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The Soviet Union: Federation or Empire?

Tania Raffass



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The Soviet Union is often characterised as nominally a federation, but really an empire, liable to break up when individual federal units, which were allegedly really subordinate colonial units, sought independence. This book questions this interpretation, revisiting the theory of federation, and discussing actual examples of federations such as the United States, arguing that many federal unions, including the United States, are really centralised polities. It also discusses the nature of empires, nations and how they relate to nation states and empires, and the right of secession, highlighting the importance of the fact that this was written into the Soviet constitution. It examines the attitude of successive Soviet leaders towards nationalities, and the changing attitudes of nationalists towards the Soviet Union. Overall, it demonstrates that the Soviet attitude to nationalities and federal units was complicated, wrestling, in a similar way to many other states, with difficult questions of how ethno-cultural justice can best be delivered in a political unit which is bigger than the national state.

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Introduction

It is a well-entrenched view that the Soviet Union was not a real federation. Epithets such as ‘merely formal’, ‘nominal’, ‘ostentatious’, and the like have made a regular occurrence whenever the Soviet or other two socialist federations are mentioned; see the entries for ‘pseudo’ and ‘sham’ in the dictionary of federalism descriptors.¹ Duchacek characterised ethnic representation in Soviet federalism as a ‘constitutional hallucinogen’.² Raymond Pearson’s chapter can be cited as particularly rich in such rhetoric, as ‘Potemkin village’, ‘cosmetic face’, etc., to the extent that in one short piece he appears to have exhausted the whole range of vocabulary that can serve the purpose.³ Jack F. Matlock’s ‘autopsy’ is also heavy on the hypocrisy theme;⁴ as he puts it, the ‘borders of republics and other entities were like decorative lines on the surface of a concrete slab, there for appearance but with no structural function’.⁵ A few of more recent quotes show that this tendency is still common:

The outward display of federal structures was just a thin veneer that masked a highly centralised state...⁶ The Soviet Union was formally a federation of sovereign, ethnically designated republics that was in reality a centralised dictatorship.⁷ A multi-ethnic, multilingual entity, composed of 15 ‘autonomous’ republics (sic) and numerous sub-units within them, the Soviet Union was in all but name an empire, held together by powerful central institutions, pressure for ideological conformity and the threat of force.⁸ [A] huge gap separated [Soviet] constitutional prescription and political practice, giving rise to a sort of fictive or sham federalism...[it was] more pretence than a reality.⁹

If not a federation, what was it? The usual answer is that the USSR was ‘really an empire [‘not a multinational state’], the last left on earth’, and its dissolution ‘spells the end of the imperial era of European history’.¹⁰ Alexander J. Motyl has prominently promoted the concept of empire as ‘especially suitable’ for analysing the Soviet Union. He claims that ‘the self-assertion of the republics cannot be explained only in terms of state-society relations’ and that they have their origins in ‘the dynamics of empire in general’.¹¹ His interpretation also distances the

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Soviet Union as an empire from 'more cohesive competitors' that are 'more or less coherent nation-states or multiethnic states'.¹²

This book addresses such perceptions and offers a revision of the relationship between the concepts of empire, federation and nation-state as it has been frequently conceived in the context of Soviet studies. It is strictly the internal condition of the USSR or its typological nature that is the subject of this analysis. I have no objections to the expression 'Soviet empire' when used as an equivalent to 'power', 'order' or 'civilisation'. The expression is also frequently used to describe the relationship between the USSR and its satellites in Eastern Europe. This relationship will be outside of consideration in this book, which enquires into the forms of statehood rather than international relations.

The demise of the Soviet Union has been in many cases interpreted as a foreseeable outcome of malintegration stemming, firstly, from the character of its political regime and, secondly, from the diverse ethnic composition of the population. In other words, analysts who predicted such an outcome appear to have been confirmed in their estimation that the levels of legitimacy were insufficient to expect a continued existence of the USSR both as a single territorial unit and as a political system. It has been inferred from the dissolution of the USSR that the system was not rooted in and had failed to inculcate a sense of shared identity and solidarity, i.e. to produce a Soviet nation or nationality, nor was it cemented by consent as a civic nation¹³ – 'empire' being the shorthand for the dual lacking. My intention is to disprove that the conflict arising out of cultural-territorial politics is related to some aberrant condition called 'empire', for which the liberal condition is the antidote. The fact that liberal democracies have been confronting the same quandaries that the Soviet Union is said to have failed to resolve, because it was illiberal, allows us to relativise and contest the tenability of the dichotomy between empire, on the one hand, and federation and nation-state, on the other.

What was distinctive about the USSR? How did its institutions and policies distinguish it from other states, unitary and federal? Was this distinctiveness imperial? I approach the task of answering these questions through a broadly comparative study. It is wide-ranging both in historical and geographical terms, involving juxtapositions between the founding of American and Soviet unions and the ideational underpinnings of both, the structure of the socialist federations and the ethno-federal restructuring in a number of Western European countries, the crises of territorial integrity in the American federation and the end of the USSR, the continental expansions of the two powers in North America and Eurasia, as well as the histories of national consolidation in other leading countries of the West. These various comparisons serve to put in question normative theories of federalism and nationalism that have sustained the imperial interpretations of the USSR that are under challenge here. In terms of methodology, this is an interpretive study, based both on primary sources and secondary research.

Some clarifications about the versatility and ambivalence of federalism will be a helpful preliminary to the forthcoming argument about its relationships with the traditional (land) empire and nationalism. Federalism is an extremely

heterogeneous body of belief and practice. An old and ramified body of programmatic orientations, it can alternately emphasise centralisation-cum-unity, decentralisation-cum-liberty, or a balance between both. Correspondingly, the ideology of federalism cuts both ways as it can be deployed to promote integrative as well as disintegrative processes in the states-system.¹⁴ In the first case, federalism is practically indistinguishable in motive (maybe less in rhetoric) from nationalism or imperialism, as it seeks an enlarged political and economic framework for the benefits of security, weight in world politics, and a larger market. Examples of unifying federalist movements are the original American federalism, the German unification of 1871, the twentieth century European federalism and its numerous antecedents.¹⁵ Such projects aiming at the unification of a nation, region, continent or the world have been known to emerge in periods of exacerbated geopolitical competition, especially after or in anticipation of war.¹⁶

In contrast, the impulse for the federal reforms within Western national states in the 1970s–80s¹⁷ did not come from security concerns, and they were not aimed at enlargement, but rather were a consequence of sub-state nationalism, and aimed at a loosening of the existing state structures.¹⁸ Thus, it makes sense to distinguish terminologically between ‘synthetic’ federalism, which merges several smaller political entities that retain some of their prerogatives in the new state framework, and ‘analytical’ federalism to refer to the attempts to establish such prerogatives in formerly unitary states.¹⁹ It has been observed that Soviet federation-building involved both analytical and synthetic elements,²⁰ complicated by nationality policies. It was analytical in the sense that the bulk of Russia that had been previously a unitary empire²¹ was partitioned with new internal borders according to the ethno-national principle, and at the same time it was synthetic in reintegrating most of the territories, detached in the course of the revolution and the ensuing civil war. While central to the Soviet founding, protection of ethnic minorities from assimilation and their cultural development as well as socio-economic equalisation with the majority was not at all a concern of the American Founders. Classical republican federalism does not provide for the political recognition of ethno-cultural difference. The multinational layout and the ‘ethnophilic’²² ethos of the Soviet federal model had no precedent.²³ Contrary to their reputation as multinational federations, Switzerland and Canada have not been structured to separately represent constituent nations at the central government. To forestall misconception about the intended argument, in acknowledging this fact, the intention is not to bestow the laurels of primogeniture. Rather, highlighting the structural and ideational uniqueness of the socialist federations is meant to advance my claim that the lack of political liberalism had little to do with their dissolution as it is often presumed. Nor should the argument here be taken to imply endorsement of either of the alternative integrative technologies. I am sceptical about the promises of indestructible union made on behalf of any strategy of integration, believing that they work – none better than the other – as long as the wider global circumstances allow them to. Thus, the basic intent is to reveal the limitations of integrative strategies and the provisional character of political integration *per se*.

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There is a further heterogeneity to analytical federalism, as it may be underpinned by ethno-nationalism or inspired by pacifist, communitarian and libertarian convictions. Ethno-nationalists, arguably, can be said to belong to the statist category of federalism, since they are interested in federal structures as a springboard for independence, but when the goal is achieved, they resist calls for federal reforms coming from internal minorities. The second group, on the other hand, is sharply hostile to nationalist agendas and characterised by utopian radicalism. This brings us to the related second point of ambivalence that typically eludes recent advocates of federalism. When promoting it, they use the same term for two phenomena that are non-identical and even antithetical. American historical federalism refers to the privileged constitutional status of the pre-existent founding communities and the associated doctrine protecting the rights of such communities that are derived from their prior sovereignty against the incursions of the federal superstructure. Its origination is international, inter-sovereign.²⁴ On the other hand, there is the radical democratic kind of federalism as a resistance against disempowerment of smaller units or the dismantlement of political structures above the communal level if they are already in place. Thus, Briffault argues that federalism, where the referent is the residually sovereign entities, such as the states in the American context, and federalism as decentralisation or ‘localism’ are not to be spliced together, since ‘the diffusion of power down to the grass roots is not quite the same thing as the creation of multiple [quasi-sovereign] centres of power’.²⁵ Such conflation is unwarranted as it obfuscates the existence of antagonism in the state–local relations, similar to that which exists in the federal–state relations. Subfederal and local autonomy are not the same thing: from the perspective of localities, the state centre may appear no less ‘remote and opaque’ than the federal centre from the state perspective, and strengthening of the state autonomy does not necessarily boost local autonomy.²⁶ In relation to ethnic secessionism as an endpoint of analytical federalism, the usefulness of the distinction Briffault brings out is, in my view, that it stops one from seeing the case of a nationalist state-builder as necessarily the case of a grass-roots democrat, the tendency that has found expression in the common claim that the ‘freeing of the captive nations’ from the USSR was an imperative step towards democracy. The partition of larger states into smaller ones does not automatically lead to the enhancement of grass-roots democracy.

Finally, federalist convictions cannot be said to belong exclusively to either side of the political spectrum: both socialist and conservative thought have been divided between support and opposition to federalism.²⁷ In France, for example, such dissimilar political movements of various epochs as Girondins, Parisian Communards and Maurrassian integral nationalists all espoused federalism, with their divergent rationales and competing sets of values.²⁸ I compare rationales and values that were involved in the Soviet and Western federation-building.

The book is organised in four parts. Having traditionally served as a yardstick against which the authenticity of Soviet federalism was denied, the USA will be therefore the main case study in my comparative framework. In the chapter ‘The original federation’, which covers the American founding era, I contend that

contrary to its reputation in the context of Soviet studies, it was a centralising project. In the next chapter, I subject to an extended critique the exceptionalist theory of American federalism and of the American federation as a ‘noncentralised matrix’, as articulated by a major figure in the comparative studies of federalism, Daniel J. Elazar. I then switch to the Soviet case, describing the process of establishing the Union. ‘The roots of the Soviet federation’ addresses the pervasive emphasis in the literature on the violent beginnings of the USSR as a factor that presumably nullified its federality and precluded its sustained viability. By dispelling the myth of consensual origins of the archetypical Western federations, I attempt to show that this criterion fails to set the USSR apart from them. Secondly, in my outline of the Bolshevik doctrine of federalism in the same chapter, I stress that the Bolsheviks followed the American model precisely because of its perceived centralism.

In the second part of the book, the chapter ‘The American federation and secession’ draws attention to the genetic connection between the British Empire in its pluralistic conception, which was also a pattern common to all medieval and early modern Europe, and the dual sovereignty model of the future American federation. Even though the Founders have been often praised for anchoring the new polity in popular consent and therefore allegedly making it capable of self-perpetuation through the same, a survey of the antebellum period contained in the chapter shows that the federal integration had been exceedingly brittle until the union was centralised more securely through war. I also highlight the fact, which seems to be forgotten, that despite the liberal character of its governing regime, the paradigmatic modern federation was the first one to be recast as an empire by the opponents of American centralism. The chapter that follows is dedicated to showing that secession is the obverse side of federation. Given the description of federation as a voluntary union, whereby constituent parties do not relinquish their political existence, they appear to be entitled to discontinue their membership at any time as of right. Turning to the Soviet case again, the right to secede in the Soviet Constitution has been habitually dismissed as deception without much effort to elucidate why a regime that was successful in achieving its goals with coercive means would consider its inclusion necessary at all. ‘Secession as a constitutional right in the USSR’ will shed some light on the context of its introduction as a purported integrative mechanism. The chapter then traces the terminal period of the union-state, and looks into what informed the decisions of those who disestablished the state after the seven decades of its run. An analysis of these brings out the crucial implications of the constitutional clause in question.

The third part focuses on polyethnicity management in Western liberal democracies and the implications of the constitutional differences in the Soviet and Western models of multinational federalism. Detailing the extent of ethno-federal reformism in the West, I argue that none of the older confederations or newly reformed states exhibits radical features of the kind that the extinct socialist federations possessed. The three socialist federations were uniquely designed to fissure – unlike the Western states in question, none of which has supplied its

ethnic groups with institutional opportunities to consolidate for instant statehood. Therefore, their continued existence may owe more to their conservative constitutions than to their inherently greater legitimacy. Next, I revert to the prescriptive theory of federalism and consociationalism to complete the dissection of the dichotomy between federation and empire. While in the first part I discuss the republican-democratic idea of federal polity that emphasises grass-roots self-governance without reference to culture, here my focus will be on the alleged merits of federation with respect of achieving ethno-nationalist aspirations and thus averting separatism. Although these two lines have been conflated in analyses of the Soviet Union, this study attempts to disentangle them. The concluding chapter surveys the Soviet nationalities policies and their evolution over time, shifting focus to the issues of nationalism, continued in the fourth part.

The purpose of the first chapter in the last part, 'The Soviet state as viewed by nationalists', is to review and assess the claims that the Soviet territorial jurisdiction was doomed to fragmentation more than any other modern state, implied in the 'last empire' cliché. I engage in particular with liberal nationalism, an intellectual current that privileges the ethno-cultural community as the locus of moral life and the basis of solid political integration in a liberal democracy. My critical effort here is centred on the related view that the decomposition of the USSR into 'true' nation-states was required for their liberalisation. I contend that the liberal-nationalist doctrine fails to provide a valid normative foundation for the congruence of political and cultural borders, and therefore to de-legitimise the Soviet state from a liberal perspective. While it is possible to mount a liberal critique of the one-party regime, it is impossible with respect to the territorial state and the history of its creation. Attention in the last two chapters of this study turns towards Russian and then Soviet imperialism. In the chapter 'On Russia's 'stunted nationhood'', I investigate the claims that empire-building of the land-based type has disrupted the normal formation of the Russian national identity and perverted the course of Russian political development. I challenge the thesis that transoceanic Occidental empires were built by established nation-states, whereas in Russia the processes of nation and empire formation were conflated. Through a series of comparisons, I show that nation-building was the obverse side of empire-building across modern Europe. I refute the view that Russia had a particularly strong indigenous tradition of imperialism, incompatible with national consciousness, and that it is a relevant factor in explaining Russia's 'deviant' course in the twentieth century. Switching to the Soviet era in the last chapter, I evaluate various approaches to construing the USSR as an empire and find them all flawed.

Part 1

1 The original federation

The present and next chapters scrutinise the orthodox assertions that federal conditions enhance personal and corporate liberty. To this end, they closely examine American federalism. The paradigmatic character of the American Union is the reason for looking in some detail at its history. Subsequent federation builders looked up to the USA as a model to imitate,¹ and constitutionalists of the late nineteenth century onwards have portrayed the US government as the embodiment of the federal principle.² As such, the American federation has been, explicitly or implicitly, the benchmark against which most outside observers would find the federation designed by the Bolsheviks wanting. Hence, it is expected here that the process of examining American federalism will help elucidate the reasons for such non-recognition of the USSR's federality.

'Federalism' is frequently used to refer to the American political history and governing institutions or even the entire identity of the United States.³ On a more narrow reading, it refers to the areal division of jurisdiction between two tiers of government, also known as 'territorial democracy', which is one component in the set of 'checks and balances' that define the American regime. Although dual federalism is usually presumed to be integral to that regime, an examination of the establishment and development of the American Constitution suggests that it is not. In this and the next chapter, I intend to show that it was a nonessential component at founding, and that the subsequent history has confirmed the prognostications of the antifederalists at the time about its transience in the process of the maturation of the system towards complete unification. Elazar's claim that 'the American founders recognised that simple republicanism was not enough, that was required was a compound republic, what we today call a federal system'⁴ is hardly accurate. Neither party at the convention desired the compound republic, and the admixture of the federal features to the national constitution, not really desirable in the eyes of Publius, was what just happened to be achievable under the given split of opinions at the convention. This improvised solution, perceived with disappointment initially, was only gradually accepted as a potentially durable formula that eventually congealed into a new orthodoxy.

Simultaneously, this is a critique of the prescriptive theory of federalism. Federal arrangements have been championed on the grounds that they empower the people as individuals and as members of territorially based communities.

As we shall see, however, the specific interests and intentions of the original federation builders did not match the current ideals of federalism in either respect. On the one hand, the federal Constitution did not aim at all at increasing the ability of ordinary people to influence government. On the other hand, far from creating protections for subnational units, the Framers strove to overcome the prerogatives of the states, which they regarded as a nuisance. States' rights and intimate government were the platform of the defeated side in the constitutional confrontation, twice defeated – the second time on the battlefield in the mid-nineteenth century. The latter aspect is pursued separately in [Chapter 4](#). In this chapter, I am taking issue with the view as presented in the quotation below.

The constituent units of the federation are not mere local authorities subordinate to a dominant, overarching central power as we would expect to find in a unitary state... On the contrary, they themselves are states with state rights.⁵

This belief originates in the federalist advocacies of the Constitution, and it appears to underpin the constructions of the USSR as an empire. The Soviet republics on such constructions were sovereign only on paper, and that is not how a 'real' federation should have been. Here is a typical summation of Soviet federalism running along these lines:

Lenin's federal formula, which thereafter became known as the Leninist nationality policy, was a brilliant move at the time. It disarmed national tensions, offered a seemingly valid justification for the rejection of separatism and created the image of a voluntary federation. But in fact it was neither voluntary nor a federation. Instead, it instituted a centralised unitary state that carried the seeds of its own destruction because it gave the component nations and nationalities the forms, but not the substance, of national existence and political power.⁶

Nationality policy was something entirely peculiar to Soviet federalism and absent from the American prototype, a theme attended to in other chapters. Here it will be argued that the rights of the subfederal units in the archetypal federation do not represent a foil to those in the Soviet Union. Moreover, the charge that the federal constitution leaves 'the form but not the substance' of independence to the states was originally levelled at the American federation itself.⁷

In what follows, I shall consider what inspired the foundation of the North American Union and what characterised its subsequent permutation. On the basis of the historical survey and the structural analysis of the national–state relations in the US, I shall then endeavour to challenge the normative interpretation of federation as a distinct form of territorial-political organisation that unlike its unitary or imperial forms does not involve hierarchy. The normative theory can account neither for the founding of the first federation, nor for its operation.

In that sense, the interpretation offered here upholds Preston T. King's claim that 'the doctrine of federalism conflicts with the fact of federation'.⁸

The foundational controversy around the form of the Union

At the time of the Philadelphia Convention in 1787–8, the words 'federation' and 'confederation' were synonyms, and long after the event, throughout the eighteenth and nineteenth centuries, they continued to be interchanged in the Anglo-American and French usage.⁹ The US founders viewed the end product of the convention as a middle ground between two principles – federal and national – and emphasised that there was no name for it, but with time it has ceased to be thought of as a composite and acquired the status of a separate basic state-building form, alternative to the nation-state. This eventually led to the differentiation between the two terms and to the entrenchment in the literature by the late nineteenth century of the tripartite continuum of political integration: 'unitary-federal-confederal'.¹⁰ Effectively, what happened in American history was that the federal idea was brought from the area of international relations over to the area of state organisation; in other words, the internal federalism of a territorial state emerged, while confederation remained a category of international relations.¹¹

The Articles of Confederation had been in operation on a provisional basis since their adoption in 1777, and legally in force upon the completion of the dragged-out ratification process in 1781. This nearly a decade of experience sufficed to cause a sentiment of dissatisfaction that was strong enough to occasion a constitutional revision.¹² The drafters at Philadelphia were divided in their understanding of how far-reaching the constitutional alterations should be. Liberal nationalists (the Federalist party) pushed for consolidation. The adherents of 'American Whiggism' (the Antifederalist party) defended the existing arrangements as optimal to liberty. They were alarmed by the shift in priorities from the preoccupation with liberty as the end of government during the war for independence to the preoccupation with the international grandeur of America, manifest in the thinking of *The Federalist*.¹³ They questioned the federalists' commitment to republicanism, and feared that their aspirations for national glory would bring back the yoke of centralised aristocratic authority that had been overthrown in the Revolution.

Antifederalists believed that the survival of freedom in America depended on the survival of the smaller sovereign communities. They reasoned that in such polities, citizens abide by the laws voluntarily, because they create them for themselves, thus making force in the organisation and maintenance of order redundant. As their officials are selected from among themselves and for short terms, they cannot develop interests separate from those of the community.¹⁴ The delegation of governmental responsibilities away from the locality and from the persons of the citizens, even if the distant government might deliver services more efficiently, antifederalists argued, would lead to the relaxation of civic vigilance and eventually the atrophy of the capacity for self-rule. Hence, participation

was crucial regardless of the instrumental quality of the outcomes, and the professionalisation of the political and military metiers was to be resisted. Although appreciative of private enterprise, antifederalists were apprehensive of large-scale commercialism that would lead to gross inequality, elevating few above many, and stimulating lust for luxury, power, and self-aggrandisement – vices corrosive of the civic health. Some of them also believed that not only social, but also cultural homogeneity was prerequisite for civic accord, and therefore objected to the naturalisation of foreigners. Finally, more writers among antifederalists accorded value to Protestantism as a cohesive force in a republic as opposed to federalists, who were indifferent to the public function of religion.

Federalists, on the contrary, valued efficiency over participation, saw small communities as oppressive of minorities, and dismissed at best as utopian the desires of their opponents to preserve pastoral simplicity, social homogeneity and participatory government or at worst their ‘zeal for the right of the people’ as masking ‘the obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold under the State establishments’.¹⁵ They were anxious to put the United States on the map of world politics as a match to the great commercial nations of Europe, not a contemptible collection of petty, feuding, and backwardly agrarian commonwealths. In the eyes of the antifederalists, the survival of liberty depended on the survival of the states. Contrariwise, the federalists maintained that national integration would help preserve liberty. Thus, the pivotal issue in the wrangling at the convention and later in wider society was whether the Union ought to remain one between states-as-communities or to be transformed into a union between individuals.¹⁶

As a basic step towards understanding the debate, I shall need to elucidate the designation of ‘federal system’ or ‘confederacy’ at the time of founding. It was typically known to have three features: the confederal centre was not an organ of government in the sense that it could not apply coercion either to member-states, or their individual citizens; the functions of the confederation were narrowly limited to serving mutual interests of its members with respect of outside security threats, and did not extend to the management of internal affairs of the members, which remained the exclusive purview of the latter; because it was not a governing body, decisions became binding on the sovereign members only through their consent and, as a corollary, collective decision-making needed to be unanimous.¹⁷ Let us now examine why the federalists rejected the Articles.

Under the Articles, Publius¹⁸ argued, the lack of a political centre with mechanisms to enforce its decisions made the American union fragile internally, as there was no means to restrain infighting between the states.¹⁹ The obligation of good faith that binds confederates will not stand to test, given the flawed human nature, Publius reasoned, and it is to be expected that federal pledges will be reneged under the spurs of self-seeking temptations.²⁰ Anticipating the contemporary institutional analysis of federal structures as creating incentives and facilitating secessionism, Publius wrote that state leaders were natural enemies of the united authority. The republican character of the states did not change that,

and in contravention of the democratic peace thesis, Hamilton denied that commercial republics were less aggressive than aristocratic monarchies. He warned that economic rivalry, disagreements over the distribution of the federal debt and competing claims to Western territories were bound to lead to wars between the states.²¹

As there was no firmly united front of diplomacy and no single foreign policy, states were ever tempted to collude separately with foreign powers against other members of the Confederation. It was easy for foreign potentates, always eager to exploit inter-state rivalries to their advantage, to meddle in the relations between the confederates, further fuelling the internal discord by intrigues in the hope of moving in to deprive the Americans of sovereignty.²² Given this permanent internal turbulence and resultant weakness, the threat of foreign attack was high, but the defensive capacity of the Confederation was low, because it had no supreme central military command to organise a swift and co-ordinated rebuff to an incursion. Furthermore, the lack of central economic authority disallowed the organisation of an effective protection of the domestic market from outside competition, the removal of barriers to and the promotion of internal commerce.²³

The Federalist dedicated several essays to projecting ancient and medieval feudatory empires and corporatist confederacies as seedbeds of anarchy, antithetical to what they had in mind.²⁴ The idea that was pressed most forcefully throughout the papers was that the root cause of the failure of the Articles, as of every other known confederation, was the structural flaw of an *imperium in imperio*. The multiplicity of sovereignties made confederation 'a system so radically vicious and unsound, as to admit not of amendment but by an entire change in its leading features and characters'.²⁵ The remedy suggested was 'consolidation', the replacement of the 'league' constitution with a 'national constitution', or simply 'government', legislating directly for individuals. I shall be bringing out the adverse implications of this for the normative theory below when analysing Elazar's interpretation of American federalism, but right now some space will be given to the case of the 'other Founders'.

A great variety of objections was mounted against the federalist Constitution in the wider public debate surrounding its ratification. Some of them were of a liberal character, raising alarm over the non-inclusion of the Bill of Rights in the new Constitution. Others expressed fears, in the leftist vein, that the wealthy were contriving to impose aristocratic rule and desired a stronger government to enable them to keep the common people in check, despoil small farmers through heavier taxes, etc.²⁶ Of relevance to this chapter are those defending the independence of the states.²⁷ First of all, the need for the drastic consolidation advocated by the federalists was refuted, and their prophesies of disaster were dismissed as scare-mongering.²⁸ One antifederalist, for example, argued that the crunch the Americans were experiencing was being wrongly imputed to systemic defects of the confederation. The financial crisis, caused by the costs of the war for independence and the depletion of specie consequential on an excessive importation of manufactures, could have been suffered by any unitary government under

similar circumstances. A transfer of powers to the Union to levy imposts on commerce and regulate trade would have been sufficient to ride out of the transient difficulties, whereas the plan of comprehensive centralisation was a disproportionate response to the crisis.²⁹ In addition, the federalists were charged with overstepping the confines of their brief, since they were only delegated to speak on behalf of the states, not the people of the Confederacy as one, and to amend the Articles, not to overturn them.³⁰ Secondly, the opponents of the Constitution were sceptical about the federalist reassurances concerning the sovereign future of the states.³¹ The position of Publius on this account was most clearly stated in Nos. 9 and 39. The passage from No. 9 can be quoted *in toto*:

The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.³²

In a longer passage of No. 39, it is similarly asserted that under the new Constitution, ‘the local or municipal authorities form distinct and independent portions of the [divided] supremacy...within their respective spheres’, and the states do retain ‘a residuary and inviolable sovereignty’ in the areas, not reserved to the federal head, and that therefore the Constitution is not completely national.³³

In response to such promises, antifederalists, and Brutus [Robert Yates] in particular, who stands out among them for the thoroughness of his critiques of the Constitution as an instrument that allegedly divides sovereignty, demonstrated that, firstly, the supremacy clause³⁴ was incompatible with the claims that the states remain sovereign even residually. Secondly, the comprehensive revenue-raising authority and the authority to organise defence and general welfare, reinforced with the right to take every measure ‘necessary and proper’ towards those ends, virtually gives the federal legislature *carte blanche*.³⁵ The latitude of the federal government’s discretion expressed or implied in these formulations, Brutus showed, was sweeping and allowed circumventing the protections offered to the states by Section 9.³⁶ In this, it would be firmly aided by the judiciary.³⁷ This was his third point that the Constitution predetermines judicial interpretation to favour the general government by the letter, spirit and intention of its centralising provisions, identified above and many other, such as the objective of the Constitution ‘to form a more perfect union’ as stated in the preamble. Since it was a union of the American people conceived as one, not of the states as corporate bodies, Brutus reasoned, the elimination of the remnants of such bodies would signify the perfection of the Union.³⁸

It would be pertinent at this point to add that *The Federalist’s* abundant denunciations of the divisive force of ‘lesser sovereignties’ appear to confirm the above-mentioned hypothesis. It also bespeaks the attitude that Publius refers to the federal remnants in the new Constitution as a ‘blemish’ that ‘disfigures’ the

‘national countenance of the government’,³⁹ and admitting that since a national government could not be agreed upon, ‘the only option...lies between the proposed [partly national, partly federal] government and a government *still more objectionable* [federal]. Under this alternative, the advice of prudence must be to embrace the *lesser evil* [of the compounded republic]’.⁴⁰ No. 45 refers to the governments of the individual States as ‘[those] particular municipal establishments’, whose institutional ambitions are irrelevant if they interfere with the ‘happiness of the people’, and No. 34 expects that ‘in a short course of time, the wants of the States will naturally reduce themselves within a *very narrow compass*’ so that the possibility of clashing sovereignties will decline. It is also known that Madison attempted to institutionalise a federal veto on state legislation, because he doubted that the decisions of the Supreme Court would be respected.⁴¹ In the period following the Convention, Hamilton and Madison continued to be concerned about the likely preponderance of the states and pondered, especially Hamilton, further constitutional reforms to subordinate the states more securely.⁴²

Another contemporary critic of the Constitution, ‘A Farmer’, argued that the appointment of senators by the state legislature without the simultaneous power to control their voting by remunerating, instructing and revoking them from office in case of non-compliance fell short of what it meant to be sovereign,⁴³ the states’ powers in this area were those of ‘mere ministerial agency’.⁴⁴ Furthermore, the Constitution deprives the states of the independent power to lay taxes and collect revenue, and to manage military forces – the essential characteristics of sovereignty.⁴⁵ He, like Brutus, also predicts that under the new Constitution ‘the State sovereignties would be eventually annihilated, though the forms may long remain as expensive and burdensome remembrances’.⁴⁶ The same author also accused Publius of misappropriating the term ‘federalist’ for their propaganda papers.⁴⁷ The fact that the states are left ostensibly in place under the new Constitution does not make it less national, he argues, because ‘there is no considerable nation on earth, despotic, monarchical, or republican, that does not contain many subordinate corporations with various constitutions’. At the same time, the Constitution meets the single sufficient criterion of a national one – it establishes a government that operates on individuals.⁴⁸

In sum, the antifederalist argument concerning the fate of the states is that Publius’ distinguishing of the proposed constitution from that of a consolidated nation turns on a false description of the latter and on a distorted notion of sovereignty, and that its momentum is resolutely consolidationist. In Luther Martin’s words, the Constitution was

just so much federal in appearance as to give its advocates in some measure, an opportunity of passing it as such upon the unsuspecting multitude, before they had time and opportunity to examine it, and yet so predominantly national as to put it in the power of its movers, whenever the machine shall be set agoing, to strike out every part that has the appearance of being federal, and to render it wholly and entirely a national government.⁴⁹

As it has been shown, contrary to common perceptions,⁵⁰ the authors of *The Federalist* were not at all defending the confederal or federal principle – their attitude towards confederations was sharply negative. What they championed was national unification, but the very peculiar fact that the centralisers called themselves ‘federalists’ and their opponents ‘antifederalists’ has become a source of confusion in itself and no doubt contributed to the aforementioned perceptions in the eyes of posterity. We have also seen that the antifederalists were the first to suggest that the self-styling of their adversaries as federalists was a disingenuous diversionary ploy, which together with certain obfuscating tendencies in *The Papers* helped Publius persuade the reluctant audience to accept centralisation. It was common among the antifederalist historians of the 1950s and 1960s to reaffirm this accusation of imposture. Martin Diamond gained particular prominence in the literature with this interpretation,⁵¹ of which a more recent reiteration is provided by Paul Peterson.⁵² This has been disputed by Storing, who argues that there is a nuance to the story that escapes the antifederalists, namely that the term ‘federal’ had already possessed sufficient ambiguity to lend itself to the use by the centralist party, and that it can be legitimately regarded as ‘a natural extension of the language, which the federalists fully exploited’. This usage developed in New York and the eastern states, where support for the common institutions under the Articles could be referred to as ‘federal disposition’, and the loyalists of the confederation could call themselves ‘federal men’ (which also had a connotation of being patriotic) in contrast, for example, to the representatives of the Rhode Island, notorious for its particularist reluctance to uphold its obligations under the Articles. This usage could stay uncontroversial until the Convention, but at that point the opponents of centralisation could legitimately take exception against it on the grounds that the drive to enhance federal authority was effectively undermining the federal principle. So, we have two meanings for ‘federalist’ on the eve of the Convention: someone who supports the strong confederal agency; or an adherent of the principle of a league of independent states, where the general government is a subordinate supplement to the state governments. This latter sense of federalism was more fundamental for antifederalists, and they could claim therefore that it was a misnomer for the consolidationist Constitution.⁵³

Despite the fact that the antifederalists had managed to secure a concession at the Convention, known as the Connecticut Compromise, the confederal cause was essentially if not as yet conclusively lost with the ratification of the Constitution (the conclusion was attained through the Civil War). The compromise preserved equal representation of the states in the Senate to reflect the confederal principle of equal sovereignty⁵⁴ and required the consent of two-thirds of the states for amending the Constitution.⁵⁵ On the other hand, the senatorial procedure was instituted in such a way that equal suffrage ceased to safeguard state autonomy. Specifically, the provision was put in place for *per capita* voting for each individual senator rather than by a single ballot as a delegation, representing its state; the states could no longer recall their delegates as they used to be able to do under the Articles; the senatorial term was prolonged from three to

six years, and restrictions on re-election were lifted. That meant that an individual senator was not tied to his state in his voting, and could be re-elected repeatedly and become permanently based in the national capital without ever returning to his home state.⁵⁶ *The Federalist* also pointed to the fact that the Constitution was to be ratified by the states rather than by the colonial population as a whole as proof that the Constitution was not completely unitary.⁵⁷ Antifederalists were quick to dismiss this as irrelevant, because state participation in the operation of the central government mattered more than the moment of founding.

How did the federalists manage to prevail over the opposition? To start with, as Roche argues, there was a fundamental preparedness among the Philadelphia delegates to strengthen the Union. That they were less divided on the issue than the society at large was manifest in the initial resolutions. The fact that they agreed to close the doors of the proceedings to the public and adhered to the condition throughout (with the exception of Luther Martin) testifies to the absence of ideological polarisation among the delegates, according to Roche.⁵⁸ They also resolved at the beginning to adopt the extremely nationalising Virginia plan as a nucleus for the constitution, and to disallow state legislatures to veto the decisions to be taken by the federal convention. The next factor behind the success was the federalists' superior organisation and agility in the art of political manoeuvre. They took initiative and stayed ahead of the antifederalists, dictating the agenda and terms of the debate, leaving the latter constantly on the defensive.⁵⁹

The federalists further undermined the efficiency of that defence by the use of the antifederalists' own weapons, i.e. the professions of adherence to the values of liberty and popular government, to fight them. This becomes clear if one looks at the two masterstrokes with which the centralists finished off their opponents in the constitutional contest. For one, they outsmarted them conceptually by overcoming what they had themselves used to recognise as a 'solecism in politics'. The challenge was to show that the states might somehow retain some sovereignty in the unified empire in the face of the classical theory that declared two or more concurrent jurisdictions over the same population unsustainable. The solution to the riddle was found in locating sovereignty in the people rather than in the legislative institutions. The states on this view could not lose sovereignty, because they had never held it. The majestic people configures its government and allocates the tasks between its various levels and departments at pleasure. Under the new Constitution, the sovereign delegates certain competences to the national government, and certain other competences to the state governments without violating the classical criterion of indivisibility, because 'the ultimate authority...resides in the people alone' (No. 46).⁶⁰ This neat conception appeared faithful to the spirit of the Revolution in that it derived legitimacy for the new polity from the people and possessed surface plausibility that could afford it persuasive potency to mollify the majority of the opposition, and to lay the foundation for the new orthodoxy of modern federalism. The antifederalist opposition was forced under the impact to retreat from objecting to the extending of the federal government's jurisdiction directly to individuals to the insistence on a

comprehensive and strict segregation of powers within the compound system, wherein they also failed.⁶¹

The other, tactical, *tour de force* of the federalists that dealt a final blow to the opposition was the submission of the Constitution to the ratification in state-based referenda, which meant that the Constitution if adopted would supersede in legitimacy the confederation, which had been formed by the legislative authority of the states without directly consulting the voters.⁶² The remarkable achievement of the federalists consists in having mobilised public opinion effectively enough to get the majority of the voters to endorse the Constitution.⁶³ The federalist argument tapped into American nationalism, called forth by the Revolution,⁶⁴ and the backing of the Constitution by its icons, Washington and Franklin, was not a negligible factor in determining its success.⁶⁵

This completes my exposition of the founding debate as concerning the fate of the states in the new formation. Now, I shall proceed with a brief reconstruction of the subsequent consolidation of the American system of government to demonstrate that the foreknowledge of the antifederalists that this will be the case due to the constitutionally inbuilt centralising mechanisms has been borne out, as it is now generally admitted.⁶⁶

From dual to new federalisms

The secular and ever-intensifying tendency in the maturation of the United States has been towards the atrophy of the features of segregated jurisdiction, which was only weakly affected by the pendulum swings in politics between left reformism and conservative backlashes.⁶⁷ As most historians now conclude,⁶⁸ dual federalism⁶⁹ was an operational reality before and for some time after the Civil War. In the antebellum decades, there was no national regulation of elections and apportionment, civil rights, education, family and criminal law, business organisation, property rights, labour and race relations. The states were virtually in full control of all these areas. The civil establishment, standing army, and tax impositions of the central government remained relatively small. There were tiny grants-in-aid for education and transport primarily, almost entirely in the form of land grants and with very little supervision and audit attached, and the states could demonstrate ‘robust resistance to federal authority’, in particular in the form of refusals to abide by the Supreme Court rulings.⁷⁰ The Constitution initially failed to centralise the Union militarily: the Second Amendment guaranteed the perpetual right to the states to have militias. The creation of the national army, as militias decayed with state acquiescence, occurred in the period between the 1812 and the Mexican wars. That meant that states could no longer influence the military-diplomatic affairs of the Union as they did before demilitarisation, and never did even after the militias were renewed in the 1870–80s practically as internal police units to deal with industrial unrest.⁷¹

The defeat of the states’ rightists in the Civil War by the unionists is usually recognised as the turning point in the process of nationalisation. Scheiber describes the period that followed till 1890 as that of transitional centralisation.

First of all, the suppression of the secessionist attempt allowed the Congress to implement three amendments and a statute according to proposals that had been previously blocked by the *Dred Scott* decision of the Supreme Court (1857), acting in this instance on behalf of the South. The 13th Amendment (1865) outlawed slavery, the Civil Rights Act (1866) and the 14th Amendment (1868) extended federal protection to all natural-born or naturalised Americans against the violations of their rights by the states. The 15th Amendment (1870) lifted the racial bar on voting. What this means is that plenary powers to confer citizenship, define and enforce civil rights independently of state law had been transferred to the national government. The jurisdiction of the federal courts was greatly enlarged in this period at the expense of the states with a view to support the new legislation.⁷² In view of this, historians such as Kaczorowski evaluate the Reconstruction amendments and statute as signifying a revolutionary transformation of American constitutionalism, albeit interrupted after 1873 when the Northern interest in restructuring the Southern states slackened, and especially after the Compromise of 1877, which suspended the process of the emancipation of black Americans for almost a century.⁷³ However, these and many other changes had been implemented without formally cancelling concurrent state authority to make the political structure unitary. This was done through a stipulation that authority to ensure the rights only shifts to the national government *if* the states fail in their duty as primary guardians of civil laws and criminal justice.⁷⁴ In the economic sphere, the Interstate Commerce Act (1882) set a movement towards policy pre-emption; the national regulation of the railroads was introduced in 1887, and with the Sherman Antitrust Act (1890) general business regulation commenced. Cash grants-in-aid have become regular since 1887. On the other hand, the federal government's share of revenue in this period still stayed below 5% of national income, and there were no significant increases in the number of civil servants relative to population. It is the next stage from 1890 to 1933 that is characterised, according to Scheiber, by a significant deviation from the model of dual federalism.

In 1913, the introduction of income tax by the federal government (the 16th Amendment), augmenting its fiscal power, and of popular elections for US senators who had been formerly selected by state legislatures (the 17th Amendment) further altered the balance in favour of the federal centre.⁷⁵ During the Progressive era, federal law extended into regulating transport and banking, maritime and labour relations, credit provision to the agricultural sector, as well as food and drug manufacturing.⁷⁶ The Federal Reserve System was established. The federal funding of grant-in-aid programmes was increased nine-fold between 1916 and 1925. The modernisation of government resulted in the growth of bureaucracies and functions requiring professional expertise, starting in the area of public health and conservation. On the other side of the scale, labour policy, education, family law, criminal justice, and race matters still largely remained within the ambit of state responsibility.

Despite the doctrinal predictions, the American federal system had proven unresponsive to the grass-roots demands in the twentieth century. It was the last

among Western industrial democracies to implement the Social Security legislation in 1935, and the black Americans in the South continued to be subjected to Jim Crow laws discrimination into the 1960s. And it was through the agency of the federal government under the pressure of the national electorate, not through the governments 'close to home' as in theory, that the needs of the racial minority and of the lower socio-economic strata were eventually addressed. The New Deal period (1933–41) saw the adoption of policies derived from Keynesian political economy, which prescribed central planning to foster growth and moderate the business cycle, to replace the classical *laissez faire* stance of economic liberalism. In accordance with the new orientation, the federal government began practising regional planning, took over labour regulation, made agriculture a managed sector, and established welfare programmes. To give some statistical indication of how drastic the changes were, grants-in-aid, the bulk of which went to cover welfare and relief payments, jumped from \$193 million in 1933 to \$2.9 billion in 1939.⁷⁷ The share of local expenditure from independently collected taxes shrunk from 52% in 1927 to 17% by the early 1950s, whereas federal revenues jumped from 31% to 72% over the same period.⁷⁸ A novel trend under the New Deal that also deserves mention was to supply aid to local governments directly, bypassing the states and therefore diminishing their status from that direction too.

In the post-war era, the erosion of state autonomy proceeded with the Warren Court opening to national control the fields of race relations, education, voting and law enforcement, starting famously with school desegregation in the 1954 Brown case. The Constitution of 1798 only specified four criminal federal offences, since the mid-1960s criminal law has been federalised to a dramatic degree of more than 3,000 items – all done with bi-partisan support, directed by popular vote.⁷⁹ However, this period was also marked by repeated campaigns to revitalise federalism under the Republican presidencies of Eisenhower, Nixon/Ford, and Reagan, as well as by the Democratic President Johnson.⁸⁰ The Eisenhower administration's efforts to moderate the auditing and supervisory role of the national government proved unavailing, as the story of the Kestnbaum Commission may illustrate. A grand affair, set up to determine which functions should be returned to the states, after more than two years of work, identified but two areas suitable for devolution: the management of sewage treatment plants and vocational education. Even this modest, the programme failed to pass the Congress, where it met, ironically, with locally based opposition from the governors who refused to accept the responsibility, which could cost them their offices.⁸¹ Johnson's affirmation of the decentralist creed in the 'creative federalism' sloganeering was happening 'amidst a virtual avalanche of new legislation that was shifting the locus of decision making and administrative control so decisively to the centre'.⁸² Nixon–Ford's 'new federalism' was closer in outcome than that of Eisenhower's to the announced intentions to undo the New Deal centralism at least as far as the retrenchment of social programmes is concerned, but at the same time, Nixon had executive power greatly boosted and concentrated.

Yet another nuance developed in US intergovernmental relations after the 1970s, which is referred to as a shift from 'co-operative' to 'coercive' federalism. If the post-war affluence allowed the federal government to buy state and local co-operation, federal budget deficits caused by the stagflation of the 1970s eroded such capacity, and the centre had to resort to the 'sticks' of pre-emption rather than 'carrots' with an increasing frequency. In all the federal history since the ratification of the Constitution in 1789, more than half of all pre-emption statutes were enacted in the 1970s and 1980s.⁸³

The unexpected ally of left-wing forces in pushing for centralisation when Republicans were in power was business, which found itself constrained by local government regulation even more than by central government's intervention, and therefore supported federal pre-emption of state authority in such areas as product-liability, tort, and consumer-protection laws.⁸⁴ Schram and Weissert rhymed on the occasion that instead of the 'devolution revolution', promised by the Republicans upon the takeover of the Congress in the 1994 elections after four decades of Democratic dominance in the House of Representatives, decentralising efforts in this period fizzled out into a 'devolution dilution'.⁸⁵

In the 1990s, the Supreme Court switched to the states' side in its holdings.⁸⁶ However, these rulings at best blocked further expansion of federal power rather than reversed the previous centralising messages,⁸⁷ or in other assessments amounted to merely a symbolic victory for the states.⁸⁸ For example, some of these pro-state rulings forbid the federal government to 'commandeer' states, or in other words to conscript their services to implement national programmes, and allow states to resist national mandates even when fully funded. However, such entitlements do not empower the states the way they may seem to, because the federal government can simply go over the heads of non-obliging state officials by pre-empting state legislation in the regulatory area, which is being targeted for the implementation of a national programme.⁸⁹ Protests against 'commandeering' after the states have reconciled to pre-emption do not make much sense, because the former cannot be any more intrusive than the latter.⁹⁰

In any case, the judicial solicitude for the dignity of the states subsided in the early 2000s, and a tone of deference to national priorities has been resumed. The Bush administration evinced little interest in promoting federalism, and scarcely any receptivity to state and local government concerns. Its policies, quite in line with the Republican tradition, aimed at federal deregulation to foster privatisation rather than devolve governmental responsibilities to the states and localities. While the states have expressed willingness to attend to health care and other issues that have been neglected at the federal level, their hands have been tied financially due to cutbacks on public spending, dictated by the need to curb national budget deficits. Overall, the long-term centralising process continued in this period.⁹¹

Some observers of the changes, as reviewed in the preceding condensed account of how the US political system evolved in history, believed them to be drastic enough to describe this as a conversion to unitarism.⁹² Other commentators have chosen to view the transformation in terms of a differently styled federalism.⁹³

One more interpretation is that the features of dual segregated jurisdictions have been expunged in the course of the progressive political centralisation, but the residual features of the former decentralisation still linger, and this is why a proponent of this view, Scheiber, is reluctant to consider the United States as having become unitary. He distances himself from both Riker, who dismissed federalism as a legal fiction,⁹⁴ and from those who consider federalism defunct. His caveat is that 'the present system is centralised relative to *earlier periods* in the history of American federalism, not that it is the equivalent of a unitary system'.⁹⁵ According to him, the evidence of persistent residual elements of dual federalism consists in: the Supreme Court's continuing invocation of the classical doctrine about the need to protect 'the States as States'; interstate rivalry; regional coalitions; and the theme of the enduring values of federalism in the national political dialogue. One might undercut this position, though, by pointing out that inter-provincial rivalry and regional coalitions are also present in unitary states. Secondly, in respect of the first and last factors of ideology, if symbolism and doctrinal appreciation matter, they should prevent any federation, including the three socialist ones, from becoming unitary by the same token.⁹⁶ In any case, Scheiber is in strong disagreement with Elazar about noncentralisation (see below) as he claims that in the twentieth century 'the locus of decision making had shifted decisively to the centre, ...[where] the programs were defined, the regulations were formulated, and the ultimate authority for modification or repeal was retained. Agenda setting, the framework of implementation, and the final responsibility for oversight all were at the centre'.⁹⁷

Finally, normative theorists of federalism, such as John Kincaid, claim that '[d]espite centralisation, the United States remains one of the most noncentralised nations in the world, with comparatively strong rights of local self-government', and 'its federal system [survives] intact'.⁹⁸ Significantly, he opts for the term 'order' instead of 'level' of government, because the latter implies hierarchy, which is according to him 'a characteristic of some but not all federal systems [states]'.⁹⁹ The former group 'operate along a centralisation-decentralisation continuum whereby the constitution and/or operation of the federal system was designed to be centralised or pushed toward centralisation'. But then he concedes that the other, 'essentially noncentralised' federations also undergo centralising-decentralising trends, and that the USA, in particular, has become 'highly centralised in most respects'.¹⁰⁰ Elazar, too, writes that the American system remains non-hierarchical 'even after two generations of centralisation', it is only that the 'hierarchs' or 'hierarchy-assumers', who came to dominate the field of public administration, have been projecting images of pyramidal levels that distort the American reality.¹⁰¹ In other places, he puts this as 'nationalisation', not centralisation, having taken place. One can immediately raise an objection that the proposition like 'noncentralisation despite centralisation' looks like a contradiction in terms, and that the distinction between 'centralisation' and 'nationalisation' Elazar makes is artificial: as used in the history of European state formation, including the literature of the history of the American federal state, these terms are synonymous. Elazar himself cannot sustain this distinction as evident in his

referring to the historical trends of dwindling localised control in the economy, education, communications, etc., in the United States now as ‘nationalisation’, now as ‘centralisation’.¹⁰²

It has been more convincingly argued from a political-economic perspective that centralisation was unavoidable under the impact of the forces of advancing modernity, and that the classical expression of federalism as a state–union duality has outlived its functionality.¹⁰³ Furthermore, the attempts to reclaim the original state autonomy after the centralising vertical integration of American society has been completed are pointless and counterproductive to the conduct of national programmes of social development.¹⁰⁴ Scheiber also argues that the transformation is irreversible.¹⁰⁵ For Elazar, on the contrary, the changes that occurred in the twentieth century were not unavoidable, but incidental upon ‘errors of transient majorities’ that had fallen under the spell of ‘Jacobin democracy’, and can be remedied as federalism is firmly supported constitutionally and culturally as a permanent commitment of the American people.¹⁰⁶

In this chapter, I have first juxtaposed motivations behind the Philadelphia federation-building according to the winning party with the construal of the same by the dissenters, and in the preceding section provided a skeletal overview of the longitudinal dynamics in the federal–state relationship. With this done, we are now ready to discuss these with reference to the normative theory of federalism, which sustains the federal–unitary dichotomy in the interpretations of the Soviet Union.

2 Daniel J. Elazar's covenantal interpretation of American federalism

The purpose of this chapter is to ascertain the character and extent of the sovereignty of the American states, so that the claims about the Soviet Union as a non-federation or empire in disguise could be set in a comparative perspective. I shall attempt to demonstrate through the following examination of the founding and intergovernmental relations in the United States that viewing the federation as a form of integration that transcends hierarchy and coercion is untenable and that there are sufficient grounds to reject Elazar's 'noncentralised matrix' construct that epitomises this tradition of thinking as implausible. Daniel J. Elazar's voluminous oeuvre is emblematic of normative federal theory.¹ Elazar's works are regularly cited in encyclopedias of political and social sciences and in books on comparative federalism. An analysis of his postulates is indispensable to this study, because he is one of the leading if not *the* leading articulator of the dichotomy between federation and empire, and his classification of the USSR as a non-federation/empire has been considered authoritative. Current researchers on Russian federalism still regularly defer to him and the school he represents.² The late scholar has vigorously promoted federalism as the greatest degree of political freedom and consensualism, and the American system as its greatest success. The distinctiveness of his contribution to the studies of American federalism consists in his emphasis on its origination in federal theology and on the basic and immutable non-centralisation of its political structures (albeit temporarily corrupted by certain twentieth-century trends). Soviet 'centralised despotism' alongside Jacobin prefectural centralism feature as twin antinomies to American federalism in his writings.

The appraisal proceeds in two stages. Firstly, I review Elazar's ideas about the provenance of American federalism, evaluating their capacity to explain the inception of the prototypical federation. The contention here will be that the phenomenological approach offers a coherent explanation for the formation of the United States, while with the essentialist approach this cannot be done. The second aspect of Elazar's theoretical legacy under assessment here is his institutional theory. I shall argue that it is equally flawed. All this has negative implications for the validity of the normative theory of federalism, which has sustained the federal-imperial dichotomy in the context of Soviet studies.

As a preliminary step, it needs to be indicated that the academe is divided between two conflicting approaches towards theorising federalism, which I believe can be appropriately called 'phenomenological' and 'essentialist'.³ The first one sees in a method of territorial enlargement for the pragmatic purposes of external defence, internal security and economic benefits or, more recently, as a method of ethnic conflict regulation.⁴ It claims to investigate federal political institutions and intergovernmental relations without presumptions as to their inherent emancipating or oppressive essence. Also known as the rational choice theory of federalism,⁵ it dismisses the moral advocacy of federalism as based on an 'ideological fallacy'⁶ that has reified what relates to the liberal order only contingently, and rejects explanations of federation-building by moral commitment to federal values,⁷ for such a commitment should be properly an *explicandum* rather than *explanans*.

In contrast, the normative discourse of federalism holds that the federal principle is fundamentally moral rather than political, and associates federation with voluntary union, liberty, consensus, democracy, and lately with the promotion of cultural diversity. The normative theorists are not impressed with the phenomenological insights either. Federalism, according to them, 'cannot be reduced to mere instrumentalism or to the mechanics of political organisation' as rational-choice political scientists have done, because it is 'rooted in a moral imperative based on the dignity and fellowship of human beings'.⁸ They insist that federalism is a systemic phenomenon, which influences and is influenced by the political regime of the state,⁹ or in other words, that the viability of federal systems depends directly on whether the civil society in question is used to relying on the principles of 'human interaction that emphasise coordinative rather than superior-subordinate relationships, negotiated cooperation and sharing'.¹⁰ The nature of federation is conceived by normative theorists as follows:

The genius of federation lies in its infinite capacity to accommodate and reconcile the competing and sometimes conflicting array of diversities having political salience within a state. Toleration, respect, compromise, bargaining and mutual recognition are its watchwords and 'union' combined simultaneously with 'autonomy' is its hallmark.¹¹ [M]utual respect and recognition, tolerance, dignity, integrity and reciprocity. These values lead to a particular form of human association, namely, the federal state or federation.¹²

Two different strategies for handling non-Western federalisms correspond to these rival approaches. The phenomenological approach points to them as proof that federation is an all-purpose institutional device that has no intrinsic link to liberalism and democracy.¹³ The essentialists, on the other hand, appraise them as inferior proto- or quasi- instances of federalism, with the strongest rejection reserved for the socialist federations, which they exclude from the federal class as bogus.

Are the roots of the American Federation covenantal?

American federalism, according to Elazar, is much older than the Union and much more comprehensive than the arrangements between the states and the federal head. It permeates the entire history of European settlement in North America from the first colonies on. More globally, it is a spin-off of a 'covenantally grounded civilisation', which sprung from two regions – ancient Israel and northwestern Europe with Judeo-Christianity as a link between them. 'Covenanted societies' are to be found in the cultural zones affected by reformed Protestantism, and the American society is one of the best specimens.¹⁴ This is merely to indicate where Elazar's theory is ultimately grounded, as it is beyond my current expertise as well as the scope of this work to engage with this civilisational thesis. However, I believe that a serious challenge could be mounted to Elazar's interpretation if the establishment of the new union is analysed as a discrete event that created a discrete entity to control its population and enter in relations with comparably constituted entities of the world. I argue below that the covenantal theory cannot marshal cogent reasons for the monopolisation of violence occasioned by the replacement of the Articles with the Constitution. Secondly, I contend that Elazar fails to draw a convincing distinction between the American formula of coming together on the one hand, and pre-modern political compacts and modern national unifications in Europe, on the other, for the federation to be considered as ethically superior to those other forms of integration.

According to Elazar, the privileging of *The Federalist* as the sole authoritative commentary on the Constitution has obscured the cardinal influence of the Biblical-Reformed Puritan tradition on the founding. He argues that the national Constitution embodies federalism of the theo-political kind in the sense of creating 'a shared common law and institutions' more than federalism as conceived in the secular political science of the time (i.e. confederation).¹⁵ Elazar cites the research by Donald S. Lutz into the pre-1787 foundational documents as supporting his assertion. Indeed, according to the latter's quantitative analysis, references to the Book of Deuteronomy in sermons reprinted as pamphlets top the frequency chart for the period from 1760 to 1805.¹⁶ However, Elazar overlooks certain nuances in Lutz, which should have greatly diminished his confidence for claiming significance for the Bible as a source that informed the Philadelphia founding. If the focus within that broad period is narrowed to the pattern of citations in 1787–8,

[t]he Bible's prominence disappears, which is not surprising since the debate centered upon specific institutions about which the Bible had little to say. The Anti-Federalists do drag it in with respect to basic principles of government, but the Federalists' inclination to Enlightenment rationalism is most evident in their failure to consider the Bible relevant.¹⁷

Salience in this period belongs to Enlightenment authors, English Whigs and common-law theorists, cited in equal measure by both parties of disputants.

Classical writings were also turned to, although more for historical examples than for guidance on institutional design. Lutz argues that, although covenant theology deserves more scholarly attention than it has attracted heretofore as an important element in the gamut of influences that nourished the intellectual life of early America, its significance was greater for the colonial self-government in the seventeenth century and for the earlier documents of foundation than for the later state and national constitutions. The comparative morphological analysis of the corpus of the earlier foundational documents and the US Constitution, according to Lutz, reveals a closer genetic connection to the English colonial charters with the royal authority substituted for the people's will than to the covenants of the sectarian settler communities. He argues that the covenantal features that used to take up most of the space in the seventeenth-century documents that declared the creation of spiritual communities had become greatly attenuated (or more specifically relegated to a short preamble) in the late eighteenth century form that became known as 'constitution'. In other words, diachronically, there is a pronounced 'movement away from a communitarian perspective toward a legalistic, contractual view of political communities'.¹⁸ The predominant content of a constitution defines in secular terms citizenship, locates sovereignty, specifies a ruling regime, establishes institutions and offices, and prescribes the scope of their powers, and the US Constitution represents in that sense its pure exemplar.¹⁹ Thus, it appears, on Lutz's authority, that tangible evidence of a biblical input into the Constitution is yet to be supplied.

Kincaid's comparison of the covenantal community and the modern contractual society evinces significant differences between the two models, too. The covenantal community emerges from consent among families, tribes, etc., to merge for the purposes of salvation. The other model is not communitarian in this sense: it brings together dissociated individuals out of utilitarian considerations to secure safety of their bodies and properties. It does without reliance on the affective bond and without related recourse – as of principle – to the factor of kinship and to the divine mandate, which is so pronounced in the covenantal community. Finally, the covenant model imposes limits on economic development, unlike the other one.²⁰ The model of contractual society, as described by Kincaid, represents an unambiguous match to *The Federalist* worldview. While occasional appeals to ethnicity are also present in *The Federalist*,²¹ they are not intrinsic to the Constitution. Therefore, it seems that there is little conceptual justification for characterising American federalism as 'covenantal' and informed by old federal theology, the way Elazar does, rather than as 'contractual' and informed by the new secular science of politics.

Even if the claim that the theo-political discourse played a major role at the Philadelphia founding were substantiated, this would not have disposed of the advocacy of the Constitution made by the federalists, as documented in the Convention's proceedings, in *The Papers*, and their other publications. *The Federalist* still remains an essential primary source of insight into the mind of the Constitution drafters.²² As such, its import has been further magnified by its use as the canonical text by the US Supreme Court²³ and by the fact that the

theory of modern federalism has arisen from it. The challenge is there for the revisionist theory to reconcile the forcefully explicit and abiding realist-nationalist-mercantilist motifs of the federalist propaganda for the Constitution with the speculative (given that religious allusions are conspicuously absent in the federalist apology) covenantal case.

As the survey of the constitutional debate in the preceding chapter shows, the two-pronged objective of the Constitution, emphatically and unambiguously stated, was internal pacification and external fortification. The former was to be achieved, firstly, by removing the intermediary agency of the states and, secondly, by neutralising the defects of democracy, i.e. the propensity of the populace to social revolts against the propertied. I would argue that the Constitution produced a greater degree of centralisation than before, adding little other than that to the system of governance that had functioned before: the *foedus* between the states, elective government based on a relatively broad franchise, and the constitutional protection of civil rights had been already in operation. The Constitution, depending on interpretation, attenuated or subverted classical republicanism, substituting legalistic mechanisms for the reliance on public virtue. But in that sense it retreated from rather than affirmed the covenantal vision of the American society, which coincided in important respects with direct democracy republicanism. Both Whigs and Calvinists decried the social changes they had observed, such as a growing penchant for luxury, distinction and dissipation, they believed were ruinous of republican liberty and of the American covenant with God. The secession from the British Empire was not simply a political act, it was meant to lead to a profound moral reformation of America, retrieving it from social declension and returning to the pristine conditions of honest industry, sober frugality, simplicity of manner and dress, and Christian self-discipline.²⁴ This vision of 'the Christian Sparta' does not sit well with the irreligious commercial republic of the federalists. I believe there is a strain between Elazar's welcoming of the liberal Constitution and his championship for federal theology, given that in the context of the constitutional debate if there were a place for the latter, it would have been with the opponents of the Constitution. Important as the legacy of the antifederalists might be as laying a foundation of the dissenting tradition in the American culture, they were not responsible for the transforming elements in the structure of the Constitution. It only stands to reason that subsequent federalist accounts (prior to the communitarian critiques of liberalism some four decades ago) used to discredit them as pre-liberals.

Now let us look at Elazar's theory from another angle. Covenant in politics refers to the voluntary creation of bodies politic by equal agents and government by conciliation and partnership.²⁵ The confederation was obviously covenantal. Why then were the delegates convened to Philadelphia? The answer *The Federalist* gives is at odds with covenantalism: the Confederation was 'imbecilic' precisely because of its voluntary nature. It lacked government, and what defined governmental authority was coerciveness.²⁶ In contrast to antifederalists who believed that a polity if based on the correct principles could subsist entirely on persuasion, Publius admitted that coercion was essential to government, however

fair, and that the granting of coercive powers to the central government was what the Constitution meant to produce.²⁷ It was possible to force recalcitrant members of the Confederation into compliance by arms, Publius argued, but the expensive and sanguinary military method was impractical, and the need for it could be eliminated by bypassing the lesser sovereignties and legislating directly for individuals.²⁸

Diamond points out that *foedus* and government are disparate notions: the one rests upon faithful compliance, the other on political coercion, and '[i]ndeed, one may even contrast federalism, not only with national government, but with government as such. This is in fact what Alexander Hamilton argues in *Federalist* 15.'²⁹ If the end of the Constitution was to deepen the existing *foedus*, the means that was chosen – i.e. propping it up by force – defeated the end. Instead, the reading of *The Federalist* and about its historical context suggests that, to repeat, social conservatism and international security were two paramount reasons for the Constitution. The proximate fillip to the Convention was the failure to promptly quell Shays' Rebellion, because the Confederation had no legal power to send troops to a member-state.³⁰ It is well documented that Washington, on whose blessing Jay and his colleagues summoned the convention, was greatly alarmed by Shays' Rebellion. He also anguished over being 'ridiculous and contemptible in the eyes of all Europe'.³¹ This second theme is very visible in *The Federalist*, as Publius expatiates on the threat from the 'transatlantic foe' (Britain and Spain),³² the necessity of a standing army in peacetime to muster a 'forbidding posture to foreign ambition',³³ and makes appeals to ethnic solidarity in the first issues to unite for the sake of national salvation, and so on. In light of the above, I would argue that the history of the Constitution seems to offer plentiful support for the phenomenological interpretation of the origins of federations. On the other hand, the evidence of a link between the Constitution and federal theology, Elazar foregrounds, is elusive at best; at the same time what is stated clearly and repeatedly does not square with covenanted federalism.

As evident from its definition above, the abjuration of violence is the essence of political covenant. What also appears incongruous in Elazar's interpretation of the American federation is his endorsement of the Northern violence against the Southern secessionists as consistent with covenanted federalism:

The partners do not automatically live happily ever after, but they are bound by covenant to struggle toward such an end, a commitment well understood and made explicit by Lincoln during the Civil War.³⁴

As soon as one allows that federal partners may 'struggle' for the continuation of 'happiness' in union, as Elazar puts it, by any means and at any cost, one has to admit that the proposition that the operative mode of a federal state is negotiation and consensual bargaining no longer holds. Its membership is not voluntary and it is ultimately held together by force. At this point, the federal state has to lose its presumptive distinctiveness as an alternative to the indivisible unitary state. Elazar argues that federalism survived the Civil War, because the southern states

were eventually restored as full members of the Union.³⁵ Let us see if this fact can differentiate American federalism from European state-building.

Elazar draws a line between the civilisation affected by the Bible and all others (to be considered below shortly), but also a secondary line within the European tradition of polity building. Elaborating on *Federalist* No. 1's trinity of 'force', 'accident' and 'reflection and choice' as methods of political integration, he posits three models: a violently forged hierarchical pyramid (e.g. France), an organically grown circle with centre and periphery (e.g. Great Britain), and a covenantal non-hierarchical rectangular.³⁶ Let us take France, which exemplifies in Elazar's typology a polity that grew by conquest.³⁷ According to a revisionist historian of absolutism, when the Valois and early Bourbons annexed a province to what was to become the French hexagon, 'the king solemnly swore to observe its rights and privileges, and signed a charter or contract to prove it'.³⁸ The sovereignty of dukes and counts was terminated, but the estates continued as before, serving to the centre in the administrative and consultative role and as a useful mechanism for sampling local sentiment and procuring local consent. This particular account of absolutist state-building gainsays the usual stereotype, showing covenantal behaviour to French monarchism that Elazar denies. It also undermines Elazar's attempt to gloss over the fact that the Civil War was conquest, because the French monarchs too, like the Northern Unionists, left the anterior structures in place, only unseating rebellious leaders. It appears that the circumstances of violence involved in the process of political integration must be inspected much closer than Elazar does before the stark comparative contrasts he draws could be recognised as warranted.³⁹

In political orders forged by conquest or evolving organically, Elazar further argues, individuals are subjected or 'born governed' into a framework inherited from immemorial times, whereas a covenanted society is built by its members through explicit deliberation and consenting. The American federation is not distinctive if consent is taken to refer in the limited sense to ruling elites concluding unions, but it is in that broader sense. The weakness of Elazar's argument here is that, if the term 'consent' is to have any specificity at all, the Constitution was passed by a narrow majority of the voters;⁴⁰ the rest of them cannot be said to have consented to the founding. Furthermore, after the one-off event of the ratification, the succeeding generations of Americans can hardly be said to 'consciously and purposively' build or renovate their institutions any more than populations elsewhere, whom Elazar describes as passively accepting the pre-existing orders as given. The latter is not true either, because the processes of modifications or even overhauls of political institutions have been ongoing in all societies.

Elazar brushes aside the fact that Hobbesian covenant and Rousseauvian contract also emphasised consent and equality as the bases for their political societies, with vague explanations that the former 'in practice, ... would not be able to coexist with the system of rule that Hobbes requires' and the latter 'as a highly secularised concept which...never develops the same level of moral obligation'.⁴¹ Here, apparently, he speaks about consent to government in

operation rather than consent at founding as above. In the latter dimension, even when moderated with modifiers such as 'predominantly' versus 'minimally' coercive, Elazar's contraposition of polities still remains crude. Although the matter is too complex to be pursued here, I believe that it would be hardly defensible to deny that various regimes can effectively exploit such diverse non-coercive resources of generating political legitimacy as inertia, indoctrination, economic satisfaction, and charismatic leadership.

Moving on to the primary level of exceptionalism postulated by Elazar, as mentioned above, political unions have been a ubiquitous phenomenon in world history, and confederation-building always involved a voluntary agreement underpinned by an expectation of mutual benefit, trusting in each other's good faith, exchange of promises, and oath taking with an appeal to a divinity to strengthen the bond. Covenanting would appear to be a structural pattern, intrinsic to humanity rather than any culture, religious and political tradition in particular.⁴² Although Elazar recognises the ubiquity, he continues to insist on the Germanic via Judaic exceptionalism in this area. He argues that unlike the pre-biblical form of covenant that had been in use to establish vassalage, the biblical covenant was employed 'to found a people, making their moral commitment to one another far stronger and enduring than that of a vassal to an imperial overlord', and that amounts to a difference of kind.⁴³

To address this claim, it needs to be noted that the biblical covenant had two dimensions as one between God and the Israelites as a nation, and another between the Israeli tribes merging into a nation. Now, it might have been novel in its nationalist dimension (the transformation Elazar describes has been traditionally regarded as the birth of nationalism), but how radical was its departure from precedents in its other dimension? The Israelites committed to each other, but they also submitted to an overlord. Kincaid attempts to explain this away as follows:

Even though the persons or parties entering a covenant may be unequal [as is the case in the Bible], covenant establishes a type of equality because it pairs persons in the same role (e.g., partner-partner) rather than different, superior-inferior roles (e.g., parent-child, ruler-subject, elite-mass).⁴⁴

The distinction drawn here I believe is untenable for the following reasons. Partners are not necessarily equals (e.g. senior and junior partners in a law firm), and indeed, it is conceded above that covenantal partnership does not require equality. As long as this is so, it is hard to see why the pairs that connote superiority and inferiority (and the word 'unequal' implies that), such as 'elite-mass' and 'ruler-subject' cannot be said to be parties to a political partnership, or 'parent-child' – to a familial partnership, in a similar sense as God and the Israelites, being unequal, are nonetheless partners in a common endeavour. The next objection is that covenant pairs parties in the same *relationship* or interdependence, not the same *role*. If partnership established by the covenant is unequal, it establishes not 'a type of equality', but quite plainly a hierarchy.⁴⁵

Similarly problematic is the character of freedom under the biblical covenant, where 'humans are free to create alternate political orders which are legitimate so long as they do not violate God's ordinances'.⁴⁶ This is a definition of divine sovereignty equivalent to the supremacy clause in the US Constitution. Finally, the choice offered to the Israelites by God was between 'life and blessing' on the one hand, and 'death and cursing' on the other. This raises the question of whether the choice between two options, of which only one is attractive, can be considered meaningful and the respective partnership as freely entered into. What I have been trying to show to this point is that it does not necessarily flow from tracing the genesis of American federalism to covenant theology that the American system of governance is flat: there is a locus of ultimate pre-eminence there as in every other system of territorial integration.

The final problem with Elazar's normative theory is that while it exalts federalism in effect as socio-political perfection, it also appears to take the United States as the country where federalism is completely realised or 'actually existing', save for the nineteenth- and twentieth-century deviations from authenticity under the influence of European philosophies.⁴⁷ This manifests itself, for example, in his comment that French intellectuals are preoccupied so much normatively with federalism, because it is so distant from reality in France, while '[i]n the United States, federalism has been so integral to the American experience, that there has been no incentive to discuss integral federalism as a concept'.⁴⁸ French federalist philosophers, however, evaluate the American federal achievement less generously (just like their intellectual forefather, Proudhon). It is federalist, according to their principal figure, Alexandre Marc, inasmuch as the American Revolution was yet another progressive step humanity made in the course of the ongoing world historical 'struggle against the blind forces of domination, exploitation, covetousness, and sadistic quest for power'.⁴⁹ Although valuable for its political liberalism, Marc continues, the American tradition is disappointing in its fixation on the political federalism of the Founding Fathers that precludes extending the federal principle to socio-economic practices.

Admittedly, Elazar wholeheartedly concurs with his French counterparts in that a comprehensive view of federalism as a 'Grand Design' rather than the focus on the relations between the Union and the states is lacking in America.⁵⁰ However, for him, the American partnership and balance is something to be maintained and protected as it is, in particular from the twentieth-century 'assault by twin forces of corporatism and collectivism'.⁵¹ In contrast, French normative federalism is acknowledged as a 'regulative utopia' that ought not to be considered embodied in any of the existing federal systems as Marc's eminent *confrère*, Emmanuel Mounier, pointed out.⁵² Integral federalists position themselves as a third way, rejecting both liberal atomistic individualism and totalitarian collectivism, both Western privately based and Soviet 'state capitalism'. They maintain that the Marxist-Leninist opposition to the market and the dogmatic opposition of 'capitalist ideology' to planning and social justice despite in effect practicing both are equally wrongheaded.⁵³ This mini-comparison of Elazar's normative writing with another variant of normative federalism serves as a good illustration