

31. I deal with this at length in "Cursed by Bigness: Toward a Post-Technocratic Federalism," *Publius*, 3(2), 1973.

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A Final Word

Federalism has become a major issue in world affairs and consequently in political science, after many years of being ignored as a proper subject for political study except as intergovernmental relations in specifically federal systems, especially in the United States. Federalism should be understood both in its narrower sense as intergovernmental relations and in its larger sense as the combination of self-rule and shared rule through constitutionalized power sharing on a noncentralized basis.

FEDERALISM ON THE AGENDA

It is increasingly clear that federalism itself, to use a biological analogy, is a genus that includes several species.[1] One, *federation*, what most people today refer to as federalism, is the form of government invented by the founding fathers of the United States in the Constitution of 1787.[2] It establishes a common general government in which to form a polity, constituent units which both govern themselves and share a common constitutional government of the whole. Powers are delegated to the former by the people of all the units. Its dissolution can only come about through the consent of all or a majority of its constituent units. The general government has direct access to every citizen and supremacy in those areas in which it is granted authority.[3] Archetypical modern federations include the United States, Switzerland, and Canada.[4] A second, *confederation*, was the accepted form of federalism prior to 1787. In a

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confederation, the constituent units form a union but retain most sovereign and constituent powers. They establish and maintain continuous control over the general government which must work through them to reach the citizenry. The secession of individual units may be possible by prior constitutional agreement without general consent. Classic confederations include the Greek Achean League and the United Provinces of the Netherlands. The best modern example is the European Community, now Union.[5]

A third species is *federacy*, an asymmetrical relationship between a federated state and a large federate power, providing for potential union on the basis of the federated state maintaining greater internal autonomy by forgoing certain forms of participation in the governance of the federate power. In the United States this kind of arrangement is called "commonwealth." Both Puerto Rico and the Northern Marianas are federacies.[6]

A fourth species, *associated statehood,* is similar to federacy in the way that confederation is similar to federation. Both are equally asymmetrical but in associated statehood, the federate state is less bound to the federate power, and the constitution which binds them usually has provisions for the severance of ties between the two under certain specified conditions.[7] The United States has entered into associated state arrangements with the Federal States of Micronesia, the Marshall Islands, and Palau.

In addition, there are other quasi-federal arrangements that should be considered, for example: unions (e.g., the United Kingdom); leagues (the Association of Southeast Asian Nations); condominiums (Andorra with France and Spain); constitutional regionalization (e.g., Italy); and constitutional home rule (e.g., Japan).[8]

Each of these forms or some variant of them solves some specific problem of governance in the world in order to resolve problems of combining a common government for the whole with sufficient self-government for the parts, and/or to establish a system of power-sharing to advance democratic self-government of the whole or in the parts. In the twentieth century, beginning with the Russian Revolution, several totalitarian regimes embraced what they called federalism in an effort to consolidate their totalitarian rule while permitting the minimum necessary cultural autonomy to the various ethnic groups concentrated within their territory. In the years following, there was a debate among students of federalism as to whether federal arrangements in totalitarian systems could honestly claim to be considered federal. Some claimed that since federalism is essentially a device to enhance democratic republicanism and requires power-sharing, totalitarian systems with their inherent opposition to power-sharing cannot be honestly federal. Others argued that while this is generally true, the impact of federalism, even that intended to be window dressing, leads to providing a certain kind of institutional-constitutional strength to local ethno-

territorial interests enabling them to survive, at least on a limited basis. In the end, both were correct.[9]

Once their totalitarian regimes were abolished, the USSR, Czechoslovakia, and even the relatively benign Yugoslav federation dissolved. In two of the cases, the solution has involved bloody conflicts. At the same time, the results were new states founded on the previously established federal lines as each ethnic constituent unit asserted its sovereignty and independence. It is also true that in at least two of the three, alternate federal solutions will need to be found in order to establish or maintain peace.

What can be learned from all of this is that, in the last analysis, federalism is a matter of relationships. While embodied in constitutions and institutions, structures and functions, in the end it is the relationships that count.[10]

THE COMPARATIVE STUDY OF FEDERALISM

The expansion of the comparative study of federalism internationally was based upon the same reasons that make the comparative method attractive in other fields: (i) better self-knowledge; (ii) learning from others confronted with the same or similar issues or problems; (iii) the value and pleasure of sharing information for increased understanding; and (iv) common theory-building of the kind helpful to all scholars. Federalism as a subject has the great advantage of having built-in mechanisms for testing and evaluation: every good theoretical question must have a good practical dimension, and vice versa. While this may be true of other aspects of political science as well, both of these dimensions are utterly essential to the study of federalism. Federal theory must be validated through practical results, and every federal practice must meet certain theoretical requirements to be federal.[11]

Comparative work focuses on six principal areas: (i) theory (ii) institutions (iii) constitutions, including constitutional law (iv) foundings, i.e., the establishment or organization of federal systems; (v) functions, or intergovernmental relations and (vi) fiscal matters such as intergovernmental taxing and spending. To this one could add a sixth area of cases and issues. Profitable work has been undertaken in all of these areas and continues to be.[12]

Questions of theory and practice have been raised about: (i) the constitutions of federal systems, including the processes of constitutional design and self-organization that are at the heart of constituting federal polities; (ii) the institutional structure of federal systems and systems utilizing federal arrangements, especially including the forms and structures of the constituent units and of the general government in which the constituent units and their citizens have a share; (iii) issues of the sharing and division of powers or competences through the general and constituent governments or their representatives or surrogates;

(iv) the establishment and maintenance of separate institutions for the federal and constituent governments; (v) the particular combination of the processes of self-rule and shared rule and the institutional structures that encompass those processes, which may differ from political system to political system, but must be internally balanced in each case for federalism to be successful; (vi) the sharing and the division of fiscal powers and responsibilities, revenue raising, and expenditure and; (vii) differences between symmetrical and asymmetrical federal arrangements.

It is well known that no federal systems are identical; each has achieved its own equilibrium in division and sharing of powers. For example, in the English-speaking federal systems, major constitutional functions usually are carried out by separate institutions for each governmental arena, in contrast to the pattern in the German-speaking countries where grants of extensive powers to the general government are modified by normally requiring the administration of those powers by the institutions of the constituent units. This is one of the factors making it difficult to transplant institutions, devices, or procedures from one federal system to another without making substantial modifications to adapt them to a different system.

In addition, the kinds of overall balance or equilibrium sought differs between federations and confederations, symmetrical and asymmetrical federal arrangements, and other kinds of federal arrangements. In other words, a strong European Union is not the United States of Europe.[13] The first is a confederation, while the second is a federation, a very different order of business. At the same time, in the context of European political culture, a United States of Europe would be much more bureaucratic and executive-centred than the United States of America, a fact which should be a factor in deciding whether or not to transform the EU into a federation.

WHAT HAS BEEN LEARNED

What has been learned from the comparative study of federalism internationally? What is now the accepted body of knowledge in the field can be summarized as follows.

First, the existence of civil society is vital to the idea of federalism as attested to by the fact that modern federalism did not develop until the idea of civil society became the cornerstone of Western politics.[14] Civil society in this sense is a political and social order in which government frames society, but the two are fundamentally separated. Government is limited to the extent of the public realm. There is sufficient space for the private realm which is legitimate in its own right and is protected against undue government intervention. The result is limited government where individuals can pursue happiness for themselves

as they understand it. There is sufficient governmental power to handle those public matters which require potentially coercive intervention but even a large part of the public sector is organized by individuals coming together voluntarily to cooperate to achieve common ends. Civil society consists of individuals and their associations while federal civil society also involves those comprehensive associations serving the multiple arenas of larger and smaller size into which the civil society is divided. The most fully federal civil societies reject the idea of the reified state, instead government is conceived to be the most comprehensive of associations, but no more.

Second, the political theory of the English-speaking countries, and American federal theory in particular, has no concept of the state per se. The politically sovereign people (usually described as politically sovereign under God) compact with each other to form a body politic or a commonwealth, and then through the same compact or a subsidiary one establish various governments and allocate powers to them as the people see fit. No government is totally sovereign; it only possesses those powers delegated to it by the sovereign people, and governments can exist side-by-side on an overlapping basis or within different arenas formed by more comprehensive governments, though relations between and among them need to be organized along proper principles and practices of intergovernmental relations.

In continental European federal systems and those influenced by continental European political thought, the politically sovereign people establish their civil society by compact and also establish a "state" to serve them and their civil society. Their "state" is more separable from civil society in its structure than a comprehensive political association and it seems to be more centralized than a mere collection or congeries of governments. Still, it, too is intended to be an instrument subordinate to the sovereign people who established it.

In both cases, the result should be a polity organized as a matrix of governments serving larger and smaller arenas with the federal government serving as a framing institution of the largest arena of the civil society and the constituent governments framing and serving their own arenas within that framework. This matrix stands in contrast to the hierarchical model of the power pyramid in which the state stands above middle-and lower-level governments (or most frequently, "authorities," with the term "government" confined to the state alone as the expression of sovereign power in the civil society), and the people, who are, in effect, underneath the pyramid. Nor is the federal matrix based upon a single power centre surrounded by a periphery having greater or lesser connection with an influence on that centre, an oligarchical model.

Both the hierarchical and oligarchical models are "natural" in the sense that in the normal course of events, power will organize itself in pyramidal fashion or around a single centre and elites will gravitate toward power at the top of pyramids or toward power centres.[15] Federalism can be understood as a

constitutional means to intervene to prevent such hierarchies or centralization. Constitutional non-centralization, established through the use of federal principles and arrangements, uses the power of institutions deliberately established for the purpose to prevent or at least substantially awaken the impact of the "iron law or oligarchy." Identification and understanding of the possible forms of constitutional non-centralization in terms of what is possible and what actually exists, is one of the major concerns of the study of federalism.

One of the ways to conceptualize constitutional non-centralization as federation or confederation is by determining the power loadings within the matrix. In a federation the largest arena is also the most comprehensive and potentially the strongest, controlling those vital purposes that give the polity its shape; whereas in a confederation the principal constituent units hold the principal power loads and are the strongest for those purposes. Internally those constituent units may even resemble hierarchies or centre-periphery models by design, restricting the relative equality of the matrix to the relations between comprehensive institutions or for the local arenas in the overall matrix. Without the matrix, however, it is essentially impossible to speak of federalism in a meaningful way.[16]

Third, federalism is essentially a territorially based matrix.[17] While it may be augmented or strengthened by consociationalism or the recognition of other forms of non-territorial power sharing, all have had to find a proper territorial base. In modern times (as distinct from premodern tribal federalism), federalism in any other form has not lasted long. This may be because it is possible to establish lasting constitutional order for territories and the people in them, but it is not possible to do this on a non-territorial basis because it is very difficult to delimit the boundaries necessary for dividing and sharing power on internal lines.

Fourth, the entire territory of a polity must be federalized if a federal system is to succeed. Polities that establish autonomous territories even with real powers, for special minorities in parts of the country only, but otherwise retain total control over all remaining territories within the hands of the general government, generate a situation in which the specially-empowered regions are peripheralized. Where the general government must exercise both general and local powers, it is in a position to, not only frighten the federalized regions, but even to overpower them. In either case, the end result is likely to be conflict, especially since such arrangements are often used to accommodate those ethnic differences which are so dangerous to federalism in any case.

Division of the whole territory of a body politic into constituent units need not be exactly equal, but can be based on dispersed inequalities among the different units, as long as no single unit is so overweening or predominant to jeopardize or appear to jeopardize the integrity or powers of the others. Prussia in the German Federation of the Second Reich simply overwhelmed the other

states in the federation, even to the point of having Prussian institutions serve as federal ones. On the other hand, the United States with states as large as California and New York on one hand, and as small as Rhode Island on the other, with every variant in between, has possibly even benefitted from the dispersed inequalities as stabilizing elements when geography and political culture are factored in.

The equal division into territory can also exist with what might be called foralistic arrangements (after the Spanish *fuero*), or bilateral agreements between the general government and specific constituent units. Thus, contemporary Spain when it adopted its constitution of 1978 provided for the essence of a federal system by insisting upon the division of all of Spain into autonomous regional communities, and at the same time provided for the Basques and the Catalans, plus any other regional communities that wanted to (in the end that included the Galicians and the Andalusians), to negotiate their own governmental arrangements with Madrid to the extent of allocated regional government powers. Most of the other parts of the country chose to make do with the general division of powers established by the constitution and the organic laws enacted pursuant to it. In any case, every constituent unit had to have its own regional government with a minimum of real powers constitutionally allocated to it and protected.[18]

Fifth, all of these elements of constitutional design and institution-building introduced to resolve relatively complex systems of division and sharing of powers and authority will succeed only insofar as they serve populations with a supportive, or at least a congenial, political culture. The existence of a federal political culture is by now well accepted by students of comparative federalism, although its exact contents are still being explored.[19] It is clear that the most successful federal systems are those with the most supportive political cultures. Switzerland may have the most federal political culture of all; but one finds strong supportive elements in the other "classic" federations as well.[20]

If the political culture is not supportive, at the very least it must be sufficiently congenial to accept federal constitutional-institutional arrangements and relationships, and to make them work. If the political culture is sufficiently neutral, or if the variety of political cultures within a potential federal entity eventually balance one another, it may be possible to achieve some kind of federal arrangement. But if the political culture is hostile, the possibilities for federalism in any form are greatly diminished.[21]

Sixth, the existence of a will to federate is vital.[22] In the best of circumstances, the political culture itself produces the will to federate. In some cases, the will to federate may have developed as a result of the circumstances, despite the political culture. In the first situation, the possibilities for the successful use of federal principles are much enhanced, though in the second, the will to

federate may serve as a counterbalance to a negative political cultural environment.

Seventh, all federal systems and arrangements in order to work, must be built in a manner that ensures broad-based consent. Federal systems are normally established around the consent of the people in a number of polities to establish common framing institutions, usually through a comprehensive "package" known as a constitution. Once established, most federal systems can incorporate new constituent units through some established constitutional procedure. In some of the old-style confederations involving pre-existing independent polities, it was more likely that all members were involved from the outset. In only a few cases were members added afterwards. But others, and most especially new-style confederations, have been built on networks of agreements rather than any single coming together. This is true of the European Union and the West Indies, for example. It was also true of the medieval and early modern founding of Switzerland, which in the nineteenth century transformed its confederation based on a network of agreements into a federation through a new constitutional package.[23] The European Union may or may not be moving in the same direction, though to date its policy of using a network of agreements seems to be successful, if confederation or the equivalent is its goal.

Eighth, every federal system, to be successful, must develop an appropriate balance between cooperation and competition among the general government and the constituent units.[24] This includes the appropriate combination of separate structures with cooperative functional relations, a jurisprudence and administrative culture based on comity, and open bargaining. In American terms, it can be said that there is need for both a measure of dual and cooperative federalism through which governments can work together to achieve necessary common ends. At the same time, unless each government can retain its own decision-making capacity and the freedom to say no, then this "cooperation" becomes a mask for coercion by the federal government. We have seen a number of examples of this, such as the institution of a more hierarchical legal-administrative system in Austria, through federal acquisition of very broad taxation powers from the states and its manipulation of those powers through the Grants Commission in Australia or in India through the extensive use of president's rule, to name only three examples.[25]

Ninth, discussions of federations often focus on differences between separation of powers and parliamentary systems, particularly those of the Westminster variety. Constitutional courts have been particularly important in separation-of-powers systems along with intergovernmental administrative cooperation; whereas in parliamentary systems, the emergence of collegial bodies of first ministers, attorneys general, or whatever, as informal but critical decision-making mechanisms has been pronounced.[26] While both kinds of systems use both mechanisms (in twentieth-century parliamentary systems, the executives

have come to control the legislatures more thoroughly and are clearly able to speak for the latter through their legislative majorities), the collegial groups can actually speak in the names of their respective polities and arrive at decisions unless challenged by extraparliamentary sources. (Actually this has been the case with regard to constitutional issues in Canada.) In separation-of-powers systems, executives cannot bind legislatures, hence such systems are less congenial to the use of collegial bodies except for technical decisions, while constitutional courts will tend to favour the framing institution unless the courts themselves have representation from the constituent units.

Separation-of-powers systems in particular rely on written comprehensive constitutions, adopted by consent, and in which constitutional issues are adjudicable (although parliamentary systems have been moving in that direction). English-speaking federal systems generally rely upon constitutional documents with substantial flexibility, while German-speaking federal systems require constitutional documents with more precision and less room for informal change through interpretation. The latter are longer and formally amended more frequently than the former.

FORCES OPPOSING FEDERALISM

Recent studies have also led us to a better understanding of the forces opposing federalism on behalf of centralization and those seeking fragmentation. Jacobin, totalitarian, and managerial approaches fall in the first category. Jacobinism transforms egalitarianism in such radical ways that no deviations are deemed truly acceptable, and only the most minor even allowable, while the idea that power-sharing is legitimate runs contrary to totalitarian principles. Administrative hierarchies tend to work against federalism in more limited ways. They are in principle non-ideological, but they too, have given birth to an ideology, that of managerialism, which has, on the whole, worked against federal non-centralization and power-sharing. In general, during the first two-thirds of the twentieth century, the consolidationist trends in society made the maintenance of federalism more difficult.

In the second category, ethnic nationalism is probably the strongest force against federalism. Federalism has become a very popular "solution" for problems of ethnic conflict in public discourse. In fact, ethnic federations are among the most difficult of all to sustain and are least likely to survive because constituent units based on ethnic nationalisms normally do not want to merge into the kind of tight-knit units necessary for federation. It may be that confederations of ethnic states have a better chance of success. Ethnic federations run the risk of civil war, while ethnic confederations run the risk of secession. The

management of ethnic nationalism is both the most common and the most difficult reasons for federalism today.

Ethnic nationalism is the most egocentric of all nationalisms, and the most difficult basis on which to erect a system of constitutionalized power-sharing; the essence of federalism. Federal theory calls for nationalism on the basis of consent whatever its demographic content, consent which allows both for the division and sharing of powers. Most of today's nationalisms, on the other hand, emphasize those things that separate peoples: language, religion, national myths, or whatever. In reality, successful multi-ethnic federal systems are those in which there is at least a certain level of divergence between the constituent units and the ethnic divisions. The kind of nationalism that fits with federalism is a kind that is formulated through the covenanting or consent of publics of individuals, and is then embodied in appropriate constitutional documents demarcating the federal system and its constituent units.

In general, nineteenth-century style ethnic nationalism tends to subordinate all free government to its uncompromising position. Federalism is a democratic middle way requiring negotiation and compromise. All aspects of society fostering uncompromising positions make federalism more difficult, if not impossible.

Many of the expectations for the use of federal principles and arrangements, while ostensibly logical, are all too often illusory. Still, at no time in history have federal principles and arrangements been as widely and successfully used as in our times. Federalism has had a tendency to attract adherents who are searching for panaceas. But federal principles, arrangements, and practices, like those of democracy itself, applied however imperfectly, often have strengthened the forces of peace and democracy in the world. The comparative study of federalism should be undertaken in that light.

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