Chapter 5

The EU's Federalism Deficit: A Madisonian Perspective

Michael P. Zuckert

Federalism or a federation has been, from the outset of EU's predecessor organizations, one of the voiced aims of the integration process. Thus Robert Schuman proclaimed the Coal and Steel Community, "a first step in the federation of Europe."[1] The theme of a European federation has become pressing in a more urgent way with the arrival of EU expansion. John Pinder made the point succinctly, when he observed that "as the number of member states exceeds twenty, rising towards thirty or more, timely and effective decisions will become less and less feasible in those fields where the intergovernmental element predominates and the veto remains."[2] The implication of Pinder's comment is that the EU must evolve towards a more purely supranational form of political structure, presumably of the federal type, in order to function effectively as an expanded union.

Of course, it is as true of Europe as it was of the U.S. in the nineteenth century—actually far more so—that not everybody is or has been committed to the goal of a federal union. Although some see EU expansion pointing to a more federal Europe, others see that the addition of a large number of countries, which add markedly to the linguistic, cultural, and economic diversity and disparities of the EU, points even more decisively away from a more federal Europe.[3] A federal republic of Europe is thus sought by some, but not by all, and the political conflict over the desirability of a federal republic has tended to color the analytical inquiries into EU federalism conducted by political and other sorts of social scientists.

---

[1] John McCormick, *Understanding the European Union* (Palgrave, 1999, p 65); Michael Burgess, *Federalism and European Union: The Building of Europe, 1950-2000.* (Routledge, 2000, p 64—76).

[2] John Pinder, *The European Union: A Very Short Introduction* (Oxford, 2001, p 132-3).

[3] See e.g., Leslie Friedman Goldstein, "The European Court of Justice and Euro-Federalism," *Evolving Federalisms: The Intergovernmental Balance of Power in America and Europe* (Campbell Public Affairs Institute, 2003, p 104).

I do not intend to take sides in this debate, but I hope to be able to help clarify the issues by bringing to bear a historically richer model of federalism than, so far as I have been able to tell, normally informs these discussions. In doing so, I hope to be able to provide a solid basis for measuring what we might call the EU's "Federalism Deficit," a concept meant to supplement the now well-known notion of a democratic deficit. We can speak with some confidence of a democratic deficit because we have a fairly clear idea of what a properly democratic polity looks like and thus can (qualitatively) measure EU institutions and practices in this light. Discussions of federalism have much less precision to them as a rule, and thus, while it is frequently noted that the EU is not a federal republic, there does not seem to be a clear enough notion of what a proper federal system should look like to generate an idea of a federalism deficit. I will appeal to James Madison to supply a set of "federalism variables" that will allow the generation of a fairly precise notion of just where the EU is and isn't a federal union (in what Madison would consider a "proper" or effective sense) and thus what would have to be different in the EU for it to overcome a federalism deficit. I appeal to Madison, for it was he who discovered "*une théorie entièrement nouvelle*," which, according to Alexis de Tocqueville, "*doit marquer comme une grande découverte dans la science politique*."[4] This mode of federalism, Tocqueville judged, must be the basis for all successful federations of the future. "*C'est pour n'avoir pas connu cette nouvelle espèce de confederation, que toute les unions sont arrivées à la guerre civil, à l'asserisement, ou à l'inertie. Les peuples qui les composaient ont tous manqué de lumieres pour voir le remède à leurs manx, ou de courage pour l'appliquer*."[5]

My attempt to apply an American model to the EU is of course neither new nor uncontroversial. Probably as often as the U.S. experience has been found to be relevant to Europe, at least as often its relevance has been denied. Thus Larry Siedenstop, following de Tocqueville, identified four "informal or cultural conditions crucial to…[the] success" of federalism in the U.S., conditions which he mostly finds missing in Europe.[6] Fritz Scharpf seconds the thought,

[4] Alexis de Tocqueville, *De la Democratie en Amerique*, ed. Eduard Nolla (Paris: Libraire Philosophique J. Vrin, 1990) I 1.8, p. 120.

[5] *Ibid*, p. 121.

[6] Larry Siedentop, *Democracy in Europe*. (Columbia University Press, 2001, p 9—24); cf. *Federalist* No. 2, ed. Clinton Rossiter (Mentor, 1961).

and draws the conclusion even more explicitly: "It is clear by now that a European Union that must be constituted of many nations cannot grow into a large nation-state resembling the United States of America."[7] Vernon Bogdanor believes that the U.S. and other "confederations which became federations" saw "the development of a common consciousness" among the citizens of the member states, which led them "to feel that the [merely] confederal political structure was a constraint upon their joint activity as a people." He does not see this kind of consciousness developing in Europe.[8] Michael Burgess does not so much deny the relevance of the U.S. model because Europe lacks the preconditions to achieve it, but rather because in his view, "the EU model has…replaced the much-vaunted American model."[9] In this judgment he follows the late Daniel Elazar, who was universally recognized as the dean of comparative federalism studies in the U.S.[10]

I would be tempted to go even a step beyond those who doubt the relevance of the American model. The trajectories of America and Europe toward a federal union—if that is indeed Europe's trajectory—are completely different. The American federal union was much more typical in its origins and development than the EU has been. The American union began, as Montesquieu, the greatest political authority for founding era Americans, said confederacies do: for the sake of mutual defense, to protect relatively small republics from larger and potentially predatory monarchies and despotisms.[11] The American republics followed the confederal model of combining their forces for dealing with the outside world—in the first instance the British, against whom they were revolting. Like members of most historical confederacies they jealously guarded their internal life from interfer-

---

[7] Fritz W. Scharpf, "Can There Be a Stable Federal Balance in Europe?" in Joachim Jens Hesse and Vincent Wright, eds., *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems* (Oxford, 1996, p 365).

[8] Vernon Bogdanor, "Federalism and the Nature of the European Union," Paper prepared for "Governing Together in the New Europe," Conference, Robinson College, Cambridge, April 2003, pp. 11-12.

[9] Burgess, *op. cit.*, 43; 269.

[10] Daniel Elazar, "From Statism to Federalism: a Paradigm Shift," *Publius*, 25(2), Spring 1995, 1.

[11] Montesquieu, *Esprit de Loix*, ix, 1-3. *Cf.* Riker, William H, "European Federalism: The Lessons of Past Experience," in Hesse and Wright, 13.

ence by the confederal authorities. They carefully affirmed the sovereignty of the member states in the Articles of Confederation and never contemplated granting the confederal authorities control over their internal economic life. Indeed, it was a significant moment when a consensus emerged within the union that a power to regulate commerce among the states and with foreign nations would be a desirable addition to the powers of Congress. Even then they did not think Congressional power over internal commerce acceptable.

EU history has been nearly the opposite of this traditional pattern.[12] Although foreign policy concerns figured in the formation of EU predecessor organizations, the danger feared was, above all, each other, not an outside force. (So far as the Soviet Union was a threat, NATO, not the EU was the transnational entity to deal with it). Moreover, the EU did at the outset what the American states would not even think of doing, grant important powers over the internal economic life of the members; but it has still not done what the American states did from the outset, integrate their instrumentalities of war, diplomacy, and foreign policy.[13] The different patterns on the two continents to some large degree reflect the dialectical impact of the other. Americans sought a union because they wanted to be able to prevent European powers from controlling or reconquering the new states, or from turning North America into a site of great power rivalry. The European pattern, on the other hand, was partly facilitated by the post-war American military presence and leadership, which made a traditional confederation less urgent, and partly by the desire to put together an economic unit powerful enough to rival America's post World War II economic dominance.

I am under no illusion, therefore, that the American model provides a historical paradigm for Europe. If Europe arrives at a federal union, it will be by an entirely different route, and for quite other reasons.

The relevance of the American model may be doubted for two other, quite opposite reasons as well. On the one hand, the original American federalism was arguably a failure, a massive failure. The union split apart, leading to the bloodiest war, to that date, in history.

[12] Craig Parsons, "Introduction," in *Evolving Federalisms*, *op. cit*.

[13] Though *cf.* Projections for Future Integration: EU Constitution, Part III, Title V, Chapter 2.

Patched together by force of arms, the American federal union, on the other hand, has become far more centralized in the post-New Deal era than many or most proponents (to say nothing of opponents) of EU federal union seek.[14]

I do not, then, look to the American model to track the actual past or likely future historical developments of federalism in Europe. My concern is rather to seek out a pattern that can help make sense of what all observers agree is a rather conceptually messy European pattern. Machiavelli once made a distinction between states which receive their constitution all at once, as it were, with a single plan from a single mind (like Sparta) as opposed to those states whose constitutions developed over time in a more unplanned and less coherent manner (like Rome).[15] The U.S. followed the first pattern (more or less), the EU the second. For that reason, as well as others, it is one of the regular complaints of Euro analysts that there is no clear pattern against which to measure EU federalism, no clear set of concepts in terms of which to discuss the federal (and non-federal) elements of EU structure.[16] One recent conference on "Federalism and the Future of Europe" was justified by its organizers in terms of "the need to rescue the term `federalism' from the mass of misconceptions into which it has fallen."[17] One of the truest observations I have run across in the literature of EU federalism is this understatement by Tanja A. Boezel and Madeline O. Hosli: "Studies have invoked different concepts of federalism."[18]

Of course, many analysts before me have held the EU up to be examined in the light of American federalism. My aim is somewhat different: it is not so much to compare the EU either to the original or the current American Constitution but instead to bring to bear the theory of federalism developed but not fully applied by the father of

[14] Cf. Ernest A. Young, "Protecting Member State Autonomy in the European Union," NYULR, 77 (Dec. 2002).

[15] Nicolo Machiavelli, *Discorsi Sopra La Prima Deca di Tito Livio*, I 2 in *Tutte le Opere*, ed. Guido Mazzoni and Mario Casella (Firenze: G. Barbera Editore, 1929), 59.

[16] Cf. Burgess, *op. cit*., 13.

[17] Peter Arengo-Jones, "Federalism and the Future of Europe," *Club of 3* Conference Report, p. iv.

[18] Tanja Boerzel and Madeleine Hosli, "Brussels Between Bern and Berlin: Comparative Federalism Meets the European Union," 1. Constitutionalism Web-Papers, Con WEB, No.2, 2002, http://les.man.ac.ur.conweb.

American federalism. It is not widely known, but Madison was not in fact very positive in his assessment of the product of the Philadelphia Convention. He wrote his friend Thomas Jefferson, then in Paris, that despite the radical departures made from the Articles of Confederation the new constitutional plan "will neither effectively answer its national object nor prevent the local mischiefs which everywhere excite disgust against the state governments."[19] In other words, the new plan did neither of the two things Madison thought most needed doing in America in 1787: it did not establish a proper, i.e., a lasting federal union, and it did not use the federal structure to repair the failures of republicanism (read, modern democratic government) and rights protection within the member states. Madison did not, therefore, expect the union to last long, and although he did not live to see secession and civil war, he would not have been surprised at events turning that way. The union came apart in just the ways and along just the fault lines he had predicted. Thus it is not the American order itself but the Madisonian theory of federal union to which I intend to appeal. The differences between the two are not often well understood in American discussions of federalism; I have not seen them even adverted to in discussions of EU federalism.

In what follows I will present Madison's "federalism variables," which I will then use to describe four constitutional orders or plans: (1) the original American constitution; (2) the American constitution of the 21st Century; (3) the EU, and (4) Madison's preferred plan. I include the first because that allows me to ground my analysis in Madison's own application of his variables to the 1787 constitution in *Federalist* No. 39; I include the second because of its greater familiarity to a European audience. In my treatment of the third I will include both current EU structures and proposed modifications under the recently drafted proposal for a "Constitution for Europe." The goal will be to locate the EU in terms of the variables, to understand Madison's position on what value those variables have to take on to achieve an optimal federal union, to understand the reasoning behind Madison's model, and finally, to formulate the "federalism deficit" for the EU (and for that matter, for the US constitutions of 1787 and 2004).

[19] Madison to Jefferson, Sept. 6, 1787; in *L.A. Madison*. 136. *Writings*, Library of America.

The Federalism Variables

One of the threshold issues that has hindered clear discussion of EU federalism is a mere, but telling terminological one. In his classic analysis, Madison presented the following thought, which has become more or less unintelligible to us in the intervening two hundred years: The American constitutional plan was being challenged in its struggle for ratification because it did not, in its critics' opinion, "preserve the federal form, which regards the union as a confederacy of sovereign states."[20] What confuses us today is Madison's interchangeable use of the terms "federal" and "confederal" or "confederacy." We are inclined to consider these as separate and different forms of union, with the American constitutional union the paradigmatic example of a "federal" system, and the precedent union under the Articles of Confederation as a paradigm of a confederacy. Rather than describing the proposed constitution as a federation, Madison calls it "neither wholly national nor wholly federal," it is "in strictness, neither a national nor a federal constitution, but a composite of both."[21]

As Martin Diamond pointed out long ago, the American founders did not distinguish "federal" and "confederal" from each other, and did not think of their plan as an example of a "federal" union. Federal and confederal were simply synonyms.[22] It helps to return (for the moment at least) to the older usage Madison employed, both because it conduces to a more accurate understanding of his federalism variables, and because it puts much of what is often said today about federalism in a different light. For example, in discussions of the EU its intergovernmental aspects are often contrasted with its federal aspects. As we shall see, this is not the way Madison would discuss it, and I tend to think that Madison's version is clearer and more illuminating.

Madison's presentation of the federalism variables is governed not by a contrast of total systems, but by the contrast between the federal (or confederal) and the national principles. Alexander Hamilton brings out the two principles in *Federalist* 15 when he speaks of the different

[20] *Federalist* (Hereafter F) 39, in Jacob E. Corke, ed., *The Federalist* (Hanover, NH: Washington UP, 1961), 257 (Hereafter C).

[21] F 39, R 246.

[22] Martin Diamond. "What *The Federalist* Meant by Federalism," *As Far as Republican Principles Will Admit* (AEI Press, 1992).

ways in which, or bodies to which, governments may relate. If one government legislates for or otherwise relates to other states or governments "in their corporate or collective capacities," then we have an instance of the federal principle at work. If a government legislates for or relates directly to the individuals who are its citizens and subjects, we have an instance of the national principle at work. A government may of course be all one or all the other. The American union under the Articles of Confederation was a quite pure instance of the federal principle working through all the federalism variables. Most unitary nation-states are examples of the other. This much is familiar.

Madison identifies five variables in the constitutional plan, which he proceeds to investigate in terms of the operation within them of the federal or national principle. It is evident that in theory, at least, various mixtures are possible, as different of the variables take on different values. It was that recognition that allowed Madison to pioneer the development of a new form of union that was to be a combination of the two principles or systems. It seems as though all (or almost all) forms of the combinations have come to be called "federal" rather than "confederal," a term now reserved for the form in which all the federalism variables are characterized by the operation of the federal principle in them.

In addition to disaggregating the system elements and thus identifying his series of federalism variables, Madison also had a clear theory of the optimal combination. He came to see not only that a range of combinations was possible in theory (an exercise in political taxonomy), but also and more importantly he had worked out a theory of the necessary characteristics of a lasting and successful combination. Just as he believed that a confederacy of the old type was doomed to fail, and that a unitary government for America was not possible or desirable, so he believed that several of the theoretically possible combinations were doomed to fail or were highly undesirable. According to his theory of what a proper combination should be, he thought the proposed constitution very defective and thus unlikely to endure. Madison sought an even more revolutionary departure from the old model of federalism than Tocqueville.

Madison's five variables are the means by which we may "ascertain the real character of the government." They are: (1) the *foundation* on which the government is to be established; (2) "the *sources* from which

its ordinary powers are to be drawn;" (3) the *operation* of those powers; (4) the *extent* of the powers; and (5) the amending authority.[23] Madison's agenda in *Federalist* 39 is to measure the proposed constitution according to these variables. Before we consider what he says there, we must notice that he labored under a certain rhetorical imperative. The constitution was being widely criticized for being too national, or not being federal enough. It was not being criticized (at least in politically significant ways) for not being national enough. His political situation left Madison with an incentive to interpret the variables in as federal a manner as possible. As we will see, whenever there is an ambiguity he (over) emphasizes the federal value of the variable. On several occasions, therefore, a modification of his own discussion is warranted.

Variable I: The Foundation

The above comments are nowhere more applicable than in his discussion of the first variable, the "foundation on which" the government of the union "is to be established." By "foundation" he means the juridic authority which establishes and stands behind the constitution. The issue is thus who ratifies the constitution; on whose authority does it rest. He concludes that "the act…establishing the constitution will not be a national but a federal act," because ratification is to be given "by the people…as composing the distinct and independent states."[24] Thus only those states which ratify the new constitution themselves will be considered members of the new union. Neither a majority of the states nor a majority of the individuals of the total union bind states which have not individually ratified. Madison is correct to say that ratification is not simply a manifestation of the national principle, which would, at the extreme, treat the total population of the union, taken "as individuals composing one entire nation," as the ratifying body, by a majority of which all would be bound.

Madison has, however, deliberately failed to mention the purer mode of federal ratification: the governments of the existing states could ratify, just as they would ratify an ordinary treaty of alliance. The Articles of Confederation had been ratified in this manner.

[23] F 39, C 253.

[24] F 39, C 254.

Madison considered the ratification by the people of the states rather than by the governments of the states to be a difference of immense significance, at least as significant as the fact that ratification was not by the undifferentiated mass of citizenry. The ratification by the people was necessary to render the general government "paramount to the state constitutions," a quality lacking in the Articles government, "ratified as it was in many of the states."[25] The states were juridically superior to the government of the union so far as the state constitutions derived authority from the people of the states, but the government of the union only from the state governments. Later on, when he faced the challenge of the theories of nullification and secession put forward by John C. Calhoun, Madison emphasized the illegitimacy of secession, precisely because the Constitution was ratified by the people of the states. Not even a popular deratifying convention (as most of the Southern states convened when they adopted secession resolutions in 1860-1861) would legitimate secession, for according to the Madisonian theory, the citizen body of each state had become one with the citizen bodies of the other states with regard to the constitution they had adopted together. That is to say, the mode of ratification contained in the Constitution had a much more national character to it than Madison admitted in his *Federalist* 39.

The procedure he defended was the one adopted for the Constitution of 1787-1788 and remains the underlying basis of the American Constitution of 2004. It is not the procedure underlying the EU, either as it currently exists or as it is proposed to be revised under the new Constitution. The EU has been built entirely on "treaties" heretofore, and Article IV.8 of the new document provides: "The *treaty* establishing the Constitution shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements." That is to say, the EU constitution is according to Madison, entirely federal, on the same footing essentially as the Articles of Confederation or any treaty. Accordingly a right of unilateral withdrawal, implicit in its status as a (mere) treaty, is explicitly reorganized.[26] The fact that some EU countries have employed referenda to govern national decision for accession or ratification makes no

[25] *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale UP, 1966) p 19.

[26] Draft Constitution. Title IX, Article 59.

difference to the status of the treaty vis a vis its members in general. This is a procedure adopted by member governments as a matter of internal policy, but from the perspective of the treaty is no different from ordinary parliamentary ratification.

From Madison's perspective this is a powerful item of "federalism deficit." It is no accident that he placed this variable first in his list. The centrifugal tendencies of federal unions are so powerful, he thought, that only a juridically equal derivation from the ultimate source of authority, the people of the member states, could reliably provide for endurance and the necessary supremacy of the constitution and acts of the union government.

It is worth noting, at this point, however, that Madison's position on this variable was developed in the context of a clear and strong commitment within the American states following the revolution to the proposition that the people were the sole and ultimate source of authority. The new governments for the states were increasingly subject to special popular ratification procedures as well. These special procedures were put in place for a reason very similar to the one Madison appealed to in order to defend popular ratification of the union's constitution: to make the constitution unambiguously supreme to ordinary acts of legislation enacted under it. To the degree that EU members do not share the commitment to popular sovereignty and popular derivation of legitimate authority, perhaps this first variable of Madison's would have a different bearing in Europe. If the member state governments rest on no superior foundation, or on an unclear foundation, then perhaps it does not matter so much that the EU constitution rests on governmental rather than special popular ratification. Nonetheless, Madison would insist that the EU agreement leaves the EU in the last analysis a creation of the member states' governments, a status which endangers the permanence and the supremacy of the union.

Variable II: "Sources of Ordinary Powers"

Madison's second variable is "the sources from which the ordinary powers will be derived,"[27] by which he means, the appointing power for the chief institutions of the general government. In the case of all

[27] F 39, C 253.

four of our constitutions the application of this variable is rather complex. The U.S. Constitution of 1787, according to Madison's own analysis, has a "mixed character." The House of Representatives, selected by the people themselves on the basis of population, is a national institution. The Senate, however, is a federal institution, for it is selected by the states in their corporate capacities, and representation in the Senate is calculated on a formula of equality for each state. The Senate is another case, however, where Madison has overstated the federal character, for he fails to bring out in his analysis two differences between the way the Senate is constructed and what a thoroughly federal arrangement would be. Although the Senators are selected by the states, they are selected for fixed and fairly lengthy (six year) renewable terms. They are not recallable by their states and thus are nothing like mere delegates from their states, as would be the case with a purer federal arrangement. They are, in a word, officers of the general government, not officers of their states. That status is underlined by the fact that they receive a salary from the general government, and not from their states. Moreover, although the states are equally represented in the Senate, voting there is not by state. Each of the two Senators from each state has his or her own vote and they in no way vote as a delegation from their states.

That executive head, the President, is "derived from a very compound source," which is something of an understatement. The selection is, in a sense, made by the states, acting as states, via the electoral college. The formula by which the states are weighted in the presidential vote is itself a compound—the number of representatives (a national feature) is added to the number of senators (a federal feature). As Madison puts it, this electoral formula "considers [the states] partly as distinct and coequal societies, partly as unequal members of the same society."[28]

Once again, however, Madison understates the national character of the selection procedure for the executive. Three features of the procedure are more national, or at least less federal than his treatment would suggest. The state legislatures determine how the electors are to be selected, but the electoral college is a select *ad hoc* body, not a part of the on-going state governments. Although Madison says that

[28] F 39, C 255.

the selection is by the states, that is not quite so either. The practice that later evolved in the U.S. has obscured the actual operation of the electoral college as planned. The electors of each state were to meet on a day set by the U.S. Congress in their own states and were to cast their ballots for two persons, one of whom must not be from their home state. The historical practice in the U.S. has been, for the most part, that all the states' electoral votes would go to the winning candidate(s) from that state. This is not, however, the system originally conceived in the Constitution. According to Article II, Section 1, the electors "shall make a list of all the persons voted for, and of the number of votes for each," which list is then transmitted to the national capital to be counted along with all the votes cast elsewhere. Clearly, the constitutional expectation is that the electors will vote as individuals for their own preferred candidates, and the aggregating of votes is to occur at the national level in a straightforward one-elector, two votes system. The constitution gives the states discretion in structuring the selection of electors and they have used this power for the most part to impose the far more federal system of state winner-take-all voting, a system which maximizes the impact of the state (or of its majority) in the presidential election. The process outlined in Article II, Section 1 was modified by the Twelfth Amendment, adopted in the wake of the Election of 1800, which had resulted in a tie between Thomas Jefferson and Aaron Burr, a result produced by the rise of political parties and party discipline in the electoral college. The amendment provided that electors shall designate one of his selections as President and the other as Vice President. Nonetheless, on the central matter, the system was the same as in the original Article II, Section 1: the electors are expected to cast their ballots as individuals, and the result is to be aggregated at the national level. The actual constitutional provisions raise serious questions about the constitutionality of the present arrangement in the U.S. Be that as it may, the selection procedures for the presidency are less federal than Madison portrays them.

The conclusion is reinforced when we reflect that the electoral college, no matter how federal in character, is an entirely temporary body—if it can be called a body at all—which can exercise no supervisory power over the president, except what may be possible at reelection time four years hence when a new electoral college once again selects the president. As with the Senate, even though the states have a

hand in selection of the executive head, the institutional arrangement carefully minimizes any ability of the states to control the behaviors of the officer once in office. The President has no responsibility to the states as such.

Madison does not mention the selection procedures for the judiciary or the lower parts of the executive branch. Judges and high executive officers are to be nominated by the President and approved by the Senate. The states as such have no role in the process, no power to control these officials. The federal principle is at work only in the very attenuated form that the Senators owe their election to the states, and the President owes his to the even more indirect involvement of the federal elements, such as they are, of the electoral college. We would have to conclude that on Madison's criteria, the judiciary and executive branch are both essentially national with regard to source.

The modern U.S. Constitution has changed formally in one respect, and informally in another. The Senate is now popularly elected, giving the states as organized bodies less role in the general government. This change makes the Senate somewhat more national in source. The electoral college, however, is dominated by the principle of winner-take-all in each state. Although this gives the state governments as such no role, it does make the system slightly more federal in character than the original constitution contemplated.

Before we turn to examine the EU on Variable II, let us consider Madison's original scheme for a government of the union. Although this scheme is the recognizable seed out of which the proposed Constitution grew, nonetheless it differs considerably from that constitution on this variable. The lower house of the legislature is to be selected in the same manner as in the final constitution: by the people voting for representatives in (roughly) equipopulous districts. This is, according to Madison's criterion, a national element. The upper house of the legislature differs most widely from the final constitution, for the members are to be selected by the lower house, and representatives in it, too, are to be apportioned by population. This arrangement makes the source of the Senate's powers national also. The executive head is to be selected by the national legislature, again a purely national arrangement. The judiciary was also to be selected by the national legislature.

What is striking about Madison's plan, as opposed to the Constitution that was adopted, is how strict it is in attempting to avoid all elements of state action in the selection of officials for the general government. The basis for the commitment to separateness and independence of the government from the states is Madison's perception that allowing states agency is to admit sappers into the new system, for despite the agreement by the member states that an effective union was in their interest (else they would not join in) they also have more immediate interests and goals which impel them to undermine the union.

With this much insight into Madison's thinking we can begin to construct a federalism index for the various American constitutional schemes we have examined. Although I am going to put numbers to the phenomena, it must be recognized that mathematical exactness is not to be attained. In the case of many of the complexly compounded elements this caveat must have special force.

Let us begin by taking Madison's theoretical proposal as a baseline. There are four main institutions of governance in this plan: two branches of the legislature, the executive head, and the national judiciary. On the variables we are examining now, Madison's theory holds that a proper union requires that the national principle underlie the selection (or "source") of all the regular powers in the government. Let us then give 1 point for each element that is national in character, 0 points if wholly federal, and estimate values between 0 and 1 for compounds. The Madison Plan itself rates a 4 on Variable II.

It is much more difficult to calculate the Federalism Index Score (FIS) for Variable II in the U.S. Constitution of 1787. Let us look at it institution by institution:

House of Representatives: 1 (it is clearly constructed according to the national principle).

Senate: 0.25 (Senators are selected by the states and each state has equal representation. Yet it is far from a purely federal institution, for the reasons brought out above).

Presidency: 0.80 (Although Madison sees the institution as mixed, nonetheless it is far from an equal mix. The truly and effectively federal elements in the constitutional arrangement are relatively few).

Judiciary: 0.90 (The state agency is exceedingly attenuated in the Constitutional arrangement).

Total: 2.95.

The American Constitution of 2004 has a somewhat higher index score:

House of Representatives: 1.

Senate: 0.65 (Direct election of Senators, even if by state, makes it a far less federal institution)

Presidency: 0.70 (The prevalence of the winner-take-all model gives the states more agency).

Judiciary: 0.80 (I am giving the judiciary of 2004 a lower score than the Constitution of 1787 on this sub-variable because the practice of Senatorial Courtesy for lower judicial appointments has evolved and has played a role for much of American history).

Total: 3.15.

The EU is more complex even than the Constitution of 1787. Its institutions do not follow the neat pattern of the Montesquiean model of the separation of powers and it is therefore difficult to identify with certainty which are the chief governing institutions to be considered. Nonetheless, there seems to be a consensus that five institutions are of especial significance: the European Commission, the Council of Ministers, the European Council, the European Parliament, and the European Court of Justice. Let us look at each of these in turn in its relation to Madison's second federalism variable, attempting while doing so to assign to each a FIS.

European Parliament: Selection occurs by direct popular election; seats are apportioned to states according to a formula based on population, but not on a "one person, one vote" formula ("digressively proportional"). (*See* Constitution, Part I Article 19; III-232; Protocol on Representation of Citizens, Article 1) The Parliament meets Madison's criterion for an effective federal structure. *FIS: 1.*

European Council: Members of the council are "heads of state or government of the member states," together with the President of the Commission. Each member state has equal representation and deci-

sion is "taken by consensus," i.e., so far as one can speak of votes, unanimity. With the partial exception of the President of the European Commission, the European Council is clearly a federal institution. It earns a *FIS: 0*.[29]

Council of Ministers: The Council of Ministers is very clearly a federal institution. The council is in a way misnamed, for it is really a set of sixteen different formations, differently constituted depending on the agenda items under discussion. But each council formation is constituted identically as relates to the second federalism variable: "each Council is composed of the relevant minister from each member state."[30] The EU Constitution quite precisely provides that "only this representative may commit the member state in question and cast its vote."[31] The representatives are office holders in their home states, and only in that capacity serve on the Council of Ministers. They thus have no term of office for their EU office as such, and no institutional independence from their home governments.[32] It is tempting to see the Council(s) of Ministers as to some degree parallel to the U.S. Senate, but the differences in selection and conditions of tenure highlight how far from the pure federal principle the U.S. Senate was, even in the original 1787 Constitution.

Voting rules in the Council(s) of Ministers are complex, and vary by the type of issue. Three different voting rules are in use: simple majority, where each state has one vote, and a simple majority of votes carries the issue. This procedure is normally used for procedural issues.[33] Unanimity is required for decision-making in some policy areas.[34] Finally, there is also the Qualified Majority Voting (QMV) system, according to which states have different voting weight, depending on population; at the same time special majorities are required, insuring that states possessing at least some (high) percentage of the total population of the EU commit to a policy before it can

[29] Constitution, Part I, Articles 20-21; III 244.

[30] Fiona Hayes-Renshaw, "The Council of Ministers," in John Peterson and Michael Shackleton, eds., *The Institutions of the European Union* (Oxford, 2002, p 50).

[31] Draft EU Constitution. Part I, Article 22, ¶ 2.

[32] Cf. Goldstein, *op. cit*., 105.

[33] Hayes-Renshaw, *op. cit*., 56.

[34] *Ibid*, 56.

be adopted . One implication of QMV is that a blocking minority can be formed, composed of a population bloc considerably less than a majority. According to Hayes-Renshaw, the post-Nice blocking minority for an EU of fifteen member states could be formed by states containing about 30% of EU total population. Under a projected EU of twenty-seven states, the blocking minority could include states with only a little more than a quarter of total EU population. In the EU-15 model this means that any three of the largest states can form a blocking majority, or any two of the largest plus almost any two of the others. In the EU-27 model, any four of the six largest states, or any two of the largest plus almost any three of the others can form a blocking minority. On the other hand, on the EU-15 model the nine smallest states can block a majority, a numerous coalition to assemble, but a possible one if the smaller state feels particularly disadvantaged. Under the EU-27 model, the ten smallest can block. Under most conditions, in a word, the QMV system imposes the requirement that policies must have the support of both the majority of states, regardless of size, *and* a majority of the large states. To some degree, then, the idea of QMV is to produce in one body the effect of the composite voting rule that arises under the U.S. Constitution: a majority of states (Senate) and a majority of the population (House of Representatives).

The QMV provisions are to be seen in the context of the prevalence of unanimity or consensus decision-making, and thus should be seen as moves in the direction of recognizing a national principle in the source of ordinary powers of the union government. Nonetheless, since the weighted votes are to be cast by representatives so thoroughly constrained by their home states, the QMV can hardly add much to the FIS for the Council of Ministers. The FIS for the Council of Ministers should thus be somewhere in the neighborhood of *FIS: 0.10*. (The weighting of votes and requirements of special majority are due to change in 2009 under the provisions of the new Constitution, as they have been changed under the treaty of Nice. Nonetheless, these details are not essentially relevant to assigning the Council of Ministers a FIS.)

The European Commission: The Commission is a remarkably hybrid structure.[35] It consists of the EU bureaucracy (directorates) and the

[35] See John Peterson, "The College of Commissioners," in Peterson and Shackleton, *op. cit.*, 72.

cabinet-like College of Commissioners. The draft constitution provides a perspicacious account of the "sources" of the College of the European Commission. The selection of the Commission President occurs in a two-stage process: The European Council, operating under QMV, selects a President who must be approved by a simple majority of the European Parliament. Like the system for selecting the American President, this system combines national and federal principles: the highly federal European Council has the decision, but it must be ratified, or, perhaps better, can be vetoed by the more national European Parliament. Since there are many members of the European Council and only one President, even this part of the process tends in a national direction because a nominee must satisfy a broad coalition of states.

The Commissioners who compose the college are selected via a procedure that also combines national and federal elements. First, "strictly equal footing" is mandated in the Constitution for each member state in membership in the college over time. Even though there are only thirteen voting members of the college, these memberships are to be allocated on the basis of equal time in office for representatives of all member states. The federal character of the requirement is reinforced by the actual selection procedure. "Each member state determined by the system of rotation shall establish a list of three persons…whom it considers qualified to be European Commissioner."[36] The President-elect then selects one person from each of the lists to make up the college. The Constitution mandates that the persons shall be selected for "their competence, European commitment, and guaranteed independence." In order to guarantee independence, the commissioners have a fixed term of office (five years). The entire list of commissioners must then be approved by the European Parliament. The commission as a body can be removed by censure vote of the European Parliament, and individual commissioners by the President of the Commission. It is significant that neither member governments nor the Council of Ministers has any share in the removal power. That is indeed a great force for independence.

The provisions for selection, tenure, and removal of the Commission thus reveal to a higher degree than any of the other institutions thus far

[36] Draft EU Constitution. Part I, Article 26.

canvassed a will to transcend the federal principle. In source, the Commission remains a highly hybrid structure, with its national and federal elements almost equally counterpoised for a *FIS of 0.50*.

(I have omitted from the discussion the Union Ministers for Foreign Affairs, a Vice President of the Commission. The initiative in appointment of this officer is taken by the European Council, which, "with the agreement of the President of the Commission," makes this appointment (using QMV). It too must be approved by the European Parliament. Unlike the other positions, the European Council may remove the Minister for Foreign Affairs. This procedure is somewhat more federal than the procedure for the rest of the Commission, but I am largely leaving it out of this account—for the sake of simplicity mostly.)

The European Court of Justice: The treaties and draft constitution provide that judges "shall be appointed by common accord of the governments of the member states," with one judge per country. In practice this means that "the judges are effectively national appointees."[37] The appointment is to a six year renewable term, which would seem to encourage dependence on the appointing authority. That is to say, method of appointment and conditions of tenure of office are—or seem to be—thoroughly federal. Yet there is a formal provision for "common accord by the governments of the member states."[38] Likewise, there is a firm statement of criteria for appointments: appointees "shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office in their respective countries or who are juristconsultants of recognized competence."[39] This provision represents an attempt to overcome the working of the federalist principle in the appointment process by insisting on independence, i.e., independence from the national governments which are responsible for the judges coming to the Court. The Constitution provides a special panel to see to it that appointments accord with these criteria. The panel is to consist of former judges and other distinguished jurists or lawyers. The idea is that the federalist bias of the office will be overcome via the application of professional, legal standards, as interpreted and administered by representatives of the profession. The drive toward judicial independence represented by the panel and the criteria for selection is reinforced by the unremovability of the judges. Likewise, although

judges are in effect appointed by national governments, they are not dismissible mid-term by the appointing country. Thus although the "source" of the ordinary judicial powers is highly federal, some efforts have been made to qualify and diminish the federal character of the office. The judiciary thus earns a *FIS of 0.25*.

The EU FIS on Variable II: Recalling that the FIS numbers are imprecise, but not arbitrary estimates, we can tally up the raw FIS for variable II:

European Parliament: 1.0

European Council: 0

Council of Ministers: 0.1

European Commission: 0.5

European Court of Justice: 0.25

Total: 1.85

This score is based on five institutions, as opposed to the various American plans, all of which are based on four items. It is necessary to calculate an adjusted FIS so the figures are genuinely comparable. The simplest way to make the scores comparable is to reduce the EU FIS by 80%. The adjusted EU FIS, then, is 1.48. This is well below the U.S. Constitution of 1787 (2.95); the U.S. Constitution of 2004 (3.15); and, of course, the Madison Plan itself (4.0). In fact, it is almost midway between the FIS of 0 that one would attribute to the Articles of Confederation on Madison's second variable, and the Constitution of 1787.

We might retroactively go back to assign a FIS on Variable I (foundation). This variable is, of course, much less complex, for it does not have an array of sub-variables within it, and it is not as capable of hybrid models as Variable II is. The real issue with respect to Variable I is comparability to FIS on Variable II. It would be arbitrary to assign it a total value of 1.0 because it has no sub-variables. The significant

[37] McCormick, *op. cit.*, 110.

[38] Draft EU Constitution, Part III, Article 261.

[39] Draft EU Constitution, Part III, Article 26.

question is, rather, how important is this variable in defining the nature of a proper federal arrangement as opposed to the other variables. Madison has made it clear, I think, that the mode of ratification, or juridic foundation of the union is exceedingly important. He puts it first on his list of federalism variables. The argument suggests that Variable I may be nearly as significant as Variable II. I propose therefore to count Variable I as worth half as much as Variable II: 2 points. On this scale, then, all three of the American constitutions receive a FIS of 2 and the EU a FIS of 0.

Variable III: Operation of Powers

Madison describes the third variable as follows: the "federal principle" recognizes that "the powers operate on the political bodies composing the Confederacy in their political capacities." According to the national principle, on the other hand, "the powers operate…on the individual citizens composing the notion in their individual capacities." The proposed constitution of 1787 "falls under the *national* not the *federal* character" on Variable III.[40] Madison identifies a place or two where the proposed government operates in the federal way, for example, "in the trial of controversies to which states may be parties, they must be viewed and proceeded against in their collective and political capacities." What he has in mind is straightforward and the application is clear-cut. The new general government legislates for individuals and has its own institutions—executive and judicial—to bring its policies directly to the individual citizens. The only ambiguity in the assessment of this variable concerns the relation between the judicial systems of the two levels of government. There are many instances in which the relevant U.S. constitutional or legal provisions will be applied in and by the state court systems. The Constitution provides for this situation in two ways: first, by clearly describing the legal enactments of the general government as supreme over those of the states, and by decreeing judges in the states to be "bound" by that mandate, no matter what a state law or constitution may say.[41] Moreover, provision is made for appeal of cases involving the Constitution, laws, or treaties of the general government to the court

[40] F 39, C 255.

[41] U.S. Constitution, Article VI.

system of the U.S.[42] Since it is the judiciary that pronounces "what the law is," Articles III and VI together mean that state courts are constitutionally required to follow the determination of the relevant U.S. courts on the meaning and application of the Constitution or enactments of the general government.

This provision could be considered a federal element in the construction of the system, but Madison does not identify it as such. His failure to do so could stem from either of two causes. First, the constitution leaves the character, even the existence of a lower U.S. court system (below the Supreme Court) up to Congress. Under the Constitutional mandate most enforcement of U.S. law could well occur in state courts (if there is no lower court system), or perhaps nearly all could occur in U.S. courts (if Congress established a very large and extensive lower court system and an extensive executive establishment). The system had the potential to be either heavily reliant on state courts or not reliant on them at all; Madison may have conceded to the constitution's anti-Federalist opponents that the system may indeed operate in a fully national manner, and he just considered it as such.

More likely, I think, is that Madison saw a significant difference between the two levels of government interacting via their Court systems, as here, and the kind of interaction he thought typical of federal systems *per se*. Under the Articles of Confederation, for example, the government of the union (the Articles Congress) legislated for the states as such, and directed themselves solely to the State legislatures, i.e., to the states "in their political capacities." While the state courts are agents of the states they do not represent the states "in their political capacities," at least not to the degree that state legislatures and executives do. Among other things, Madison seems to have in mind the same sort of appeal to legal professionalism that the EU provision for judicial appointment appeals to in looking toward immersion in legal/juristic culture as a force for independence and commitment to the law as a countervailing force to parochial loyalty to home state.

I would be inclined to say that on the basis of Madison's own reasoning, however, we should slightly modify his assessment of the new

[42] U.S. Constitution, Article III.

constitution under Variable III. Operation of the powers completely via agencies of the general government or individuals with no intermediation or involvement of state agencies should be construed as the pure form of operation of the national principle (FIS = 4). Operation of the powers entirely on and through agencies of the states other than state judiciaries, should be construed as the pure federal principle in action (FIS =0). Operation via state judiciaries should be construed as a mixed mode, with the relative weight of national and federal difficult to assign in the abstract, for it will depend a good deal on the legal culture of the society. With this array of considerations in mind, I would assign the Constitution of 1787 a FIS of 3.60 rather than the 3.95 or so to which Madison's own discussion points.

Structurally the U.S. Constitution of 2004 seems much the same as that of 1787, but there has been a significant change that makes the system *as a whole* more national, but Variable III less so. I refer to the development of the use of the spending power to induce state legislatures to adopt policies that Congress wants, but arguably lacks direct authority to impose. Thus, federal money is used to "encourage" states to enact speed limit laws, or federal educational aid is used to induce states to adopt favored educational policies. Although not all Constitutional scholars would agree with my judgment, I believe this use of the spending power is contrary to the original constitutional scheme, not only as a circumvention of the very idea of enumerated powers, but also because it leads to much greater levels of operation of the powers of the general government in the federal manner. Strangely, then, even though the entire Constitutional system is far more national now than it was in 1787, I would nonetheless give the 2004 Constitution a lower FIS on Variable III, say, 3.40.

Madison's original plan was to operate much as the Constitution of 1787 provided. It thus earns the same FIS: 3.60. A brief remark on the significance of Variable III in Madison's constitutional thinking is in order, however. It would be no exaggeration to say that Madison's insight into the ineffectiveness of the mode of operation of the powers of preexisting confederacies was the germ from which Madison's invention of a new kind of federalism grew. His study of previous federal unions led him to see that their "great and radical vice" was "the principle of legislation for states or governments, in their corporate or collective capacities…as contradistinguished from the individuals of

whom they consist."[43] Madison's idea, which outstripped all other ideas for reform at the time, was that the government of the union could be successful if and only if it could legislate for individuals. That is, strange to say, a successful federation required that the national principle of operation characterize its actions.[44] Given American theories of legitimacy, the general government could rightly legislate for individuals only if the source of its ordinary powers was also the individuals for whom it would legislate and tax. All the major features of the U.S. Constitution as a federal union followed from these basic insights of Madison. It had to be ratified by the people, not the state governments; it had to forbid unilateral withdrawal by member states; it had to break with all federal principles of internal decision-making, by, for instance, rejecting unanimity of states as a decision rule, and even rejecting QMV for most matters.

The assessment of the EU on Variable III is difficult, because like much else its mode of operation tends to be complexly hybrid in character. The various pillars further complicate matters. I am going to simplify to ease treatment of the subject. The EU has law-making bodies, it has a kind of executive (the directorates of the Commission), and it has a judiciary. It certainly goes well beyond the kind of institutions typical of historical federations. However, the EU "executive," if that is the proper term for it, is not actually an executor of laws. It plays a role, in part a technical role, in developing proposals to be made into law and adumbrating regulations as part of the law. It does not, however, in most instances enforce EU law—the member states do that.[45] Thus, although the EU law and rule-making structures are highly developed (some complaints are heard that they are over-developed), the EU operates in the manner Madison identified as federal: the general government legislates for its member states in their corporate or collective capacity and is dependent on the executive actions of the member states to bring EU law home to citizens of EU states. This is a mode of operation Madison considered deadly for federal unions.

---

[43] F 15, C 93.

[44] See Michael Zuckert, "Federalism and the Founding," *The Review of Politics*, Vol 48, No. 2, Spring 1986, 166—210; Michael Zuckert, "System Without a Precedent," in E. Levi and D. Mahoney, *Framing and Ratification* (MacMillan, 1988).

[45] Neill Nugent. "The Commission's Services." In Peterson and Shackleton, *op. cit.*, 152-3.

The EU has been far more effective than Madison or Tocqueville would have predicted on the basis of that feature alone. In part the EU success must be attributed to EU judicial institutions. The EU courts contribute to effective federal governance essentially through jurisdiction over infringement actions, and the preliminary ruling procedure. The EU court operates quite differently from U.S. courts in relation to member state courts. The U.S. Constitution provides for appeal of cases from state courts to U.S. Courts if there is a "substantial federal question" involved. This procedure allows the U.S. courts to enforce the Supremacy Clause, i.e., to apply U.S. law over law in the states and it allows it to establish a degree of uniformity of interpretation and application of U.S. law in the states. In the EU, on the other hand, compliance with EU laws and regulations is left to member states. In the EU, "the Commission is vested with the primary responsibility for ensuring the member states comply with both the applicable treaty provision and community legislation."[46] Since Maastricht there is also in place a provision whereby the Commission may return to the Court to seek disciplinary measures in the form of a fine against recalcitrant states which refuse or neglect to rectify earlier adjudged failings under EU laws.

The EU provides for a preliminary ruling procedure, whereby EU related issues arising in member state court systems are to be referred to the European Court for a determination of EU law. That determination is to be accepted as the authoritative meaning of EU law by the state court, and is to be considered supreme over state law in case of conflict. By all accounts, the ECJ has been forward in asserting its powers and has been on the whole quite effective in helping the otherwise unwieldy and (as Madison would see it) overly federalized operation of the EU take hold. The role of the judiciary has been much enhanced by the famous decision in the case of *Von Genen Loos* (1963), which decreed individuals to have the right of direct appeal to EU provisions in cases being adjudicated in national courts.[47]

According to Madison's formal description of Variable III the EU would have to be judged fully federal in operation, even in the opera-

[46] Kieran St Clair Bradley, "The European Court of Justice," in Peterson and Shackleton, *op. cit*., 123.

[47] Goldstein, *op. cit*., 94.

tion of its judiciary, for the EU court operates on member state courts and other parts of their governments rather than on individuals. Nonetheless, the EU mode of operation goes beyond the purely federal principle. For one, the treaties and proposed Constitution contain a strong supremacy clause: "The Constitution, and law adopted by the Union's institutions in exercising competencies conferred on it, shall have primacy over the law of member states."[48] Although the ECJ does not have appellate jurisdiction over member state courts, the preliminary ruling procedure accomplishes much the same thing, with what is, in effect, an appeal in advance. As Lisa Conant makes clear in her study *Justice Contained*, a full assessment of the effectiveness of the EU judiciary requires accounting for political and other aspects of EU interaction with member states, a task that goes beyond my task here. Judging the operation of the EU on Madison's third variable we would have to conclude that although it looks like the Articles of Confederation more than a unified state or any of the various U.S. constitutional plans, yet it merits a FIS well above the "0" that might seem to belong to it. Powers of the Commission (or other states) to call member states before the ECJ for non-compliance is a federal device, but one with some teeth. The preliminary ruling power goes beyond the mere federal principle, in that it involves Court to Court interaction in cases involving individuals. Although it is very difficult in this case to fully justify any given numerical FIS, I estimate that a 1.0 would not be out of line.

Variable IV: Extent of Powers

"The idea of a national government," Madison wrote in *Federalist* 39, "involves in it not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature." In such governments all local or municipal authorities are juridically inferior to or even creatures of the central government. Unions of a federal type differ in these two respects from a purely national government: the more local authorities are not creatures of the central government, but have their own foundation, sources of

[48] Draft EU Constitution, Part I, Title III, Article 10.

powers, and means of operation of powers; in such systems there is also a division of legislative authorities between the center and the members. Neither the structure nor the powers of the members depends on the center.

Here, finally, Madison identifies elements of a federal union that the popular mind also identifies as federal. It no doubt struck the attentive reader that in all three of the previous variables the optimal FIS designating the optimal federal arrangement was allocated to the value of the variable associated with the *national* principle. This is no longer the case when we come to the fourth variable.

Thus, in the Madison plan, we may notice that he projects a general government which rests its authorities on a popular source, draws its ordinary powers from the people in the national manner, operates on individuals in the national manner, but does not dominate the member states and governments as a national government would, nor does it possess the full range of governmental powers over "all objects of lawful government" as a national government would. These two differences, related to the fact that the union has only a limited set of purposes, are the factors that lead Madison to consider his plan as a federal plan, a new kind of federalism to be sure, but nonetheless a federalism, a "state of states," as Montesquieu put it. To be an effective "state of states" a federal union must adopt much of the ways of the national system—it must be national in foundation, source, and operation. The Madisonian federal plan projects a government national in every respect except these crucial two, a government sitting side by side with the governmental structure of the member states. The key idea in Madison's plan was that the general government was to rise and act in near complete independence of the member states; or, put in another way, member states were to have no, or as little as possible, agency in the structure or operation of the general government. In Madison's plan the general government has almost as little agency in the member states. Complete independence of the two—two systems touching each other nowhere at all—was not in Madison's opinion desirable or optimal.

Regarding Variable IV, extent of powers, there were in effect four sub-dimensions of the variable. First, there must be an allocation of powers between the center and the independently constituted member states. Just what powers ought to belong to which level of government

was not altogether to be settled in the abstract, however, for that depended a good deal on the purposes the member states meant their partial, federal unions to serve. However, there were certain powers which it was indispensable that the central government possess. As developed in the *Federalist* these were the tax power, and the power to raise and deploy armies, or more generally, the powers to provide for national (or federal union) defense. The need for an independent and adequate revenue power flowed directly from the imperative driving Madison's thinking on federal union: the government of the union needed to possess all the essential instrumentalities of action in itself, and could not be dependent on the member state for any of the essentials. The need for military and defense powers was a bit more ambiguous. In the American case, the union existed first and foremost for the sake of meeting foreign and defense needs. But Madison also understood the core of the state and of law to be the power to coerce, to impose sanctions. Therefore, any government of any union would require coercive powers, whether the union existed for the sake of defense primarily or not. Finally, the general government required a power to police the borders between its powers and prerogatives and those of the member states. This power required that the two levels of government, finally, touch.

Thus the Madisonian constitutional plan contained a division of authorities, including a grant to the general government of a power to raise both revenues and armies, and a power, to be vested in Congress, to negative state laws that infringed on the powers and prerogatives of the union or on the rights of fellow member states. The last, never adopted by the constitutional convention, was an echo of a power the English Privy Council had possessed over legislation in the colonies prior to independence. Maintaining our practice of using the Madison plan as the benchmark for calibrating FIS, we once again allocate a FIS of 4 to this plan. It divides authorities between independently constituted center and member governments (1 point); it provides revenue powers for the central government (1 point); it establishes power to create, support, and regulate a military force (1 point); and finally, it provides a power to keep the member states "in their proper orbits," as Madison liked to put it.

The Constitution of 1787 differed in several respects from the Madison plan. It divides authority as the Madison plan does (1 point);

it grants a revenue powers (1 point); military powers (1 point); but does not contain some other powers (of a means sort) that Madison considered important, e.g., the power to incorporate. The most important difference, however, is that the Congressional negative on state acts is replaced by the Supremacy clause and judicial enforcement or umpiring of the federal system. The Constitution of 1787 thus earns a slightly lower FIS: 3.80.

The Constitution of 2004 is very much like the Constitution of 1787 with regard to this variable, but it earns a lower FIS for a very different kind of reason: the boundaries between the general government and the member states are much blurred, and the authority of member states powers much compromised. Measured against the Madison model, the Constitution of 2004 tilts too far toward a national government, thus earning a 3.5 FIS.

On Variable IV, the EU meets the first sub-criterion very well, for it has an elaborate division of "competences" between the general government and the member states, which are very definitely constructed independently of the EU structures (1 point). The EU has some revenue powers but these are limited. There is no general power to tax, as in the U.S. Constitution, but revenue is not limited to requisitions on the member states, an EU commitment underlined by the tendency to speak of revenue sources as "own resources."[49] Sources of revenue can be set, apparently, by the Council of Ministers acting unanimously.[50] As a system intermediate between the general power of a majority rule (or QMV) legislature to tax, and confederal power of mere requisition, the EU revenue power has a FIS of 0.50. There is no EU military power to speak of, although there is talk and perhaps promise of this developing in the future (FIS = 0.10 for promise).

Finally, the EU does have a series of devices to police the boundaries between EU and member state powers, including a careful delineation of exclusive, and concurrent competencies, the supremacy clause, and the role of the ECJ in enforcing the distribution of competencies (FIS = 0.95).

[49] *cf.* Draft EU Constitution, Part I, Title VII, Article 53.

[50] *Ibid.*

To sum up Variable IV FIS:

Madison Plan: 4.0

U.S. Constitution of 1787: 3.8

U.S. Constitution of 2004: 3.5

EU: 2.35

Variable V: Amending Procedure

The last variable concerns the question of how the constitution is to be altered. The national way would be by a majority, or a super majority of individuals of the whole union. The purely federal way would be unanimous consent of the member states. According to this test the U.S. Constitution of 1787 was a mixture, leaning toward the federal principle. The amendment process noticeably attempts to mix the national and federal modes, for it involves two steps, the first of which involves a largely national mode and the second a largely federal mode. The first stage of the amendment process is the proposal phase; amendments may be proposed either by two thirds of both Houses of Congress, or by a congressionally convened special convention, to be called on application of two-thirds of the states. While both methods have some admixture of federal elements, they are on the whole national modes. The ratification is more nearly federal in character, for three-fourths (not all) of the states, acting either through their legislatures or through special conventions must ratify. The Constitution of 2004 has the same amending process. Madison's original plan had little to say about amendments, other than to mandate that the national legislature not be part of it, a mandate partially fulfilled by the convention route to proposed amendments. That route leaves Congress the non-discretionary role of convening a convention, although it also leaves Congress with the potentially significant powers of establishing the character of the convention. Madison seems to have had no fixed notions of what the amending procedure should look like in his ideal federal plan other, perhaps, than that it would not suit for the arrangement to be either wholly federal or wholly national in character. By that standard all three of the American constitutional plans achieve a 2.0 FIS (2.0 rather than 4.0 for this does not appear to be as central as the last three variables.)

EU procedures for amendment of the proposed constitution are typically complex, as outlined in Part IV, Article IV-7. The proposal phase has four stages, allowing initiation by any member state government, the E.P., or the Commission. At the second stage the European Council considers proposals and by majority vote decides whether to move forward to the third stage, a special convention, to be composed of representatives of member state Parliaments and governments, as well as representatives from the EP and the Commission. The Convention then "by consensus" will decide whether to formally propose amendments to member states for ratification. The ratification phase proceeds according to the procedures in place under member state constitutions; ratification must be unanimous. The EU procedure is, like the American procedure, a mix of national and federal elements, but here the mix leans in a much more decidedly federal direction. The requirement of unanimous ratification indicates that we have a process hardly removed from ordinary treaty-making. The FIS on Variable V for the EU can be no more than 1.0.

Conclusion: The Federalism Deficit

Our first order of business is to tally up the total FIS (FIS_T) for the various plans we have considered here:

	Variable					
Constitution	**I**	**II**	**III**	**IV**	**V**	**Total**
Madison Plan	2.0	4.0	3.6	4.0	2.0	15.60
U.S. Constitution of 1787	2.0	2.95	3.6	3.8	2.0	14.35
U.S. Constitution of 2004	2.0	3.15	3.4	3.5	2.0	14.05
EU	0.0	1.48	1.0	2.35	1.0	5.83

The FIS is, of course, an excellent example of deceptive precision. The FIS_T is much less precise than it appears. I have counted the five variables of unequal overall weight. This is a rather arbitrary choice at least across the entire array of variables, but it reflects my estimate of the contribution of each variable to the effectiveness of the federal union.

Federalism Deficits

We may now calculate Federalism Deficits using the Madison Plan as the benchmark model. The deficit **D** is the difference between the federalism model we are taking as the standard (the Madison Plan) and the percentage of that standard achieved by each constitutional scheme. Thus

D = [$FIS_{T(cn)}$/ $FIS_{T(cm)}$—$FIS_{T(cn)}$/ $FIS_{T(cm)}$] x 100. (Where cm = Madison's Plan; cn= the nth Constitution)

We thus arrive at the follow values for the Federalism Deficits of the Constitutional models we have been considering:

Madison Plan: 0

U.S. Constitution of 1787: 8

U.S. Constitution of 2004: 11[51]

EU 2004: 66

Conclusions

Our first conclusion is that the EU suffers a substantial Federalism Deficit. That deficit is not spread equally among the Federalism Variables, however. From the perspective of Madisonian theory the most serious deficit is that in Variable III, operation of the ordinary powers of government. Indeed, one can only marvel at how successful the EU has been, given its weakness on this central variable. The EU seems to have hit upon a substitute mode of operation that is far more successful than Madison's theory would predict, suggesting that a modification of Madisonian theory may be in order. The modification could move in one or both of two directions. First, it could be that as a structural matter, the EU operational mode is more effective in itself than Madison thought any federal mode of operation could be. It is

[51] It may seem odd to the observer that the U.S. Constitution of 2004 has a greater federalism deficit than the U.S. Constitution of 1787 because it is evident to all that the 2004 constitution is more centralized than the 1787 Constitution. It must be recalled the national principle (i.e., centralization) is the optimal value only for two of the five variables. The greater degree of centralization of the 2004 Constitution is one factor that contributes to its lower FIS_T

certainly true that the EU mode is more sophisticated than any of the federal modes of operation of which Madison was aware. Perhaps we should conclude that a much lesser modification of the federal mode of operation is necessary for a successful federal system than Madison believed. If that is true, then the EU may indeed (as some have held) have hit upon a superior federal model, in that it is less likely to succumb to the centralization that lowers the U.S. Constitution FIS on Variable IV (extent of powers).

A second possible modification of Madison's theory would be to emphasize more than he did non-structural elements. For example, specially pressing consciousness of common interest, which can overcome the collective action problems Madison saw as underlying the centrifugal tendencies of standard federations, may have more impact than he expected. Sub-political commonalities of culture, identification, and so on, may also play a larger role than he thought.

The EU also has an importantly large deficit on Variable II (source of ordinary powers). This aspect of the Federalism Deficit overlaps with the Democratic Deficit, for the deficit derives from the heavy dependence of EU authorities on member state governments rather than peoples. When and if the EP rises in prominence in the EU, the EU's ranking on this variable may come to look very different. The worry about the EU Democratic Deficit is strongly related to Madison's parallel identification of the need for direct connection to the people rather than the member states; legitimacy (and therefore federal effectiveness) requires that powers exercised over the people be derived from them.

Looking at the EU and the Federalism Deficit through a Madisonian lens, what appears to be the prospect for the future of the EU? First, the theory suggests that EU expansion is likely to cause severe strains and undermine union effectiveness. The EU is not structurally sound, and has relied, it seems, on non-structural elements to make up, in the past, for EU structural deficits. The addition of more states, which introduce more differences of interest and culture, undercuts the non-structural factors that have contributed thus far to EU effectiveness.

Likewise, EU expansion makes genuine structural reform less likely. Member state governments will probably be even more eager to

keep Variables II and III in their own hands, and these are the variables requiring the most reform to produce a sound federal structure in the Madisonian mode. It is quite possible that even in the area where the EU has had the greatest success, in the creation of a large free-trade area, expansion will have problematic consequences. The creation of the "common market," while certainly not without its bumps and rubs, was an achievement where the strong overall common interest of EU member states was able to override structural weaknesses. EU expansion introduces greater economic and market disparities than has been the case heretofore, with the almost inevitable result that differences of interest will play a larger role than they have.

Madisonian theory also suggests that EU hopes and ambitions to become a yet more integrated trans-national entity as in the second and third pillars are likely not going to go smoothly. The EU Federal Deficit is too great to sustain the ambitious plans and projections of post-Maastricht Europe.

I put forward these somewhat sobering conclusions very tentatively, however. They rest on my judgment, itself open to question, that the EU has not in fact supplanted the Madisonian federal model or the analysis underlying that model. I might, however, be mistaken about the powers of the Madisonian model, and close with the usual caveat of social scientists: further research is needed to conclude with any finality whether EU experience points to or requires substantial modification of Madisonian theory. Until such research is conducted, my conclusions remain necessarily tentative.