
Conclusion: We Have Always been Federal

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We are all federalists now—or so one might conclude from reading the rich and wide-ranging chapters in this timely volume. Not federalists in the strong sense that every one of the authors, let alone a broad range of publics in Britain, would defend a division of powers and authority between a strong central government and various subsidiary bodies. And not federalists even in the weaker sense of promoting more flexible conceptions of ‘self-rule plus shared rule’ for the United Kingdom, whether internally or externally.¹ However, we—the contributors to this book, as well as an expanding range of political actors, legal scholars and interested historians—are finally overcoming a very British aversion to imagining federalism as applicable to Britain’s past, its present or its future. What had seemed unthinkable is now being widely thought: the book’s authors all show that, for Britain at least, federalism is very good to think with. In light of the scholarship on display here, this renewed ‘faith in federalism’ can hardly be called ‘faith without knowledge’, as AV Dicey described an earlier moment of British interest in the topic in the 1880s.² If even scholars of Britain can embrace federalism in this way, then there is hope for questioning more persistent but in fact quite recent conceptions of unitary sovereignty. We might also reimagine sovereignty’s presumptive homology with territoriality and question the ingrained teleology of statehood assumed not just by English lawyers but by much of the modern human sciences in the twentieth century. In this sense, we may all be federalists yet.

One great strength of the volume is its remarkable breadth in both space and time. For example, Robert Schütze’s chapter takes us back to the eighteenth century, Alvin Jackson and Peter Oliver’s essays illuminate colonial and imperial contexts in the nineteenth century and Nigel White traces developments in the international realm to the mid-twentieth century.³ These and other contributions

¹ Daniel Elazar, *Exploring Federalism* (Tuscaloosa, University of Alabama Press, 1987) 12, quoted in Adam Tomkins, ‘Shared Rule: What the UK Could Learn from Federalism’, XXX above.

² AV Dicey, ‘Federal Government’ (1885) 1 *Law Quarterly Review* 80. On the broader context of that earlier federal moment, see especially Duncan Bell, *The Idea of Greater Britain: Empire and the Future of World Order, 1860–1900* (Princeton NJ, Princeton University Press, 2007).

³ Robert Schütze, ‘The United Kingdom and the Federal Principle: An Overview’, the Introduction above; Alvin Jackson, ‘The Failure of British and Irish Federalism, c. 1800–1950’, XXX above; Peter Oliver, ‘Parliamentary Sovereignty, Federalism and the Commonwealth’, ch 2 above; Nigel White, ‘A Willing International Federalist? The UK’s Pivotal Role within the United Nations’, ch 10 above.

also link British discussions to a global history of federalism within the English-speaking world, from Canada to Australia and from the United States to the United Nations and to debates on federalism in Italy and Spain.⁴ At its core, any conception of federalism grapples with the problem of shared recognition and authority between large and small communities, in situations of diversity and often combining distinct but overlapping conceptions of political and cultural space. Any treatment of federalism imperatively demands the wide-angle view: this volume amply fulfils that need.

And yet a *longue-durée* view also requires admitting that our contemporary grasp of federalism and its forms barely compares with the historical knowledge possessed by past actors. Earlier students of the subject, such as the eighteenth-century Swiss jurist Emer de Vattel, David Hume or his follower James Madison could conjure with examples of federalism over across almost two millennia, from the Achaean and Amphictyonic Leagues of ancient Greece to the federal and quasi-federal arrangements of early modernity, in Switzerland and the Netherlands.⁵ As Vattel wrote in 1758,

[S]everal sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. ... Such were formerly the cities of Greece; such are at present the Seven United Provinces of the Netherlands and such the members of the Helvetic body.⁶

Later commentators like Gladstone could add the United States to this roster, along with contemporary states like Austria-Hungary and Canada, which presented more successful models for late nineteenth-century observers after US federalism had survived a near-death experience in 1861–65.⁷ Even a thorough-going sceptic about federalism's relevance for Britain such as Dicey drew on this repertoire of past and current examples to inform his own lack of faith in federalism. We are perhaps not as fortunate as these mighty forebears to consider federalism over such great sweeps of time, but this volume will better equip readers to enter present debates with an appropriate arsenal of historical and contemporary instances and counter-examples.

The deep and wide view of federalism reveals it to be less a single concept or unique political or legal structure than a family of ideas and practices that developed and diverged across history and in multiple contexts. Etymology is not destiny but it is salutary to recall that the terms 'federal' and 'federalism'

⁴ Barbara Guastaferrero and Lucía Payero, 'Devolution and Secession in Comparative Perspective: The Case of Spain and Italy', ch 5 above.

⁵ James Madison, 'Notes on Ancient and Modern Confederacies' (1786), in *The Papers of James Madison*, ed Robert A Rutland and William ME Rachal, 17 vols (Chicago, University of Chicago Press, 1962–91) IX 3–23.

⁶ Emer de Vattel, *The Law of Nations or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (1758), ed Béla Kaposy and Richard Whatmore (Indianapolis, Liberty Fund, 2008) 85 (I. i. 10).

⁷ On Gladstone, see Jackson, 'The Failure of British and Irish Federalism, c. 1800–1950' XXX above.

both derive from the Latin word *foedus*—that is, a covenant, pact or treaty.⁸ In English, at least, the word ‘federal’, or ‘foederal[1]’, began its lexical career in the early seventeenth century as a theological term denoting the covenantal relations between believers and God; slightly later, it came to cover any relationship based on a formal agreement such as a treaty. The Articles of Confederation for the newly independent United States were just such a ‘federal’ arrangement; so, too, was the US Constitution designed to replace the Articles, in so far as it was a contractual agreement among states (or their representatives). Only in the closing decades of the eighteenth century, did the adjective ‘federal’ spawn the nouns ‘federalism’ and ‘federalist’ in the context of debates on the ratification of that Constitution.⁹

The concept and practice of federalism long preceded the modern neologism used to describe it.¹⁰ However, in common with many parallel ideas in what the German conceptual historian Reinhart Koselleck called the *Sattelzeit*—the ‘saddle-time’—of the late eighteenth and early nineteenth centuries, federalism as a concept became politicised and ideologised and singularised in that moment.¹¹ What had for centuries been a set of disparate but related practices for dividing and distributing authority now became an identifiably political phenomenon. It also became a subject of ideological contestation. And it emerged as an essentially contestable concept, with distinct and sometimes incompatible meanings that could be deployed strategically in political debate, as it was during the arguments over the ratification of the US Constitution. From this time onwards, federalism had a name but no agreed or stable identity. It could connote either the strength of central government, based on a compact or treaty relationship among sovereign entities (as it did in the US ratification debate), or imply a pluralistic distribution of authority and functions (as it would do mostly outside the United States). With these divergent forms in mind, we should think of federalism not in rigorously normative terms—as a critic like Dicey evidently did—but instead as a suite of ideas or a bundle of overlapping and related concepts that may be recombined but can also be deconstructed.

Modern federalism emerged in an environment where sovereignties were layered and divided more often than they were exclusive and hard-edged. Early modern Europe and its overseas extensions comprised a congeries of composite monarchies rather than a club of ‘Weberian’ states, of polities held together by rulers over multiple domains that had been combined through inheritance, conquest,

⁸ JGA Pocock, ‘States, Republics, and Empires: The American Founding in Early Modern Perspective’ in T Ball and JGA Pocock (eds), *Conceptual Change and the Constitution* (Lawrence, Kansas, University Press of Kansas, 1988) 67–72.

⁹ David C Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence, University Press of Kansas, 2003); *Oxford English Dictionary*, s.vv. ‘federal’, ‘federalism’, ‘federalist’.

¹⁰ Murray Forsyth, *Unions of States: The Theory and Practice of Confederation* (London, Leicester University Press, 1981).

¹¹ On Koselleck, the *Sattelzeit* and its development in his thought, see Niklas Olsen, *History in the Plural: An Introduction to the Work of Reinhart Koselleck* (New York, Berghahn Books, 2012) 171–78.

cession or treaty.¹² Britain itself was a classic example of such a composite state. England's monarchs first conquered Ireland and later incorporated Wales into an Anglo-Welsh union that supplied the Tudor dynasty in the sixteenth century. The royal line passed by inheritance to a Scottish king, leading to a British union of the crowns in 1603 whose destabilising effects would only be settled by a union of parliaments in 1707. This fundamental union was achieved both by act of Parliament within municipal law—formally dissolving both the English and Scottish Parliaments in order to create a British legislature where the English one had formerly stood—and by a treaty between the English sovereign (Queen Anne) and the Scots sovereign (also Queen Anne) under the law of nations. This was both a parliamentary union and, in contemporary terms, a 'federal' union, based on a *foedus*.¹³ That federal union endures to this day: even the most hard-nosed Diceyan would have to admit that Britain has been federal in one very basic sense, for more than three centuries under public international law, as a unitary state (or, rather succession of states) containing a plurality of nations, each with historic or more recently devolved institutions.

Legal pluralism rather than legal uniformity was the norm in the early modern world that gave birth to the British state. Distinct bodies of local, regional and transnational law encouraged eclecticism, forum-shopping and the collision as well as the cross-fertilisation of legal systems. This was especially the case in the extra-European inter-cultural encounters created by the expansion and competition of empires but was not confined to them.¹⁴ Such legal pluralism fed off the division of sovereignty and the distribution of powers among distinct and overlapping agencies, whether within states or among states, trading companies and bodies of indigenous people with whom colonial powers made engagements by treaty. Until well into the nineteenth century, legal theorists from Hugo Grotius to Henry Maine had assumed that sovereignty was divisible not unitary: as Maine argued in 1864,

[s]overeignty is a term which, in international law, indicates a well-ascertained assemblage of separate powers or privileges ... there is not, nor has there ever been, anything in international law to prevent some of those rights being lodged with one possessor and some with another. Sovereignty has always been regarded as divisible.¹⁵

¹² HG Koenigsberger, 'Composite States, Representative Institutions and the American Revolution' (1989) 62 *Historical Research* 135–53; JH Elliott, 'A Europe of Composite Monarchies' (1992) 137 *Past and Present* 48–71.

¹³ [James Hodges,] *The Rights and Interests of the Two British Monarchies: With a Special Respect to an United or Separate State* (London, 1703) 2–4; TB Smith, 'The Union of 1707 as Fundamental Law' in TB Smith, *Studies Critical and Comparative* (Edinburgh, W Green, 1960) 1–27.

¹⁴ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge, Cambridge University Press, 2010); Laura Benton and Richard J Ross (eds), *Legal Pluralism and Empires, 1500–1850* (New York, New York University Press, 2013).

¹⁵ Henry Maine, quoted in Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge, Cambridge University Press, 2002) 77.

‘The powers of sovereigns,’ he reaffirmed in 1887, ‘are a bundle or collection of powers, and they may be separated one from another.’¹⁶ Maine referred specifically to international law and to forms of sovereignty in North America and South Asia but his generalisations could have been applied illuminatingly across the world, within and between sovereign communities and their neighbours, until at least the age of Dicey. Indeed, by juxtaposing Maine and Dicey on either side of a *debate* over the divisibility of sovereignty we can see it was just that—a debate, not a doctrine, an ideological argument in which it could not be taken for granted that sovereignty was unitary and indivisible. That understanding of sovereignty had to be argued *for*, as Dicey did against more immediate opponents like the Imperial federalists and Irish Home Rulers.¹⁷

Federalism was merely one species of divisible sovereignty: the question, then, is how did a dogma of indivisible sovereignty come to triumph ideologically over alternative conceptions of the distribution of functions, powers and authorities in Britain? Answering that question is beyond the scope of this volume, or this afterword. However, it should alert us to the contingency of assuming that federalism is somehow un-British, or that the aversion to it a ‘neurosis’ to be diagnosed among ‘the historical pathologies in which the idea of parliamentary sovereignty always trumps over the federal principle’, as Robert Schütze puts it.¹⁸ Barely 50 years ago, to imagine Britain as in any way federal aroused at most a question-mark, as in JC Banks’s *Federal Britain?*¹⁹ Within a quarter of a century, scholars were more confident in excavating a ‘British tradition of federalism’ and in telling the history of ‘federal Britain’.²⁰ In light of their researches, we can see that we are currently in far from the first federal moment in British history. Our period of debating anew the implications and limitations, the morphology and the genealogy of federalism, is not only not unprecedented; it is but one such moment in a succession of British federal moments, stretching back at least to the Union of 1707 and erupting with some regularity, for example in the 1760s (and the first crises of Atlantic sovereignty), the 1780s (and the federalist moment in the United States), the 1860s (and Irish Home Rule), the 1880s (and the Imperial Federation movement) and onwards to the Second World War with the abortive plan, taken seriously even by Winston Churchill, for a federal union between Britain and France in June 1940, and thence to the era of decolonisation.²¹

¹⁶ Henry Maine, quoted in *ibid.*, 108.

¹⁷ Alvin Jackson, ‘The Failure of British and Irish Federalism, c. 1800–1950’ ch 1 above; Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford, Oxford University Press, 2005) 54–75; Dylan Lino, ‘Albert Venn Dicey and the Constitutional Theory of Empire’ (2016) 36 *Oxford Journal of Legal Studies* 751–80.

¹⁸ David Marquand, ‘Federalism and the British: Anatomy of a Neurosis’ (2006) 77 *Political Quarterly* 175–83; Schütze, XXX above.

¹⁹ JC Banks, *Federal Britain?* (London, George G Harrap, 1971).

²⁰ Michael Burgess, *The British Tradition of Federalism* (London, Leicester University Press, 1995); John Kendle, *Federal Britain: A History* (London, Routledge, 1997).

²¹ Andrea Bosco, *June 1940, Great Britain and the First Attempt to Build a European Union* (Newcastle upon Tyne, Cambridge Scholars Publishing, 2016); Kendle, above n 20, 123–49.

All these earlier moments showed that federalism was both a flexible means for combining, without dissolving, distinct sovereignties and a feasible alternative to unitary statehood, particularly in the context of decolonisation. Federalism provided an alternative to nationalism and a creative answer to the minority problem of the inter-War period; it offered a potential solution to the problem of protecting the identities of both Jews and Palestinians; it could strengthen smaller states emerging from empire in regions from the West Indies to Southeast Asia; and it could redistribute rather than rupture sovereignty in the transition from empire in French West Africa and the Caribbean.²² Sovereign statehood was not the necessary endpoint of anti-colonial nationalism.²³ The process of unwinding empire showed that, despite the assumed antipathy to federalism at home, Britain was a willing and enthusiastic promoter of federalism abroad. The presence of monarchy had long facilitated this manoeuvre: from Thomas Jefferson's 'plan for a federal union' of legislatures under the Crown in 1774 via the promise of Dominion status to Canada and Australia through to the looser association of the Commonwealth, allegiance to the Crown offered a guarantee of equality within hierarchy and independence with association.²⁴ In this regard, federalism was rather like written constitutionalism—good for foreign export, especially to Britain's colonies, but apparently not fit for domestic consumption.²⁵

Federalism could thus be the answer to many different questions. Within the context of the British Empire, it could be the solution to the problem of diversity within unity but often within a hierarchical structure under monarchy. After empire, it could offer political and economic cover for newly independent states potentially too small to pull their weight in regional and international orders, or the means to suspend difference in contexts where anti-colonialism empowered multiple communities who could not agree on a single nationalist destiny. And in the context of the British—or, at times, British-and-Irish—state, it presented a third way between domination and subordination on the one hand and absorption and uniformity on the other.

Just how federalism offered solutions to these problems depended on the means of entry into federal arrangements—what kind of negotiations took place, what

²² Frederick Cooper, *Citizenship Between Empire and Nation: Remaking France and French Africa, 1945–1960* (Princeton NJ, Princeton University Press, 2014); Gary Wilder, *Freedom Time: Negritude, Decolonization, and the Future of the World* (Durham NC, Duke University Press, 2014); Gil Rubin, 'From Federalism to Binationalism: Hannah Arendt's Shifting Zionism' (2015) 24 *Contemporary European History* 393–414; William Selinger, 'The Politics of Arendtian Historiography: European Federation and *The Origins of Totalitarianism*' (2016) 13 *Modern Intellectual History* 417–46.

²³ Manu Goswami, 'Imaginary Futures and Colonial Internationalisms' (2012) 117 *American Historical Review* 1461–85.

²⁴ Anthony M Lewis, 'Jefferson's Summary View as a Chart of Political Union' (1945) 5 *William and Mary Quarterly* 34–51; Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge MA, Harvard University Press, 2011); Oliver, 'Parliamentary Sovereignty, Federalism and the Commonwealth' ch 2 above; Philip Murphy, *Monarchy and the End of Empire: The House of Windsor, the British Government, and the Post-War Commonwealth* (Oxford, Oxford University Press, 2013).

²⁵ On the British export of constitutions, see Linda Colley, 'Empires of Writing: Britain, America and Constitutions, 1776–1848' (2014) 32 *Law and History Review* 237–66.

sort of agreements settled competences. It could also arise from the means of exit from prior structures of power, whether through revolt, secession or act of Parliament, for example. And it would be determined by the relative sizes of the parties entering into federal arrangements: massive inequities, in population, resources or economic power, can stifle federalism, whether as a plan for combining independent sovereignties or as a prospect for redistributing existing authority when one of the parties (for example, a devolved England within a federalised United Kingdom) would greatly outweigh the others (Wales, Scotland, Northern Ireland). Now, at a time when, as Stephen Tierney puts it, 'the internal territorial constitution of the UK is rapidly changing' under the pressures of devolution, 'the federal question can no longer be avoided.'²⁶ What the answer to that question will be remains uncertain and contested. History can at least give some guidance, by showing how it has been answered in the past.

At the heart of the federal question is the problem of keeping various forms of diversity in suspension. The forms of that diversity have, of course, changed over time. In the nineteenth century, race set the limits of imperial federation: it was only imaginable for 'Anglo-Saxons' within a global community of settler colonial states. Within some, but not all, of those states, federal relations by means of treaties between the settler state and Indigenous peoples cross-cut the demands of shared rule between provinces and central administrations, and between the Dominions and metropolitan Britain. Federal relations determine the dimensions of multiculturalism as well as multinationalism and are, in turn, shaped by the demands of political economy, between the regions of federal states and in their relations with other economies. These latter federal questions are beyond the immediate scope of this volume but they do suggest the range of pressures that federalism has both relieved and exerted, over time and across the British world.

Britain's place in the world is likely to change quite radically in the coming years, with the prospect of its exit from the European Union in March 2019. This moment, concluding the two-year period mandated by Article 50 of the Lisbon Treaty, marks a 'foederal' cure (in the eyes of supporters of Brexit) for a 'federal' disease—the invocation of treaty rights against any further sharing of sovereignty. At the time of writing, none of the authors can foresee what form Brexit will take, what new relationships—with the EU or other international actors—Britain will forge after that moment, or what effect this will have on the composition of the United Kingdom. For the moment, at least, the shock of Brexit seems to have halted moves towards Scottish independence, whether temporarily or in the longer term it is not yet possible to say. The prospect of reconstructing a land border between the Republic of Ireland and Northern Ireland is the thorniest territorial problem arising from Brexit, with implications not just for Anglo-Irish trade but also for the Good Friday Agreement and the possibilities of reunification

²⁶ Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016' ch 4 above.

on the island of Ireland. What supporters of Brexit termed ‘taking back control’—presumably from institutions outside Britain, presumably in favour of the legislative supremacy of Parliament and the primacy of British courts—has, so far, led only to fears of executive overreach and an unresolved collision between the will of the people (expressed in a non-binding, advisory referendum) and Parliamentary sovereignty. How this tangle of Gordian knots will be cut, and what might be the unintended consequences arising from such perilous procedures, we will discover in the coming years.

What seems clear, nonetheless, is that we need to be forearmed with creative solutions to the problems exposed by the 2016 referendum and those already evident in the aftermath of triggering Article 50. How will the British union state resist the pressure to devolve power in more radical ways after Brexit, perhaps with a solution to the ‘West Lothian question’ leading to greater autonomy for England, the heartland of support for Brexit, with or without London, one of the democratic bulwarks against it? Does the return of a hard border in Ireland make more elaborate sharing of functions more plausible, or does the reversion of part of the island to third-country status vis-à-vis the European Union foreclose that option? Will gradual disengagement from the European Court of Justice lead to greater judicial independence or the likelihood of more vigorous judicial review, that great mark of federalism for Dicey and other critics? And where will all this leave the European Court of Human Rights, the product of ‘a concordat between states’ long prior to the European Union and spearheaded by Britain?²⁷ It is too soon to tell. Federalism would certainly ‘institutionalise power-sharing across the board’, as Jo Murkens notes, particularly within what Nigel White calls ‘a federalising international order’.²⁸ With the variety of deep and wide perspectives presented in this collection, there is much less danger of simply ‘drifting towards federalism’, as Stephen Tierney puts it. With our eyes open to the possibilities, we may become federalists again—as, indeed, we have long been.

²⁷ Roger Masterman, ‘Federal Dynamics of the UK/Strasbourg Relationship’ XXX above; Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford, Oxford University Press, 2017).

²⁸ Jo Eric Khushal Murkens, ‘The UK’s Reluctant Relationship with the EU: Integration, Equivocation, or Disintegration?’ XXX above; Nigel D White, ‘A Willing International Federalist: The UK’s Pivotal Role in the United Nations’ XXX above.