CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM

VOLUME 11

ISSUE 2

2019

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

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ESSAYS

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Towards a re-launch of the EU?

by

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Perspectives on Federalism, Vol. 11, issue 2, 2019

Abstract

The European elections may have opened a window of opportunity for the re-launch of European integration. This is also due to a specific constellation of national politics in the three largest countries of the EU. But it will not last long.

Key-words

European elections, European integration, nationalism, interdependence

1. Introduction

A window of opportunity to re-launch European integration through a comprehensive reform of the EU may be opening. This is due to a combination of events at European and national level. First, the results of the European elections and their impact at European and national level. Second, the new alignment on a pro-EU stance of the national governments in France, Germany and Italy. In combination with a third factor: the choices of the new leaderships of the European institutions. However, this does not guarantee that the needed reforms will really be agreed and implemented.

2. The European elections

For the first time since 1979 there was an increase in the turnout in the European elections. This was the result of several factors. First, European integration has become a central issue – and often a main cleavage – in the political arena, both at European and national levels. Therefore, the European elections were perceived as a sort of referendum in favour or against the EU. Second, the international context has deteriorated so much, that it is becoming increasingly clear for European citizens that there are many challenges that no member state can hope to successfully address alone. Third, after the 2014 success of the Spitzenkandidat system, people believed that their vote would count in the selection of the new president of the European Commission. This increase in the turnout strengthens the European Parliament vis-à-vis its critics, and in the inter-institutional interaction at the European level.

The European elections were a defining moment for European politics. In the last few years new nationalist forces of the extreme right have tried to infiltrate and become ally of the traditional centre-right parties. They have obtained significant successes in several countries. In the US Donald Trump – following to a large extent Bannon's ideas and plan - managed to gain the Republican nomination, to win the Presidential elections, and eventually to extend its control over the Republican party during his Presidency. In the UK the Conservative gave in to the UKIP when Cameron promised to hold a Referendum on Brexit if he won the national elections. Ever since the Tories have progressively became

essentially a nationalist party, completing the process with Boris Johnson's leadership. In Austria the extreme right had managed to enter a coalition government with the People party. In Italy the League even managed to have an alliance with Forza Italia (part of the European People Party) at regional level, while in government with the Five Stars Movement at national level. Orban has been demolishing liberal democracy and the rule of law in Hungary, protected by his choice to affiliate Fidesz to the EPP. While Kaczynski was doing the same in Poland, while allied at the European level with the British Conservatives and the Italian Fratelli d'Italia, possibly further to the right than Salvini's League. The conversation caught by Buzzfeed in Moscow between people close to Salvini and Putin suggests that there was a plan to transform Europe bringing more division and nationalism, under the patronage of Russia. All at a time when Putin declared liberal democracy obsolete.

In this context the European elections were crucial. Their results could have brought about a majority between the EPP, the Conservative and the extreme right of the Identity and Democracy group. An option that Orban envisaged. The choice of Manfred Weber as the EPP Spitzenkandidat made this possible. Weber comes from the Bavarian CSU, one of the EPP affiliated party more to the right, and strongly supported by Austrian Chancellor Kurz, the first to enter into a coalition government with the extreme right. In his initial statements Weber had opened to the possibility of a cooperation with the souveranists. Salvini and Le Pen made their campaign with the stated goal of becoming decisive for the new majority in order to completely overhaul – that is dismantling - the EU, giving back powers and competences to the national level. Eventually this requires to dismantle the monetary union and the euro, and not by chance among their candidates there were strong advocates of that option.

If such a majority had emerged, it could spell the end for the European unification process. But it did not. Because when at stake was the survival of the Union and the elections were perceived also as a show of support or opposition to the EU, the citizens voted to express their support. The pro-European parties obtained a vast majority after a campaign based on the idea that the EU needs to be strengthened. They thus have a strong mandate to enact reforms in that direction.

However, they lost the first chance to use that majority and strengthen European democracy. The pro-European groups in the Parliament were unable and to agree on a

common program and a candidate for the Commission presidency. In politics, power vacuums tend to be filled. And of course, the European Council did, by choosing Ursula von der Leyen, who was not one of the Spitzenkandidat. This was the almost inevitable result of the political groups in the European Parliament being unable to agree on a joint candidate. Had they made a proposal backed by a majority of the Parliament, the European Council would have endorsed it, like in 2014. Without such a proposal it was unreasonable to hope that the European Council could find an agreement on any of the Spitzenkandidat, if the Parliament itself was unable to reach it. It was not in the European Council' interests as an institution, because it would further strengthen the Parliament. And it was not in any of its individual members' interests, as it would be a victory for the party of the chosen Spitzenkandidat and a defeat for all others. However, it chose a President from the European party which got the most votes and seats, thus somehow considering the results of the European elections, as the Treaty demands. Particularly relevant is that the choice was someone clearly unwilling to compromise with the extreme right.

The nationalist goal to become indispensable and obtain a crucial say in the EU decision-making was frustrated by the citizens' vote. Therefore, some of the nationalist or ambiguous forces worked to be included into the majority coalition in Parliament, and to establish a positive working relationship with the new Commission, by contributing to the choice, and supporting the election, of Ursula von der Leyen as its President. This was the case for the Hungarian Fidesz (also trying to retain its status as member of the EPP) the Polish PIS (leading the Conservative and Reformist group), and the Italian Five Stars Movement (which was unable to secure enough allies to create a group on its own, and ended up in the limbo of the Non Inscribed to any group, with all the limitations that this implies in the European Parliament works, even if it is now trying to join an existing groups, such as the Greens).

3. The effects of the European elections and the re-alignment of Italy

Some pro-European parties were weakened, such as the EPP and the Socialist and Democrats; but other were strengthened, such as the ALDE and Greens. Overall they won the European elections, with a strongly pro-EU reform agenda. This was a crucial

structural element, that significantly contributed to the demise of the Austrian and Italian government, which has their own specific sparkles at national level.

This was partly due to the fact that not all nationalists got the message. Some had an excellent result at national level and thought they had won the elections, as if the elections were not European ones. It is like being happy after a national election because you had an excellent result in one region only but are irrelevant at national level. This was the case for Matteo Salvini's League, which got 34% of the votes in Italy. But it was prevented from taking any significant role in the European Parliament by a *cordon sanitaire* against the extreme right nationalists, enacted by the pro-European groups. This should have made it clear that the nationalists had actually lost the elections. But it did not.

In a self-inflicted mistake – possibly linked to the fact that the next financial budget would imply either a dramatic breach of the European rules, with a possible speculative attack on Italian public debt on the markets, or the exposure of the impossibility of the too many promises Salvini made in 14 months of government approached as a permanent electoral campaign – Salvini killed the government of which it was the vice prime minister and the de facto leader. He hoped to obtain snap elections. But the Italian Constitution obliges the President of the Republic to verify the availability of a Parliamentary majority for a new government, before eventually dissolving the Parliament. Salvini bet on Matteo Renzi aversion to the M5S, and on his ability to prevent the PD supporting a government with it, like after the 2018 Italian elections. However, with an impressive turnaround – made possible by the situation of power created by the European elections - Renzi took the initiative of proposing such a government, thus paving the way for the new coalition between PD and M5S. Salvini was completely surprised. In a desperate move he prayed the M5S to create a new government with the League, even offering M5S leader Luigi Di Maio the premiership. He would accept anything, to ensure that the League remained in government. However, the new European political situation created an incentive for the M5S to complete its pro-European turn. Furthermore, after you stab someone in the back, it is unlikely that he will accept to embrace you again, at least for a while. The result is the new Italian government, characterised by a pro-European turn, personified by the choice of Roberto Gualtieri as Minister of economy and finance, Enzo Amendola as Minister of European policies, and Paolo Gentiloni as Commissioner designate: all Democratic Party's personalities, with a strongly pro-European profile.

This creates a favourable political constellation in the three largest countries of the Euro-area[I]. The parties in government in these countries also exercise a significant role in the European Parliament: the German CDU/CSU has a leading role in the EPP group, the German SPD and the Italian PD in the Socialists and Democrats group; the French REM in the new Renew Europe group. And the M5S is trying to join the Greens, another pro-European group, even if it did not vote to elect Ursula von der Leyen.

These governments, and the parties that support them, also have the same main opponent, both at national and European level: the nationalist far right parties. The German Alternative für Deutschland, the Italian League and the French Rassemblement National are all together in the Identity and Democracy Group in the European Parliament. A comprehensive reform of the EU would be in the best interest of all the three governments and would be perceived as a dramatic defeat of the nationalists. The latter would like to go back to the XIX century conception of absolute national sovereignty. The real alternative is a XXI century European sovereignty within a multi-level system of government, that is a federation.

4. The new European institutions' leadership

Another element that contributes to this window of opportunity is the package-deal on the next EU institutions leadership. It was a setback for the Spitzenkandidat system and the European Parliament, but this was largely a responsibility of the Parliament party groups themselves. But eventually it brought a German President of the Commission, a French President of the ECB, and a Belgian President of the European Council. Then the Parliament elected an Italian President. All strongly pro-European representatives of "old Europe". Even if she had to say she has changed her mind, von der Leyen was also on the record in the past supporting the creation of the United States of Europe. Personalities from the three largest countries of the Euro-area at the helm of the EU supra-national institutions. This will make it more difficult for those countries to oppose a comprehensive reform – including the completion of the economic and monetary union, as sketched by the Four and then Five Presidents' Reports - for which all those institutions have been vocal advocates in the previous legislature. The choice of two women as the President of

the Commission and of the ECB is also in line with the public opinion and can help them, especially at the beginning of their term, to bring forward an ambitious agenda.

Ursula von der Leyen has a difficult task in front of her. She was elected by a wafer-thin majority and has to deal with a fragmented Parliament. Much will depend on her ability to bring the Greens into the pro-European coalition. The fact that no Green commissioner was nominated by any national governments does not help. At the same time the Greens have a great opportunity to make their electoral success count in the European decision-making process, and to show they are a reliable force, that can be trusted to govern also at the national level in those countries where they have a significant following. Some of the choice for Commissioners and their titles have sparked controversy. But overall, if she characterises her agenda in strongly pro-European and reformist terms, she shall be able to command a comfortable majority in Parliament. And her choice to provide the Parliament with a de facto power of legislative initiative will help her build a trusting and cooperative working relationship with the Parliament.

5. The international challenges in front of the EU

The international scenario is rapidly deteriorating, and the public opinion perceives that many challenges cannot be addressed successfully at national level. On the global level only continent-wide states - such as the US, China, Russia, India and potentially Brazil – seem able to play a role. In twenty to thirty years no EU member state would be part of the G20. To cope with the instability and consequent security threats in the neighbourhood, from East to South, a European defence and foreign policy is needed.

Trump helped wake-up Europeans on the need to act together to ensure their own security. The end of the disarmament Treaties in Europe poses the EU a deep challenge. It can react by rearming and run the risk of a new armament race with Russia. The alternative cannot be to give up to Russian aggressive policies, but to develop a new cooperation framework with Russia able to guarantee European peace and security, exploiting Russian economic weakness and its dependence on Europe, and strengthening the requests for democracy inside the country.

The second challenge is linked to the migration fluxes deriving from the political instability, economic poverty and worsening climate conditions in much of Africa and the

Middle East. This too calls for a European answer, articulated in a new strategic partnership with Africa and a truly European migration policy.

The raising awareness about climate change also favours renewed European action in the economic domain and the international arena, as the EU can be the leader in promoting a coordinated global response to the challenge.

Citizens ask for solutions to many problems which clearly overcome national boundaries and capabilities. Peace, security, the development of Africa within a transition process to a carbon-neutral economy are huge challenges, that can possibly be addressed only at European and global level. Therefore the pro-European parties shall exploit their time in government to start these policies, while at the same time reforming the EU, so that it has adequate powers, resources, and decision-making procedure to enact them and cope with these challenges. The time available may be short. The favourable constellation of the national governments in Germany, France and Italy may soon end. National elections in Germany are scheduled in 2021, in France Presidential and Parliamentary elections in 2022, and in Italy in 2023 (but could be earlier). While the political system in Germany and the electoral law in France are a significant obstacle to nationalist forces entering the government, the situation in Italy is much more unstable.

6. Conclusion

Several factors seem to contribute to the opening of a window of opportunity for a comprehensive EU reform. However, this may be short. And much depends on the political will, capital and courage of the European and national leaderships.

In the previous legislature the Juncker Commission and Italy asked for a deep Eurozone reform, but President Hollande in France was unwilling to go ahead, and this allowed Germany to block it. Many expectations were then placed on the end of the legislature, after the elections in France, Germany and Italy. When Macron was elected in France he tried to push again on that subject, also helped by the Commission. But the long impasse after the German elections, and the results of the Italian ones, which brought about a nationalist government, frustrated all hopes. An Italian nationalist government meant not only that France lost a crucial ally in the attempt to convince Germany. It also made it impossible for Germany and other countries to conceive any further sharing of

sovereignty with Italy. This is why the new Italian government needs to follow its pro-European words with deeds. The pro-European turn shall be implemented in a coherent manner for Italy to regain credibility and contribute to the exploitation of this new window of opportunity to reform the EU.

In 1954 Luigi Einaudi, then President of the Italian Republic, which had not yet ratified the European Defence Community Treaty wrote that "In the life of nations not to seize the fleeting moment is usually an irreparable mistake" (translation mine). At a time when liberal democracy and the rule of law are under attack even in many EU member states, when the evil of nationalism threatens to prevail in Europe once again, Einaudi's warning is more relevant than ever.

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[1] The political constellation of the fourth one, Spain, is less relevant because the whole political spectrum and a pro-European stand, with the only exception of Vox. Even the most recent parties, such as Podemos and Ciudadanos, maintained a pro-EU attitude, just like the Socialist and Popular parties. The same is true for most regional parties.

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PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Rising to the Populist Challenge: Social Security prescriptions for the Italian Welfare State

by

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Perspectives on Federalism, Vol. 11, issue 2, 2019

Abstract

Nowadays, the European Integration process is challenged by a rise in anti-establishment parties proposing policies reactionary to globalization. Italy, one of Europe's founding nations and largest economies, leads this change with the Five Star – Lega Nord coalition government. The change in voting behavior urges a serious reflection on the social unease causing it. The prevailing view argues that the effects of welfare state reforms on labor market conditions has been a leading cause of the rise of populism. To operationalize this claim, Esping-Andersen's decommodification index is used in the article, drawing social security data from 1980 to 2015 for Italy's pensions, unemployment and sickness benefits. The results are plotted against key watershed reforms of the Italian Welfare State and confirm a decrease in social security performance experienced by the latter in the analyzed period.

Key-words

Federalism, Social Policy, Populism, Welfare Performance, Decommodification, Italy

1. The Populist Earthquake

In 2019, the main challenges for European Integration and the global order derive from the populist surge worldwide. A prospect trade war with the US, the issue of Brexit, a gust of anti-globalization rhetoric that questions the EU integration process are results of policies introduced by populist parties, who have been winning voters' share over the past two decades. A singular populist belt has now accessed remarkable shares of Member States' parliaments in Central and Eastern Europe, from the Baltic Sea to the Aegean (Eiermann et al. 2018). Anti-establishment parties are now likely to encroach even on Europe's founding nations, where the Five-Star – Lega Nord coalition government took the levers of power in Italy, the Front National is achieving popularity in France and the AFD reaches significant successes in Germany. The changed political scenario in Italy and the EU urges a reflection on why voters are siding with populist parties. Why are populist parties winning in Italy and how can Federalist Parties respond to the challenge?

It is firstly interesting to understand the diversity of populisms' political spectrum. Right-wing populist parties such as the Lega Nord hinge feature a protectionist rhetoric, with a strong stance against immigration and loss of state sovereignty (The Economist 2019). Parties such as the Five Star Movement move away from a right-wing narrative and address increasing socio-economic insecurity caused by the global financial crisis, at a juncture where the welfare state struggles to protect vulnerable groups. The crisis of the Welfare State called on by the Five-Star movement has brought about issues of purchasing power reduction, falling living standards, a rise in cyclical unemployment to low and middle classes, causing severe dissatisfaction (OECD, 2018: 3-10).

Welfare retrenchment is a key area to work out Europe's populist puzzle and propose policy advise for European Federalist parties (Giger and Nelson 2011:1-3; Raniolo 2012). This article presents a review of Italy's social security in the three dimensions of pensions, sickness and unemployment benefits from 1980s to 2015. It then measures the Italian welfare performance using Esping-Andersen's *Decommodification* score, hypothesizing lower performance scores over time. The results are plotted against key national welfare reforms to such as Law No. 92/2012 to elaborate a policy direction to rise to the populist challenge.

2. The Three Worlds of Welfare Capitalism and Beyond

The quantitative reference model for welfare performance indicators is Esping-Andersen's *Three Worlds of Welfare Capitalism*. In his cornerstone classic of social policy analysis, Esping-Andersen divides the way in which OECD countries allocate welfare benefits to vulnerable groups for pensions, sickness and unemployment benefits, in three clusters of welfare capitalism: Liberal, Conservative and Social Democratic (Esping-Andersen 1990: 32-33). The Liberal type of welfare capitalism embodies individualism and the primacy of the market and institutionalizes means-tested welfare schemes. Liberal Welfare types feature minimal state intervention and labor market conditions are mainly administered by the law of supply and demand, featuring low *decommodification* scores (Esping-Andersen 1990: 26-28). Conversely, The Conservative world of welfare capitalism shows a *corporatist* and *estatist* structure of welfare provision that levels income distribution according to occupational status and locates the traditional family structure as the unit of welfare recipiency. Conservative welfare states are characterized by upper-intermediate levels of *decommodification* scores (Esping-Andersen 1990: 27). Finally, the social democratic model of welfare distribution is based on principles of universal solidarity and egalitarianism, basing eligibility of social contributions on citizenship which results in very high social security performance and decommodification (Esping-Andersen 1990: 28).

3. Decommodification: A Key Performance Indicator

Esping-Andersen conducts part of his welfare state analysis using *decommodification*, a quantitative indicator that measures how effectively the welfare state supports vulnerable groups who, for conditions of old-age, unemployment or sickness benefits, are not able to work (Esping-Andersen 1990: 23). The term traces back to the Marxian commodity, an object of certain use-value produced or exchanged in a society where the social division of labor exists (Marx 1981:123; Polanyi 2001: 84-85). To Marx, a commodity is purposefully designed not to satisfy human needs, but to be traded off for something else, the exchange value (Marx 1981: 126). In this sense, *decommodification* measures the degree of human degradation of average labor conditions, or the degree of citizens' dependence from the wage (Marx 1981:126- 130).

Esping-Andersen builds the components of the *Decommodification* score according to three principles: (1) eligibility, such as work experience, contributions or means tests; (2) the strength of institutionalized disincentives to resort to welfare benefits, such as waiting days to receive the benefit and the maximum period for which the entitlement lasts; (3) the replacement level of the welfare contributions to a real job in terms of cash payment.

The index D is as the sum of the *decommodification* scores for pensions δP and the *decommodification* score for unemployment δU and sickness δS cash benefits. Thus,

$$D = \delta P + \delta U + \delta S$$

The *decommodification* score for pensions δP is calculated as the sum of four random variables: (1) the minimum pension benefit for a standard production worker receiving an average salary, with a replacement rate calculated as the ratio of the benefit to the normal worker earnings in that year net of taxes; (2) The standard pension benefits for the average worker, with a replacement rate computed as above; (3) The average individual's share of pension financing measured as total proportion of insurance fund receipts derived from contributions by the individuals insured; (4) The contribution period of the average worker in the country, computed as the number of years of contribution required to qualify for an average pension. The score attributed to this variable is calculated inversely, because lesser years of contributions mean easier eligibility criteria (Esping-Andersen 1990: 54-55).

Esping-Andersen draws the data points of the four different control variables from the two datasets for 1980 and assigns to each of them score from 1, indicating low decommodification, to 3, high decommodification. The score attribution process is based on the distance of the individual country's performance score from the mean μ of the set of OECD countries. The degree of dispersion from the mean is expressed in standard deviations σ, calculated with μ for each row of time-contingent observations. Esping-Andersen then multiplies every obtained score by the coverage rate of each variable. A coverage rate is defined as the percentage of the relevant population that successfully obtains the benefits entitled to by the program divided by the qualifying population (Esping-Andersen 1990: 54). For pensions, the coverage rate is the take-up rate. In other words, Esping-Andersen creates a confidence interval of the distribution of OECD countries in the 1980s and assigns a score to each difference between specific country score in four control variables and the OECD, awarding higher points if the country scores above average.

Esping-Andersen uses a similar system of computation to obtain the index of *decommodification* for sickness and unemployment cash benefits. In this case, the two *decommodification* indexes δU and δS are respectively the sum of: (1) The quality of the replacement rates that the benefits grant to a standard sick or unemployed worker during the first 26 weeks since the start of the eligibility status; (2) the number of weeks of employment required prior to qualification, which amounts to the time measured in weeks of employment required for eligibility, with a score computed inversely; (3) the number of days the beneficiary needs to wait before the payment is operated; (4) the amount of weeks during which individuals are entitled to the benefit. (Esping-Andersen 1990: 52-54). As computed for pensions, the *decommodification* scores for unemployment benefits and sickness insurance δU and δS, are achieved through the sum of the scores attributed to the observations regarding the four random variables listed above. The score for each variable is obtained measuring, like in the case for pensions, a confidence interval where all the observations span within with a certain probability with a mean and a standard deviation. Finally, the four scores are summed up to obtain total decommodification.

4. Data Collection and Methodological choices

To conduct his inferential analysis on the *decommodification* scores, Esping-Andersen uses two popular databases in the 1990s: the *Svensk Socialpolitik I International Belysning* (SSIB), belonging to the Bank of Sweden Tercentary Fund, and the SIED data files, belonging to the Social Policy Indicator Database (SPIN) (Esping-Andersen 1990: iv). Unfortunately, the SSIB data files feature limited access and could not be retrieved. It was however possible to gather the data for the *decommodification* scores elaborated from *Figure 1* to *Figure 5* by using the SIED data files and collected from the SPIN. The SPIN is a major program at the Swedish Institute for Social Research (SOFI) of Stockholm University based on the larger social citizenship project. This project started in the 1980s and has gathered data at a five-year increment for all OECD countries from 1930 to 2015 for the control variables through which Esping-Andersen has extracted his indexes. The SPIN data are very important to Esping-Andersen's analysis of *decommodification* as they report all the components of his index. A good feature of the SIED data files is that they have been chronologically updated to 2015, benchmark point in time that is crucial to measure the variation of welfare policy for OECD

countries in the aftermath of the European Sovereign Debt Crisis, which for European countries has been a true watershed in terms of social policy spending. With regards to the specific case of Italy, the SIED database allows to observe the initial impact of the Fornero-Monti reform for old-age schemes.

To construct the decommodification for pensions, unemployment and sickness benefits adjusted for GDP expenditure in *Figure 6*, data on expenditure as percentage of GDP have been extracted by the OECD Social Expenditure Database (SOCX). The database has been designed to include sound and internationally comparable statistics on public and voluntary private social expenses for the social policy areas of: Old age, Survivors, Health, Family, Unemployment, Housing and Active Labor Market Programs. SOCX covers the 36 OECD countries for the period 1980-2015 and estimates for aggregates for 2017-18.

5. A Literature Review on the Welfare State

Few years after Esping-Andersen published the Three Worlds of Welfare Capitalism, the book became a modern classic of social policy theory (Arts and Gelissen 2002: 140). The book's influence has been unprecedented because Esping-Andersen was the first to emphasize the importance of cross-national differences in welfare state structures, expanding a field of study still in its infancy. For his widespread accomplishments, the *Three Worlds* model not only received praises but was also the epicenter of many criticisms that the later social policy literature raised and tried to work out. Among the various criticisms, three important areas stand out: (1) Esping-Andersen's arbitrary invention of ideal-types (Klant 1984; Boje 1996), (2) the omission of key regime-set typologies and the Misspecification of the Mediterranean Welfare state (Castles and Mitchell 1993) (Korpi and Palme 1998; Ferrera 2000), (3) the doubts regarding the goodness of fit of Esping-Andersen's dimensional property space of *decommodification* to explain welfare clustering (Allan and Scruggs 2006).

The first issue the literature highlights about the *Three Worlds* model is that Esping-Andersen arbitrarily constructed ideal welfare types that do not have *per se* theoretical nor empirical value. It may, in fact, be the case that Esping-Andersen has constructed his analytical lenses elaborating the three main typologies and super-imposed them *ex-ante* on the data he deemed relevant (Boje 1996: 20-25). These types of methodological criticisms scale back to Karl Popper's studies, according to which scientists often elaborate theories by

studying phenomena through replicable experiments, but then deliberately assume that the behavior of the examined phenomenon can be inferred and applied to a remotely related family of phenomena (Popper, 1990: 4). The tacitly agreed convention smoothens the passage between the empirical experiment and a comprehensive theory and often makes researchers attempt to effectively force nature into the conceptual boxes of the paradigm (Popper 1970: 5). Esping-Andersen (1999) and some later authors such as Arts & Gelissen (2006:139) address this methodological criticism claiming that typologies are fruitful to an empirical science that is still in its infancy. Although the literature on social policy is indeed hefty, many authors agree that a lack of theory did not make welfare studies reach a mature empirical science (Boje 1996: 18; Arts and Gelissen 2002: 139-140). For a lack of theoretical alternative, the arbitrary postulation of ideal types can be useful to give an overview of the broad characteristics of a situation of welfare policy variation, making Esping-Andersen's *Three Worlds* an advantageous cartography for social welfare analysis.

Finally, many authors have replicated the *Three Worlds* model, questioning the goodness of fit and the empirical robustness of the model's performance in measuring welfare analysis (Esping-Andersen 1997: 150). The goodness of fit of the three-branched regime typology has been many times examined, whereas the *decommodification* score assessed and double-checked. Authors such as Kangas (1994) corroborated the existence of Esping-Andersen's different welfare typologies through the clusters' analysis by data on healthcare and sickness schemes in industrialized countries from 1950 to 1985. The most recent and remarkable attempt to empirically corroborate Esping-Andersen's classifications on the *decommodification* index has been undertaken by Scruggs and Allan. In their research, the authors operate a reassessment of the welfare state index of *decommodification* and introduce a publicly available dataset of key welfare state programs (Scruggs and Allan 2002: 51). Their investigation questions the correct classification of certain countries in terms of the index, arguing that it does not empirically lead to welfare state typologies, and propose a reclassification of comparative welfare clusters by the new index of *Welfare State Generosity* (Scruggs and Allan 2006: 52). The replication results show that the three world typologies simply break apart: two conservative states show *decommodification* scores clustering around the liberal group, whereas Canada and New Zealand score higher than other conservative welfare system (Scruggs and Allan 2006: 60).

Finally, two pivotal authors discussing welfare economics are Peter Hall and David Soskice (2001: i-iv) who build a model measuring the degree of convergence of countries' economic policies over time. To find an answer to the quandary, the two authors create a new approach to the comparison of national economies and divide industrialized countries in two distinct types of market economies: The Liberal Market Economy (LME), and Coordinated Market Economies (CME). In LMEs, firms coordinate their activities mainly via hierarchies and competitive market arrangements and an emphasis is put to the maximization of stock market capitalization (Hall, Soskice 2001: 8). In these systems, market relationships feature the exchange of goods and services in competitive markets and formal debt-credit contracting. The laws of supply and demand generate an equilibrium price that represents the willingness to buy and sell those goods and services, factors at the basis of neoclassical economics (Hall, Soskice, 2001:10). In CMEs, production occurs in firms that rely more importantly on non-market institutions to construct core objectives and competences non-market institution may be corporative relationships, favoritism and other forms of patronage, incomplete contracting, an exchange of private information inside networks of interest. The value of a good and service is in these systems more established by the result of the strategic interaction among firms and institutions than the laws of supply and demand, with prevalence of monopolies and monopsonies (Hall, Soskice 2001: 23-24). By arranging the various nations according to the two models of economic system, the two authors show how institutional arrangements push firms towards corporate strategies that distribute income and employment differently. Hall and Soskice (2001: 468-470) conclude that Europe enters the new millennium with increased pressure towards the convergence of the two different economic systems into one, the main cleavage being the liberalism of British firms and the coordination of German and French firms (Hall and Soskice, 2001: 469-470). The authors' research is very relevant in that they set the basis for an analysis on whether there is a convergence towards a unique liberal economic system in Europe, which in this research is epitomized in the hypothesis of convergence to lower *decommodification* scores.

The formidable contribution offered by the various authors shows that the *Three Worlds* model has room for improvement but maintains its legitimacy as the best model for welfare state analysis for the scope of policy prescription to the Italian Welfare State for two main reasons. Firstly, the remarkable amount of the literature's criticisms did not propose an

alternative model of welfare state performance measurement. Secondly, while Esping-Andersen's typologies may have changed, the *decommodification* score is a useful means to understand if the Italian social security has decreased over time and open the discussion to policy prescriptions.

6. The Italian Welfare System: An Overview

The Italian welfare State (*Stato Previdenziale*) dates to the 1960s and 1970s, a period when Italy achieved heavy industrialization and experienced rapid economic growth in what has been later globally recognized as the *Miracolo Economico Italiano*. It is relevant to note that social policy was developed in terms of generous Keynesian policies that fostered full-employment and early retirement, which were designed in concert with a taxation system that was needed to fund them. This phenomenon entailed the creation of an increasingly critical view to the Keynesian social policies once Italy experienced a decline in its rate of growth in the 1980, that focused on the dubious effectiveness of Italy's welfare system in achieving income and wealth equality (Fadda and D'Apice 2010: 321). In fact, social spending seemed to be devoted to benefit the upper middle class at the expense of the lower ones: patches of poverty persisted despite state intervention and a growing tax burden to finance what were conceived as inadequate services. The wave of critics in the 1980s led to the first reforms by the Social Democratic governments, followed by further revisions in the 1990s in compliance with the budgetary parameters spelled out by the Maastricht Convergence Criteria and enshrined in the namesake treaty of 1992 (Martorelli and Zani 2015: 4).

Despite the increasing pressures towards budget cuts in the 1990s, Italy steadily devoted a quarter of its GDP to social protection in terms of old age schemes, healthcare and unemployment benefits from the 1980s up to the 2000s, falling below the Western European average of 27% in the same period. However, a clear-cut comparison with other member states cannot be operated due to the great anomaly of the Italian support system. Firstly, Italy is the European country with the highest share of people with more than 65 years of age : 18,2% compared to the European average of 16% (Fadda and D'Apice 2010: 322). Because of this, the Italian social support system spends 60 percent of its social security budgets on old-age schemes. The bias in supplying a generous pension system works in concert with the traditional importance of family as a societal nucleus distributing welfare, where the elderly

strongly contributes to the support of the entire household. The anomalous shock-absorption features of old-age schemes in the Italian Welfare State also exemplifies why unemployment benefits are highly marginal in conditions of disability or long-term unemployment (Fadda and D'Apice 2010: 322-323). The weight difference of the various social security domains in the Italian case urges separate sections regarding the history of pension schemes, unemployment and sickness benefits from 1980 to 2015, as well as the weighing of the decommodification index with each related GDP spending.

7. Italian Pensions: An Ever-Changing Area

Italy is a very peculiar country because of the complexity of its pension schemes and the various social security reforms it experienced throughout the analyzed three decades and a half. The pension system Italy had during the 1980s was institutionalized in 1975 and based on a defined benefit pension plan (*sistema retributivo*), which conceived the monthly benefit paid by the pension scheme to have a near-one replacement rate with the highest wage attained by the pensioner in his or her best-performing years of productivity (Martorelli and Zani 2015: 3-4). This resulted in being highly decommodifying, since workers reaching sixty years of age for men and fifty-five for women fulfilled the requirements of old-age pension (*pensione di vecchiaia*) becoming independent from the labor market without changing their life-style. During the 1980s, the *sistema retributivo* featured a final salary plan, under which a pension's replacement rate is eighty percent of the most favorably paid three-year wage of the last decade of productivity. As previously stated, the 1990s have been a playground for path-breaking reforms that echoed a general European shift from a universal support network approach to a residual welfare approach. From 1992, every legislative mandate put forward a pension reform aiming to reduce welfare spending. The proposed policies spanned from increasing the retirement age, to requiring higher contribution to qualify for pension schemes, to cutting pension benefits by changing how equalization funds are computed (Martorelli and Zani 2015: 4). The Amato Reform of 1992 is the first step towards the welfare reductionist shift by increasing the retirement age of workers in the public sector of one year every two-year period until reaching a stable threshold of 65 years of age for men and 60 for women. The reform introduced a mandatory requirement of 35 contribution years to qualify for *pensione di vecchiaia* (Martorelli and Zani 2015: 5).

Welfare retrenchment policies continued in 1995 with the Dini reform, which changed the computation of pensions' benefit from the salary-based model *sistema retributivo* with a replacement rate of 0.8 to a contribution-based model (*sistema contributivo*) where benefits are conditional on the amount of contributions each worker gives (Martorelli and Zani 2015: 6). This system was also imposed retroactively to some who had already made contributions under the previous salary-based pension system, to then create a hybrid computation process for pensions. The new system has been conceived to consistently yield lower pensions and demand more stringent eligibility standards, weakening the existing social support system. To dampen the problem, the Dini reform introduced a second pillar of support in the form of a supplementary pension system through employment-based old-age schemes. The initiative has been met with significant resistance from employers and has proven inadequate to generate enough resources. Therefore, a third completely private-based pension pillar has been introduced. The third pillar is to be combined with incentives enacted in the Finance Bill of 2003 and the *Riforma Maroni* which, among other measures, abolishes financial disincentives to combine pensions with earned wages (Fadda and D'Apice 2010: 330). In 2007, the *Prodi Reform* introduces quotas calculated as the sum of the person's age and working contributions for eligibility. (Martorelli and Zani 2015: 6).

In 2012, a heavy and comprehensive overhaul of the pension system and the labor market dynamics was brought forward by the technocratic government led by Mario Monti, supported by the main European and international financial institutions, in the form of Law No. 92 of 28 June 2012. The Monti-Fornero Reform has been widely controversial in Italy for the magnitude of the change it implemented in the various fields of welfare and labor market conditions. The reform hinged on the main principles of increasing flexibility in dismissals while decreasing it in hiring and toughening eligibility criteria for welfare benefits devoted to vulnerable groups (Tiraboschi 2012: 83). The reform harmonizes retirement age, increasing it to 67 years, and eliminates the old 'quota' reference parameters of legal age and the contribution period whose sum determined a minimum threshold to access old-age benefits (Falasca, 2012). The reform also introduced an exceptional condition of early retirement (*pensione anticipata*) whereby employees can retire before the age of 67 if their contribution period is greater than 41 years. Disincentives for early retirements are however stringent: old-age allowances gradually decrease of 1% every year (Falasca, 2012). This brief history of the complex evolution of the Italian pension system is useful to create a theoretical

background that helps to correlate and explain changes in the *decommdification* score for Italy over time.

8. Measuring Decommodification for Italian Old-Age Schemes

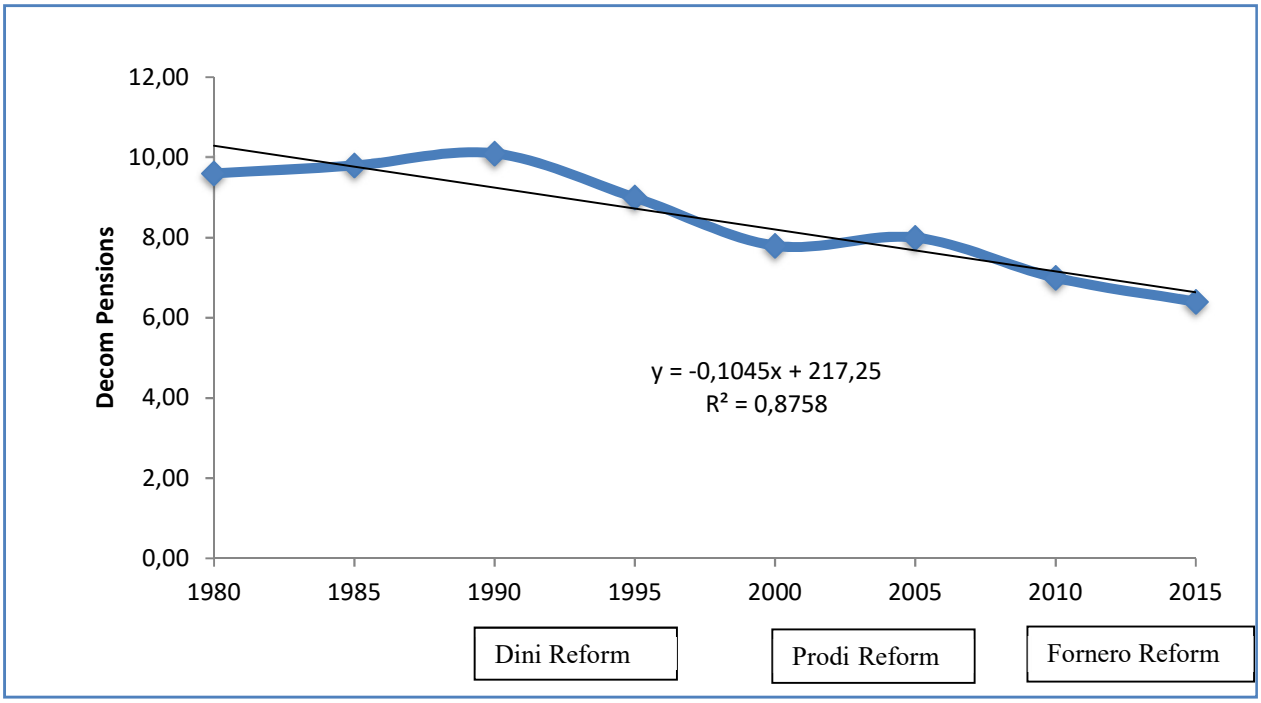

Figure 1 - Decommodification for Italian Pension System 1980 - 2015

The results in *Figure 1* above confirm the overall downward-sloping trend of decommodification scores for the Italian pension system that has been formulated by the prevailing literature. More in depth, the score has a 1-point increase from 1980 to 1990, then decreases two points from 1990 to the 2000, slightly recovers in 2005 and then gradually sinks to a minimum of 6.40 in 2015. As the graph shows, the correlation between the passing of time and a change in *decommodification* score displays a negative slope of 0,104 for the fitting line. With a goodness of fit explaining 87 percent of the variation, the significance of the test exhibits an overall negative trend in *decommodification* scores for the Italian pension system, proving the general soundness of our initial hypothesis in this section. Very interesting are the points of deviation from the common downward trend in the years 1980-1990 and 2000-2005 showing how Italian pension plans do not unequivocally follow a linear worsening of social security conditions over time.

An in-depth analysis of the period spanning between 1980 and 1990 reveals that the increase in *decommodification* scores is due to a temporary 1.5 boost in minimum take-up rates while the coverage rate remains equal. The introduction of the Amato reform relates *prima facie* to a significant drop in pensioners' levels of independence from the labor market with an increase in mandatory contribution years to qualify for benefit. Three years later, the Dini Reform of 1995 ushers in a decrease in *decommodification* by an increase of insurance funds paid by the individual insured, resulting in less overall benefits. Subsequently, the *Prodi Reform* of 2007 negatively affects the performance score by heavily reforming the minimum pension benefit. Finally, the first effects of the Fornero-Monti reform in 2015 are mixed and do not exhibit the foreseen plummeting in *decommodification*: the score increases in replacement rates for standard workers and for looser eligibility criteria in terms of contribution years for the early retirement schemes and slides one point in minimum replacement rates. This result entails greater social stratification and income inequality, and an increase in individuals' share of pension benefit. An additional feature to highlight is the slight decrease in the take-up rate over time. Since the take-up rate represents the amount of population over 65 that is covered by the pension scheme, an increase of the Italian population over 65 occurring with the phenomenon of population aging could be the variable which inflates the *decommodification* index and produce observations that counter the decreasing trend. A sound explanation of the lack of drop in decommodification in the period after the crisis is that an increase in unemployment and worsening living condition increase citizens' reliability to social welfare and therefore its GDP spending, interfering with the degree of the score's reflection of social unease.

9. Unemployment Benefits in Italy: A Short Overview

Social Policy for unemployment benefits in the post-war Italian period witnessed a sequence of expansive reforms in terms of coverage rate and increase of benefits until 1975 to then remain stable in the 1980s (Ferrera 2000: 71). Only since the mid-1990s a standard critique of the unemployment assistance (*assistenza occupazionale*) gained political preponderance and institutional attention due to the high fragmentation of the unemployment schemes, policy overlaps and a bias towards certain vulnerable groups in terms of transfers. More specifically, the nature of employment programs' fragmentation in

labor law was highly skewed towards unilateral protection of people in special need (*contraente debole*) (Ferrera 2001: 76). Moreover, the Onofri commission established in 1997 highlighted that Italy featured deep inequalities with regards to eligibility criteria, duration and amount of benefits in favor of groups such as the elderly or public workers that left excluded the least represented. In 1990s the sovereign debt adjustment policies highlighted even more the weakness of the programs it sought to reform, as well as the various discussions regarding the reform of unemployment schemes that would pave the way to the Monti-Fornero Reform in 2012 and Renzi's Jobs Act of 2014. In the period 1980-2015, the unemployment benefits system, since highly marginal, has not been reformed repetitively, but experienced significant change with the Monti-Fornero Reform (Bonke and Elke 2004: 241-242). Before 2012, unemployment schemes were divided into two branches: (1) an insurance system with time-limited benefits (*indennità di disoccupazione ordinaria*) which is for formerly employed people who became unemployed due to dismissal. The eligibility criteria for access to the benefit is 52 weeks of contribution for all those who do not quit their job voluntarily, except for justified resignation (*dimissioni per giusta causa*). The benefit is calculated as a percentage of the wage of the formerly employed that is paid for 8 months for workers of up to 49 years of age and for 1 year for citizens of 50 years of age or more. A more generous insurance system that functions as a shock absorber to factory workers is the Redundancy Fund (*Cassa Integrazione Guadagni*), where the State relieves factories in financial difficulties by paying unemployment benefits to unused workforce. The workers entitled to Redundancy Fund receive 50% of their previous wages from a threshold established by law, and their contributions validated figuratively (*contributi figurativi*) (Bonke and Elke 2004: 243).

The Fornero-Monti Reform of 2012 did not only encompass labor market conditions and old-age schemes but had a significant impact in social insurance for unemployment safeguards. The reform gathered all the previous scattered unemployment schemes under the umbrella of the Social Insurance for Employment (*Assicurazione Sociale per l'Impiego, ASpI*), granted to workers at the end of the employment contract in cases of dismissal and special causes of resignation at the Centers of Budgetary Assistance (*CAFs*) (Tiraboschi 2012: 76). The eligibility criteria amount to being outside of the labor market because of dismissal or being inactive from the labor force and wishing to re-entering it. The lack of equality in the welfare provision is a remarkable highlight because it shows the lack of the universality principle employed by Italian labor law (Tiraboschi 2012: 77).

10. Measuring Decommodification in Unemployment Insurance

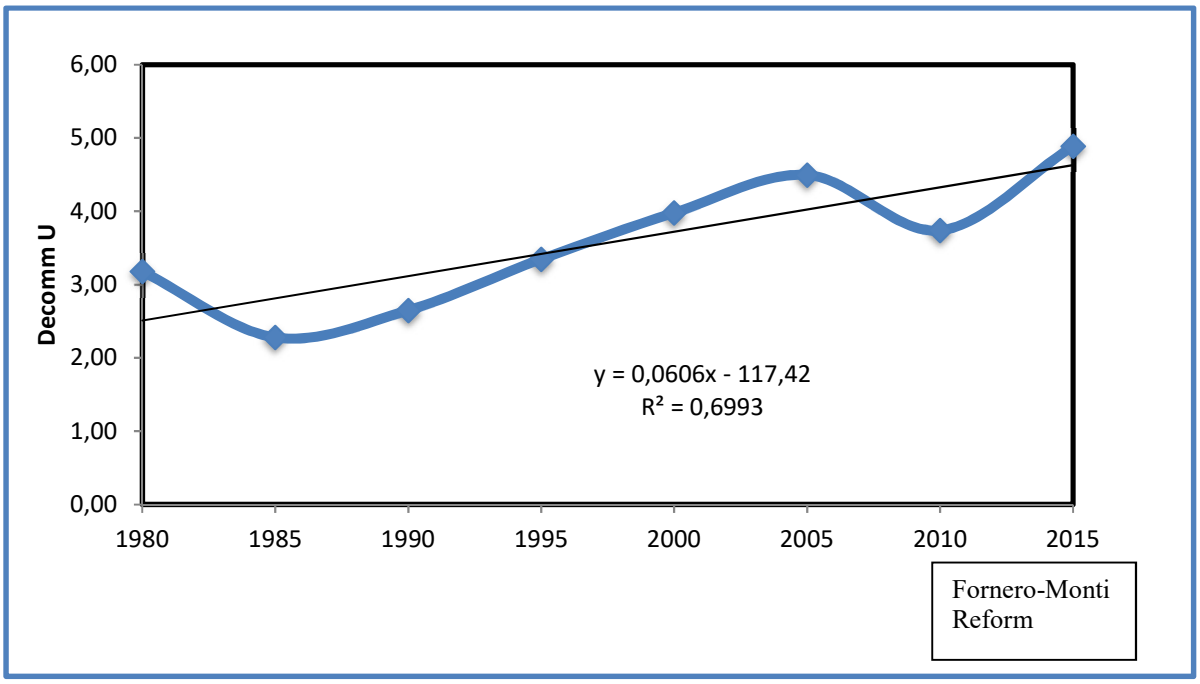

Figure 2 - Decommodification δU for Unemployment Benefits in Italy

The results in *Figure 2* show an unambiguous rise in the levels of *decommodification* from 1985, the absolute minimum of 2,28, to more than double of it in 2005, with a trend reversion and a local minimum of 3,74 in 2010. After 2010, the curve reaches its peak point at 4,89. The components of the *decommodification* score that create the positive temporal variation are a small increase the coverage rate that weighs all the indicators, the rise in the payment period of the unemployment benefit and its replacement rates. The singularity points in 1985 and 2010 have been originated respectively by a tightening of eligibility requirement in terms of contribution period and a drop-in replacement rate. Despite the small trend swings to attribute to the reforms, the Italian Welfare State has undoubtedly increased its performance in distributing unemployment benefit schemes via increased coverage rates and replacement rates. The coverage rates have been enhanced by the Monti-Fornero reform through the ASpI and mini-ASpI. As the labor market becomes more flexible, unemployment benefits acquire a more important role. A last comment to point out is that the replacement rate of this score incurs in operational hurdles when it comes to describing citizens' quality of life, as it only measures the degree of the replacement the pension has with a wage but does not

examine the wage variation over time. As the replacement rate is the quotient between the dollar value of the benefit scheme and the wage, it rises either by an increase in pensions' dollar value or due to falling wages.

11. Italian Sick Pay

Together with pensions, healthcare has always been the chief sector of Italian welfare spending. Italy has been allocating on average more than 30% of the overall social security resources to its public National Healthcare System (NHS) and has made public health a number one state priority. Thus, the Italian Labor Law defines sickness benefits, or *indennità di malattia*, as the benefit that a standard public or private worker should receive upon certified sick leave from the workplace (Phillips 2016: 173). In Italy, employees have been eligible for the *indennità* from the first day of sickness without any legislative variation throughout the whole analyzed period. In the *Three Worlds* paradigm, Esping-Andersen does not differentiate between short-term illness or disability, which in Italy is covered by the National Collective Bargaining Agreement of the trade sector and long-term accident insurance. However, through the various indicators that Esping-Andersen uses, he appears to describe the welfare treatment of an employee's absence from work as a long-term illness. This has been spelled by the law in the period 1980-2015 without significant changes in the legal provision. According to Italian law, managers or *dirigenti* are paid 100% of the regular salary by the employer for the first 12 months of sickness. Employees in the public sectors, or *impiegati,* are entitled to an indemnity of 50% of the daily normal salary from day 4 to day 20 by the Welfare state, whereas the company pays the same amount for first three days of sick leave. From the 21st day, the employee has the right to an indemnity of 66% of her salary, charged to the National Social Security Institute (INPS) (Phillips 2016: 173-175).

12. Welfare Performance Score for Sickness Insurance in Italy

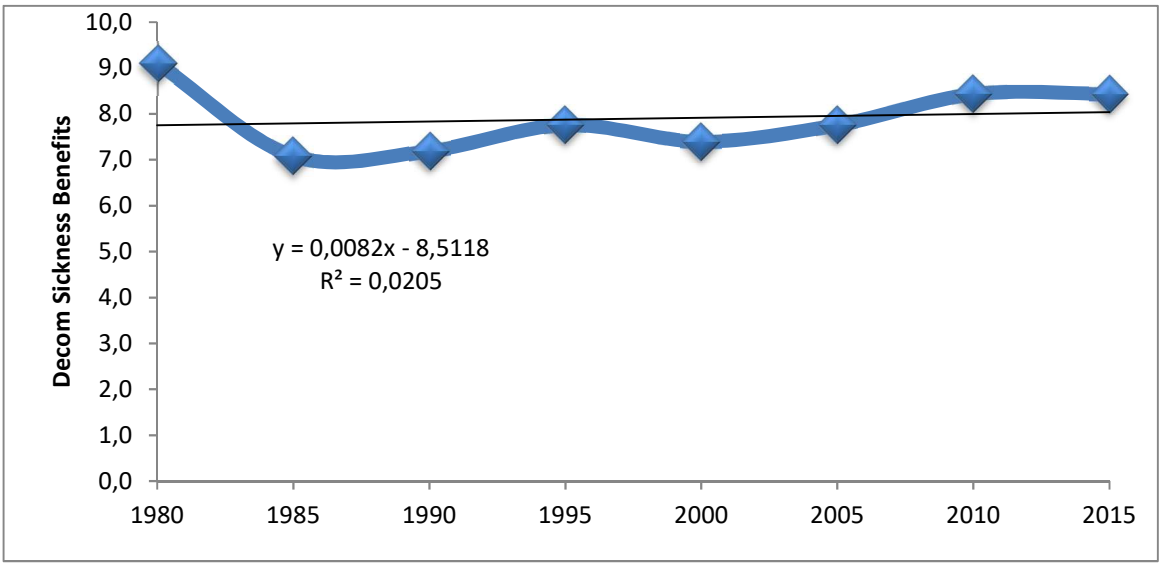

Figure 3 - Decommodification Score for Sickness Benefits 1980-2015

Figure 3 confirms the general stability of the welfare state performance in terms of sickness benefits, conferring a very high score to the Italian Welfare State over time without remarkable drops or increases related to any legal reform or watershed event. The main source of variation for this score lies in the decrease of the replacement rate of the benefit for the 26-week period enjoyed by workers in sick leave from 1980 to 2005 and then its recovery in 2010 and 2015. Interestingly, but not surprisingly, another factor that contributes to the variation is a significant increase of the coverage rate of sickness insurance of 20% in the period 2005-2015. The increase of sickness benefits' coverage rate can partly be explained as a certain number of private sickness contractors that after the global financial crisis of 2008 gradually leaned towards public sickness benefits provision.

13. Measuring Total Decommodification Trends for Italy

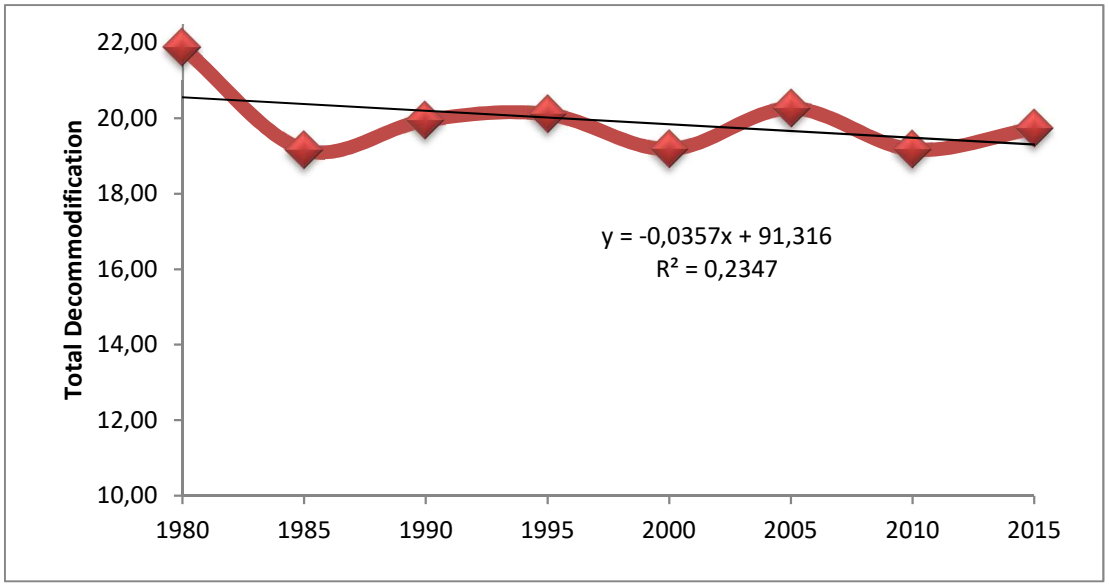

Figure 4 – Total Decommodification score for Italy 1980-2015

Once that the *decommodification* scores of the three dimensions of Italy's welfare have been successfully calculated, one can finally draw the conclusive values for total *decommodification* in Italy from 1980 to 2015. To compute the final *decommodification* score for Italy in the 1980s, Esping-Andersen (1990) has added each single of the three scores δP for pensions, δS for sick pay and δQ for unemployment benefits to then compose an overall index of welfare performance for social security distribution shown in *Figure 4*. The graph firstly reveals a two-point difference in *decommodification* scores for Italy with Esping-Andersen's results in 1980. This comes without great shock since the literature following the *Three Worlds* model has already highlighted the divergence of results with Esping-Andersen's due to the constant update of the numbers in the SIED database. The study's results show the overall confirmation of a downward trend in *decommodification* scores over time that is far from being linear. The *decommodification* levels experience their greatest plummet in the 1980-1990 period

with a 2.7-point drop, and then stabilize around a mean score of 20 exhibiting a gentler downward-sloping trend. The findings are however unusually interesting in that they show a small decrease in the *decommodification* scores forecasted by the initial hypothesis but do not seem to fully explain voters' discomfort and reveal a much more nuanced scenario that excludes a total confirmation of our expectations. As Graph 4 shows, the downward trend is associated to an overall negative coefficient of the fitting line of -0,032. The linear model features an R squared of only 26% of the variation, leaving many crucial variables outside the model. Further studies should be done in the points of singularity characterized by a high drop or rise, such as the values of 1995, 2005 and 2010.

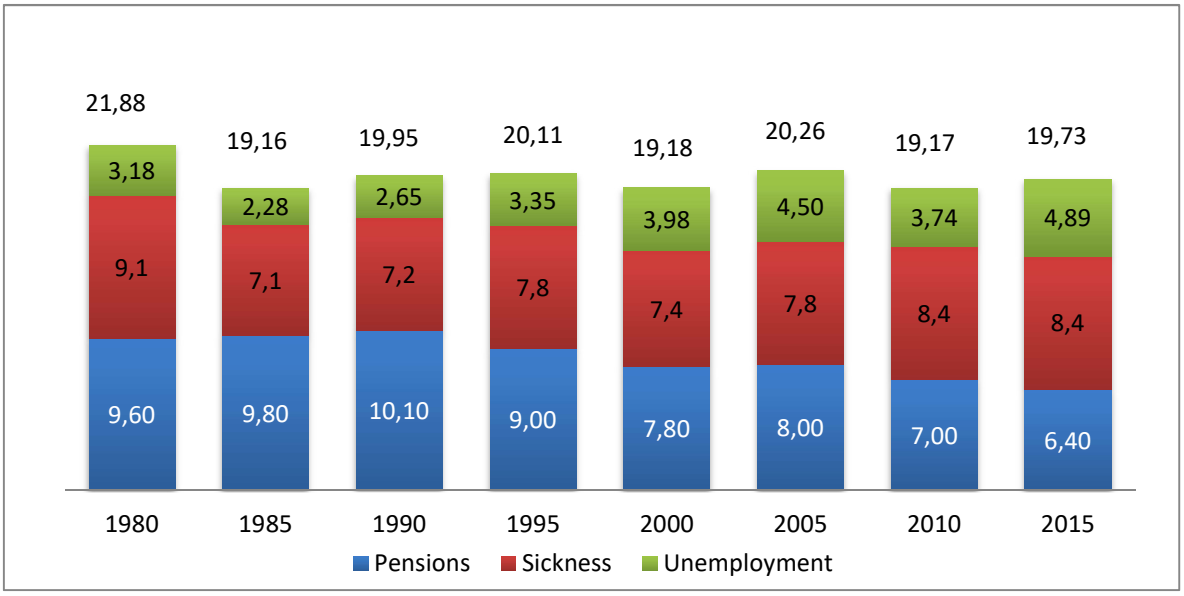

Figure 5 - Deconstruction of the Decommodification Score in Italy

To better understand how and why total *decommodification* does not reflect all the unease related to social security, *Figure 5* is drawn. The graphics show the change of the various components of the *decommodification* scores and the role they play in the score's variation. It needs to be noted that the sharp fall in *decommodification* for pensions, an area strongly reformed throughout the studied period, is partly offset by the rise in the score for both unemployment and sickness benefits over time. The results of the overall *decommodification* score are particularly interesting to understand because it shows quantitatively that the Italian Welfare State is having a worse performance in insuring vulnerable groups against the job market and therefore decreasing its levels of social security provision. A major highlight is

that the *decommodification* score does not reflect the widely denounced welfare retrenchment introduced by the Monti-Fornero reform. The score in fact is greater than 2010 and the welfare performance for pensions only decreases of 0,20. There are two reasons for the inconsistency between the *decommodification* trend and the widely denounced cuts to social spending. Firstly, the cut towards financial spending in a national economy results in the increase of the coverage rate of the various welfare dimensions, as more people lean towards social security. Secondly, the full effects of the reform are felt later than 2015, as the impact of welfare reforms takes time to reflect in the data. A proposed scenario to offset the Italian welfare state's peculiar skewness towards its pensions system is presented in *Figure 6* weighing each component of the total decommodification score with the respective percentage of GDP divided by the full social security budget for each five-year span.

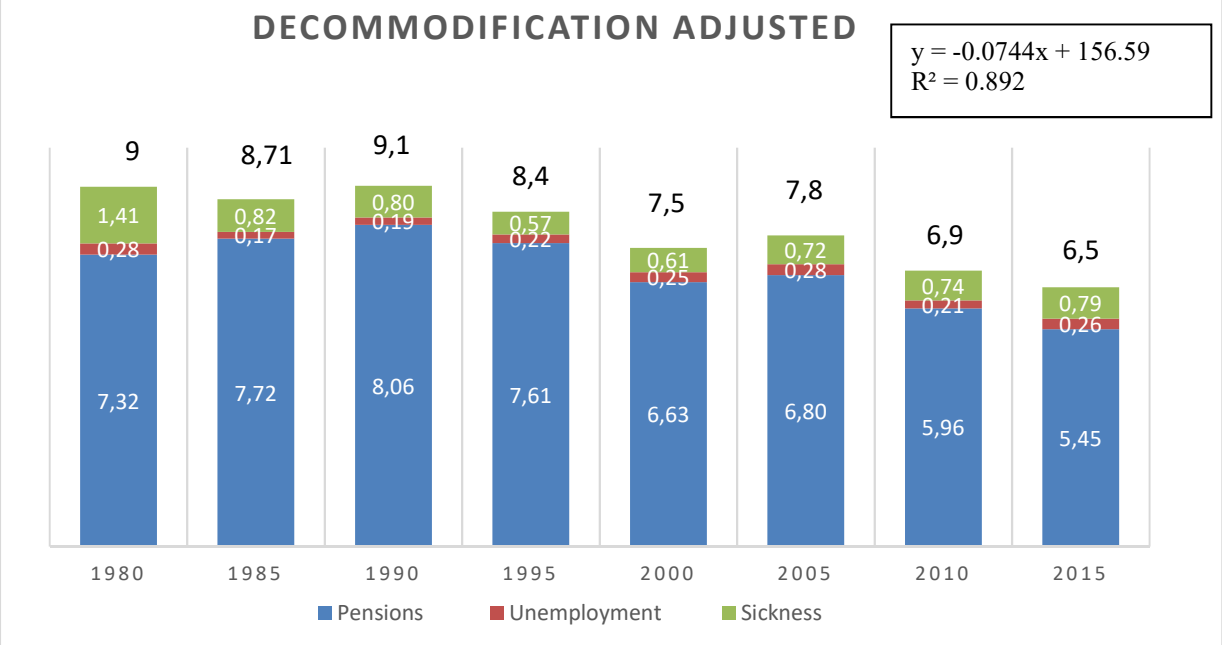

Figure 6 – Decommodification adjusted for GDP expenditure

The weighed parameters of the adjusted decommodification model show a much more unambiguous trend towards lower decommodification scores. It is immediately notable how the Italian skew towards pensions in terms of compared GDP percentage allocated to each area is accounted and how pensions' decrease in decommodification scores is no longer offset by an increase in unemployment benefits. The innovation increases the variation

explained by the model of 66% with an R squared of 0.89. This model better aligns with the prevailing view of the variation of social security performance perceived by the vulnerable groups in decommodification epitomized by the downward sloping curve reflected in the graph with a negative coefficient of -0.07. This analysis shows a maximum decommodification in 1990 of 9.1, after which a decrease in welfare performance ushered in by the Amato pension reforms takes over, with the singular exception in 2005. As the Italian Welfare System is plotted against the European average, with a high partiality of its GDP spending devoted to pensions that is not reflected in the indicator (Fadda, D'Apice, 2010: 322-323), the decrease in decommodification scores is epitomized by the change from the retribution-based system (*sistema retributivo*) to the contribution-based system (*sistema contributivo*), which decreases the replacement rates and coverage rate of pensions, along with increasing the years of contributions required for eligibility. Conversely, the *decommodification* trends for Italy do not reflect the bemoaned disruptive worsening of social security made by the Monti-Fornero reform in the three years after its issuance as predicted by the literature. The greatest drop in social security performance occurs from 1995 to 2000 and from 2005 to 2010, and the negative variation in 2015 in the aftermath of the Monti Reform is small compared to the latter points. However, a final judgement of the Monti-Fornero reform cannot be drawn at this point as an analysis of decommodification over a wider time-span will be needed to understand the complete effect of it on Italian social security.

14. Conclusion: The teachings of Italian Welfare State Performance

This article has attempted to formalize the change of social security conditions in Italy from 1980, a period in which Esping-Andersen formalized his social security model, to the 2015, a date that marks the first effects of the significant Monti-Fornero reform. To operationalize the welfare performance in the key domains of pensions, sickness and unemployment benefits, the *decommodification* index employed by Esping-Andersen in his book *Three Worlds of Welfare Capitalism*, has been used. The analysis of the index shows a decrease in *decommodification* over time that reflects the view of the prevailing majority on welfare state retrenchment (Mishtra 1999; Schumacher et al. 2013; Starke 2006). A chief point to highlight is the inadequacy of the total *decommodification* score elaborated by Esping-Andersen to fully reflect the Italian Welfare State performance, since the country prioritizes

an important amount of its social spending to pension schemes. A proposed suggestion to achieve greater precision in representing social security conditions across countries has been to weigh the *decommodification* scores for the areas of pensions, sickness and unemployment benefits with their respective percentage of GDP spending, divided by the overall social security spending for each five-year interval. The results presented in *Figure 6* is very useful to bridge a connection between the wide discomfort expressed by Italian voters in supporting populist and a decrease in social security levels.

The Italian case hereby studied reconnects to the point raised by Ramesh Mishra (1999) who claims that from 1990s, a core of industrialized welfare states is committed to reduce social expenditure and introducing labor market deregulation that goes hand in hand with a period of intense globalization. In Italy, the greatest source of variation is related to the shift between the higher scores in decommodification associated to the retribution-based system for pensions, and the less performing contribution-based system. Anti-establishment parties highlighting socio-economic issues such as the Five-Star movements have understood the unease spurring from welfare state retrenchment and are addressing it, proposing increased welfare spending in 2019 with the *Reddito di Cittadinanza* for unemployment benefits and *Quota 100* reform for pension systems. The movement has justified the provision by claiming that it will positively impact on GDP growth by 0.18% in the first year based on the notion that higher liquidity for middle and lower classes will increase the money multiplier, enhance spending and lead to growth and employment (Il Fatto Quotidiano 2019). However, such an indirect stimulus is unlikely to bear a strong boost to economic growth in terms of debt-GDP ratio than a more direct expansionary measure, as the risk-averting behavior of the post-crisis Italian population may lead to higher saving (OECD 2019b). Historical Italian Federalist parties, the most influent of which the Democratic Party (*Partito Democratico*), should vocally address the worsening of social security and labor market conditions by putting redistributive policies in their political agenda as the Five Star movement has done. They should however differentiate themselves by the movement by conditioning welfare aid on the credible achievement of economic growth, as prescribed by economic international institutions. This would mean firstly implementing macro-economic counter-cyclical measures to increase productivity and employment, a list of which needs elaboration in a further study.

Other than initial policy prescriptions, the article brings forward countless stimuli to further research. Firstly, the scope of the analysis hereby operated for Italy can be spatially extended to more European Member States, resulting in a complete overview of European Welfare State Performance. Secondly, the exercise could be extended to the second social policy indicator of social stratification that Esping-Andersen (1990) has elaborated in the Three Worlds model. Social Stratification measures studies to detect welfare state clustering measures to what extent does the state encourage income stratification among the population by ad hoc social security transfers or lack thereof to certain social groups (Esping-Andersen 1990: 57). Social stratification can help to determine the trajectory of how the three clusters of welfare capitalism have changed in Europe from 1980 to 2015 converging, as Hall and Soskice (2001) claim, to a Liberal model with low decommodification scores.

Secondly, the analysis for decommodification scores adjusted for GDP expenditure in Figure 6 that confirms the worsening social security levels endorsed by the prevailing literature has limitations to fully explain the rise of populism. It is necessary to highlight that the present article's aim so far has not been to show a causal relationship between the vote for populists in Italy and the fall in decommodification over time. The article has attempted to formalize the debate on social security in Italy, confirming a significant fall in welfare performance for pensions. A next step to the analysis could be the construction of a rigorous econometric model to understand to what extent the fall of social security standards correlates with the change in Italian voting patterns to populism. To do that, a better account of the varieties of populism needs to be outlined through the modeling of key characteristics that divide Italian populist parties in various clusters. It is in fact clear that Lega Nord and Five-Star movements have different focus areas, political programs and supporters. Once that populist groups are obtained, a regression or ANOVA model between the voting behavior and social security standards can be drawn. The unidimensional model correlating the voting behavior of Italian citizens can be improved including other determinants of populism: economic inequality, captured by the Gini index, income per capita, employment rates, and immigration flows per year in terms of total Italian population. These factors can offer a contribution to understand the key issues behind voters' inclination towards populists. However complex the populist phenomenon is, nowadays' political polarization needs a thorough discussion on freedom from want, income security, inequality levels and labor market conditions to bring Europe beyond its current challenges.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Reimagining Congress's Treaty-Implementing Authority: An Originalist Case for the Unexplored Middle Ground

by

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Perspectives on Federalism, Vol. 11, issue 2, 2019

Abstract

This Article addresses Congress's prerogative to implement non-self-executing treaties. In construing Congress's Necessary and Proper Clause authority in this area, most commentators have argued that it is either virtually plenary or virtually nugatory. I explore part of the vast middle ground. I assume as true Justice Scalia's key argument in *Bond v. United States*, that implementing a treaty cannot be necessary and proper to making it, for it is completely made once the president ratifies it. Though this appears to eliminate congressional authority, I argue that Congress derives treaty-implementation power from the Necessary and Proper Clause because implementing current treaties facilitates making future beneficial treaties. Implementing a treaty need not be necessary and proper to making *that* treaty because it is necessary and proper to making future ones. Congress's power to implement treaties is not unlimited, however, and the approach herein expects it to account for its efforts to accommodate state interests.

Key-words

Treaty implementation, non-self-executing, U.S. Constitution, Necessary and Proper Clause

1. Introduction

"I don't think that powers that Congress does not have under the Constitution can be acquired by simply obtaining the agreement of the Senate, the President, and Zimbabwe. I do not think a treaty can expand the powers of the Federal Government…." (*Golan* 2012: Transcript at 32-33).

"We completely agree[] with that, Justice Scalia" (*Id.*: 33).

The exchange above between Justice Scalia and United States Solicitor General Donald B. Verrilli, a moment of levity in a dry copyright case, summarizes the two men's views on a deeply consequential and controversial matter. Since the early days of the Republic, the Supreme Court has held that certain treaties are not self-executing (*Foster* 1829). The treaties alone, while still law, are not enforceable in United States courts absent accompanying legislation that implements the treaty obligations.[I] Therefore, assuming that the Treaty Clause grants the federal government power to make treaties free from typical federalism constraints on the federal government's authority,[II] does Congress necessarily have authority to pass laws that implement such treaties, regardless of whether the implementing laws fall within Congress's traditional Article I powers? To what extent, if at all, can Congress pass legislation otherwise beyond the scope of its constitutionally enumerated authority in order to implement an Article II treaty?

In *Missouri v. Holland*, the Supreme Court upheld legislation implementing the Migratory Birds Treaty against Missouri's federalism-based challenge to the implementing act's regulation of hunting seasons, practices, and permitted species targets. The *Holland* Court endorsed a sweeping view of the Treaty Clause in its five-page disposition of the case. It also penned the following line: "if the treaty is valid[,] there can be no dispute about the validity of the statute [implementing the treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government" (*Holland* 1920: 432). Just five years earlier, courts had struck down the Weeks-McLean Act, the purely domestic-legislation predecessor to the Migratory Birds Act at issue in *Holland*, on the grounds that it exceeded Congress's constitutional authority (*McCullagh* 1915). Holding the Migratory Birds Act valid meant that Congress's power to legislate increased due to the treaty. Despite this unusual outcome, Professor David Golove has observed that the Necessary and Proper

Clause analysis is "the least controversial portion of [the *Holland*] opinion" (Golove 2000: 1100).[III]

A controversy over exactly that matter recently reemerged, however, and General Verrilli likely came to regret his off the cuff answer to Justice Scalia quoted at the beginning of the Article. He soon returned to the Supreme Court to defend the United States' view that a valid treaty does expand Congress's power to legislate. The case, *Bond v. United States*, challenged The Chemical Weapons Convention Implementation Act of 1998, which makes it a crime for a person knowingly to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."[IV] The Act implemented the non-self-executing portions of the Chemical Weapons Convention.[V] Carole Bond was convicted of violating the implementing act when she attempted to poison her friend after finding out that her friend was pregnant with Ms. Bond's husband's child (*Bond* 2014: 2085). On appeal, Bond argued that the implementation act exceeded Congress's constitutional authority, reawakening the theretofore uncontroversial *Holland* question.

The *Bond* case was ultimately decided on statutory grounds.[VI] But the question of Congress's implementation authority, which the Supreme Court raised and then refused to answer, remains of the highest importance. Following *Bond*, the tally on the *Holland* question is as follows: two Justices (admittedly, one now deceased) have called for *Holland* to be overturned; Justice Alito appears agnostic on the question; and not one full-throated *Holland* defender has emerged on the Court. Given these circumstances, it is high time to scrutinize the *Holland* argument once more.

In Part II, I will provide a brief overview of the literature on this topic, which has generally urged either near-plenary or near-nugatory treaty-implementation power. In Part III, I will examine the *Bond* case and the opinions it produced in order to demonstrate the consequences of the debate over treaty implementation authority. In Part IV, I will contend that both sides of the debate—both the expansionists who urge essentially plenary Necessary and Proper Clause authority to implement treaties and the restrictionists who argue that no treaty implementation authority can be drawn from the Necessary and Proper Clause—fail to account for crucial arguments. I will adopt arguendo a premise that Justice Scalia defended in *Bond*: once the President ratifies a treaty, it is not susceptible of any more "making," and therefore Congress cannot give a treaty domestic legal effect by

relying on its necessary and proper powers to facilitate the making of that treaty, which is completely made once it is ratified (*Bond* 2014: 2099). My argument will be geared toward those who hold this view, as I contend that even on this narrow understanding, the Necessary and Proper Clause still grants Congress certain implementation authority that it would otherwise lack because implementing past treaties is necessary to and proper for preserving the ability to make future ones, and therefore necessary to and proper for preserving the treaty power itself.

On the other hand, proponents of a broad treaty-implementation power often fail to contend with the Supreme Court's Necessary and Proper Clause case law, and seem to assume that if Congress can sometimes rely on the Necessary and Proper Clause to implement a treaty otherwise beyond its Article I authority, it always can (Golove 2014: 9-10).[VII] This view is incorrect as well; Congress's treaty-implementation power is not plenary. The new means of evaluating implementation authority that I propose confers upon Congress maximum implementation authority when the political branches have shown attentiveness to federalism values through mechanisms such as attaching RUDs to treaty provisions that conflict with federalism values, ratifying treaties following the passage of implementing legislation that includes a full debate on federalism concerns, and passing implementing legislation that closely resembles the text of the treaty. Furthermore, when Congress bypasses these safeguards, its reasoning for doing so may be scrutinized by courts under a slightly elevated rational-basis standard, consistent with the Court's Necessary and Proper Clause case law.

2. Literature Review

Most scholars have argued that the Necessary and Proper Clause provides either broad, almost plenary authority to implement treaties, or no authority at all beyond Congress's other enumerated powers. Proponents of the former view, such as Professor David Golove, generally rely on structural arguments about the Constitution. Professor Golove has argued that while the courts should take their guardianship of the boundaries between federal and state powers seriously, state interests disappear in the treaty context, when the United States acts as a single entity on the global stage rather than an amalgamation of fifty smaller sovereigns (Golove 2000: 1091). Furthermore, at the Founding, treaty violations

were a principal cause of war, so by necessity the United States government had to have the power to force states to comply with treaties (Jay 1961: 42). A rogue state could throw the entire nation into war.

Supporters of expansive implementation power also have made textual arguments, suggesting that because the treaty power in the Constitution lacks subject-matter limitations (Hathaway et al. 2013: 247-50), and because the Supremacy Clause of the Constitution says that "all" treaties are the supreme law of the land (Art. VI, Cl. 2), Congress must have ample authority to enforce non-self-executing treaties. Lastly, proponents of the expansionist view make use of the history of actual treaty enactment and argue that the structural checks built into the process—such as requiring, as prerequisite to ratification, super-majority support in the Senate, the body that weights all states as equal sovereigns and was originally elected by the states—are sufficient to protect states against intrusion into their sphere of regulatory authority (Hathaway et al. 2013: 304-24).

These arguments will be discussed in great detail in the remainder of the Article, but their main defect is that they prove too much. If Congress's implementation authority truly comes from its duty to avert war, for instance, or if "all" treaties must be enforceable as the supreme law of the land, then why should any congressional legislation in pursuit of a treaty ever be unconstitutional? It seems that Congress could, by treaty-implementation statute, contravene the First Amendment, abridge states' sovereign immunity, or create a unicameral legislature if a treaty so required.[VIII] Moreover, at the Founding, treaties typically addressed nations' obligations to each other and each other's citizens; in the modern period, treaties have become detailed pacts with broad regulatory sweep into individual citizens' lives (*Bond* 2014: 2100). For example, *Bond* concerned how the United States would enforce a treaty against its own citizens. If the United States were reluctant to enforce the Chemical Weapons Convention against Ms. Bond, perhaps other nations would have enforced the treaty less vigorously against their own citizens as well—an undesirable result, to be sure—but no one would have gone to war with the United States. The war-avoidance justification may not apply to many treaties today.

Conversely, restrictionists typically hold that the Necessary and Proper Clause provides no treaty-implementation authority because the Constitution discusses only the power to "make" treaties, a process distinct from implementing them, so the Necessary and Proper Clause may supplement only Congress's powers of treaty-making, and not treaty-

implementing (Cato Institute 2014: 23-25). Restrictionists also rely on slippery-slope-style arguments. If Congress can implement treaties that otherwise go beyond its Article I authority, there is no principled mechanism to limit this power.

Most scholarly approaches to treaty implementation power sit near the extremes, as the foregoing arguments demonstrate. Offering a middle-ground approach, Professor Carlos Manuel Vázquez has suggested that Congress has virtually unlimited power to implement specific treaty guarantees, but less power to act when it comes to what he labels "aspirational" treaties (Vázquez 2008). These vaguer treaties might commit the United States to ending discrimination against women or to ending gun violence, but Congress could not use these capacious goals to pass implementing legislation otherwise beyond its power (to protect a right to abortion all throughout pregnancy, perhaps, or to do away with the right to bear arms).

Having surveyed the scholarly literature, I next turn to *Bond*.

3. The *Bond* Opinions, the Stakes of the Treaty-Implementation Authority Question, and the Threat of Severe Restrictions on That Authority

The Supreme Court held 9-0 to vacate Bond's conviction. The lopsided tally is belied by the deep fracture on the proper rationale for vacature. The majority opinion held that the implementation act did not criminalize Bond's local, non-terrorism-related chemical weapons usage. Justice Scalia, joined by Justice Thomas, concurred in judgment only. Justice Scalia argued that the implementation act clearly covered Bond's actions (*Bond* 2014: 2094). Thereby required to reach the question of the implementing act's constitutionality, he would have held it unconstitutional as beyond Congress's Necessary and Proper Clause authority (*Bond* 2014: 2098).

Justice Scalia argued that a treaty is "made" under Article II once the Senate has consented to it and the President has ratified it (*Bond* 2014: 2099). Giving a treaty domestic legal effect is a separate process, distinct from making the treaty. Congress's Necessary and Proper Clause powers apply only to facilitating the making of treaties, not giving them domestic legal effect, for it is the power to make treaties alone that the Constitution discusses and therefore only that power that Congress can effectuate using the Necessary

and Proper Clause. Once the President has ratified a treaty, it is not susceptible of any more making, and Congress's power to do what's necessary and proper to assist in the making of treaties drops out of the picture. Therefore, in order to give a treat domestic legal effect, Congress must rely upon its enumerated Article I powers (*Bond* 2014: 2099). Justice Alito joined part I of Justice Scalia's opinion only, meaning that he expressed his assent to the proposition that the implementing act did cover Bond's infraction, and withheld his vote from the constitutional analysis.

Justice Thomas joined Justice Scalia's opinion in full, while "writ[ing] separately to suggest that the Treaty Power is itself a limited federal power" (*Bond* 2014: 2103). In other words, beyond simply not permitting aggrandizement of Congress's implementation power based on treaties, Justice Thomas would require that treaties "be used to arrange intercourse with other nations, but not to regulate purely domestic affairs (*Bond* 2014: 2103).

Justice Alito added a brief concurrence, writing just for himself. Despite that it runs only nine sentences, it is a remarkably slippery opinion. He expressed agreement with Justice Thomas's view of the Treaty Clause (*Bond* 2014: 2111). He then acknowledged that control of true chemical weapons "is a matter of great international concern," but urged that "insofar as the Convention may be read to obligate the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case, which typically is the sort of conduct regulated by the States, the Convention exceeds the scope of the treaty power" (*Bond* 2014: 2111). Given that the text of the implementing legislation copies almost exactly the text of the treaty, it is apparent that it does require the United States to enact the domestic legislation that it did, which means that Justice Alito cast a vote to partially invalidate an Article II treaty on federalism grounds.

Why was Justice Alito willing to commit himself to invalidating a treaty that no one else was interested in discussing, and neither party had challenged, rather than joining all of Justice Scalia's opinion disposing of the case on the Necessary and Proper Clause issue that was briefed and argued by the parties? I suspect that he may have understood, and been discouraged by, the radical restrictions on the federal government's authority that would come to pass if both Justice Scalia's opinion and Justice Thomas's opinion became law. Consider a non-self-executing treaty. For it to have domestic legal effect under the Scalia-Thomas formulation, it must first pertain to matters of international relations in order to

be a valid Article II treaty. Then, in order for Congress to be able to give it domestic legal effect, the treaty must also touch on matters that Congress can regulate under its traditional Article I powers. In other words, if a non-self-executing treaty is to have domestic legal effect, it must exist at the intersection of the "regulation of international affairs" box and the "within Congress's Article I powers" box.

To help illustrate this principle, consider the Vienna Convention on Consular Relations (VCCR). In *Medellin v. Texas*, Medellin sought to enforce the International Court of Justice's decision that he was entitled to habeas review of his state-court conviction for capital murder because the United States had violated his rights under the Vienna Convention on Consular Relations. The Supreme Court declined to give the ICJ's decision domestic and judicially enforceable legal effect, holding that it and the VCCR were non-self-executing (*Medellin* 2008: 519). To respond to the dissent's objections that the Court's decision rendered this treaty and others like it useless, the Court offered that "Congress could elect to give [such treaties] wholesale effect … through implementing legislation, as it regularly has" (*Medellin* 2008: 519). Justices Scalia and Thomas joined the Chief Justice's opinion for the Court without qualification, but it is far from clear that it coheres with their understanding of Congress's implementing authority as expressed in *Bond*.

The treaty obligation at issue in *Medellin* was that the State of Texas had not informed Medellin of his right to have the Mexican consulate notified that Medellin, a Mexican national, was being held in an American jail (Vienna Convention on Consular Relations, art. 36(1)(b)). Congress has many enumerated constitutional powers that touch on foreign relations, such the power to regulate commerce with foreign nations (Art. I, § 8, Cl. 3), the power to provide a uniform rule of naturalization (Art. I, § 8, Cl. 4), the power to declare war (Art. I, § 8, Cl. 11), and others. But it has no explicit right to regulate all aspects of foreign affairs and all matters that have international implications. One must wonder, then, under what enumerated power could Congress give domestic effect to the VCCR and require states to follow certain procedures after arresting people for violating state criminal law?

It seems quite plausible that Justices Scalia and Thomas would find legislation implementing the VCCR to be unconstitutional. The non-self-executing treaty would then lack domestic legal effect, even though it involves a quintessential treaty matter: the regulation of how sovereigns are to treat each other's citizens when they leave their home

nations, particularly within the criminal justice system. The treaty would certainly pass muster under Justice Thomas's understanding of the treaty power because it regulates sovereigns' treatment of one another's citizens, but still would not have domestic legal effect. The ability of the United States to comply with many criminal-justice treaties is thrown into doubt under the Scalia-Thomas view of the law.[IX]

These are the stakes of the battle over Congress's implementation authority. Luckily for advocates of a less restrictive view, Justice Scalia's reading of the text of the Necessary and Proper Clause and the distinction between making and implementing treaties need not foreclose Congress from relying on the Necessary and Proper Clause in order to implement treaties.

4. The Necessary and Proper Clause Justifies Treaty-Implementing Legislation that Demonstrates to International Treaty Partners that the United States Will Honor Its Treaty Obligations

The main goal of the Article is to demonstrate that, even assuming Justice Scalia's interpretation of the distinction between making treaties and giving them domestic legal effect is correct, the Necessary and Proper Clause still grants Congress authority to pass statutes to implement treaties that it otherwise could not have passed because Congress can reasonably determine that abiding by current treaty commitments will assist in the process of making future treaties. Such an interpretation is consistent with the Supreme Court's modern Necessary and Proper Clause jurisprudence, which, although relatively sparse, clearly indicates the correctness of such a construction of the Clause.

Next, I will contend that one must be careful not to read the Clause too broadly, for the case law, text, and structure of the Constitution require Congress to give due deference to the prerogatives and police powers of the states. Because the Framers placed no substantive limits on the Treaty Clause (Corwin 1913) and envisioned most treaties to be self-executing (Vázquez 1999: 2157),[X] however, the best methods for ensuring congressional respect for federalism are procedural. I will suggest several such procedures, including structuring treaties so that they do not enter into force until implementing legislation has been passed; the use of reservations, understandings, and declarations; and, when these measures are not observed, modest scrutiny of why they were not.[XI]

4.1. Implementing Treaties Is Necessary and Proper for Making Future Treaties

Congress must have the authority to determine that giving domestic effect to the United States' treaty commitments is necessary to and proper for facilitating future treaty agreements. This argument has been only lightly engaged in the literature. I will analyze in turn the textual, precedent-based, and structural arguments for and against this interpretation of the Necessary and Proper Clause.

4.1.1. The Constitution's Text

Justice Scalia did not address the argument I am putting forth in his concurrence in *Bond*, but the most prominent academic defender of the restrictionist view of treaty implementation, Nicholas Quinn Rosenkranz, has discussed it briefly (Rosenkranz 2005). First, he labeled the argument that future treaty negotiations would be aided by present treaty adherence as "speculative" (and presumably not "necessary," then, within the meaning of the Necessary and Proper Clause) (Rosenkranz 2005: 1889). This far understates the argument, and improperly applies the Supreme Court's Necessary and Proper case law. Congress need not *prove* that a certain regulation assists in executing its enumerated powers in order to be able to effect that regulation under the Necessary and Proper Clause.

In *McCulloch v. Maryland*, the original and still-seminal case on the Necessary and Proper Clause, the Court held that Congress has the power to enact laws that are "convenient, or useful," or "conducive" to the enumerated power's "beneficial exercise." This argument meets the bar of usefulness or conduciveness: flouting treaties may lead to hostile international relations; abiding by them is surely useful to productive international relationships. The Framing generation was certainly quite aware of this and assessed the violation of treaties to be a principal cause of war (Graebner et al. 2011: 119; Jay 1961: 42).[XII] It takes no large leap to determine that behaving in a way likely to lead to war damages the ability to cooperate with nations through future treaties, and therefore that Congress can facilitate such cooperation by ensuring compliance with the United States' treaty obligations. In more modern times, Andrew Guzman has written that when a state with treaty-compliance problems "seeks to enter into agreements in the future, its potential partners will take into account the risk that the agreement will be violated, and will be less

willing to offer concessions …. If there is enough suspicion, potential partners may simply refuse to deal with the state" (Guzman 2005: 596).

Viewing Professor Rosenkranz's argument charitably, one can admit that it is at least slightly speculative that flouting current treaty obligations will impede future treaty negotiations. In the narrow sense, it is at least a bit speculative because no one can say for sure *how much* it will impede future treaty negotiations. More broadly, one can imagine an argument that the United States' cooperation will still be highly sought after on the international stage, even if it occasionally ignores treaties, because of its economic and military might. Even this potentially meritorious argument misses the point, for it is not a constitutional argument. Defenders of this view are free to attempt to convince Congress that adhering to treaty obligations does not matter. Congress may well agree and not implement a treaty out of indifference to whether the states abide by it. But if Congress makes the judgment that implementing a treaty *is* conducive to the beneficial exercise of the treaty power in future cases, nothing in the Supreme Court's Necessary and Proper Clause jurisprudence would allow it to second-guess that decision. It is that case law that I turn to next.

4.1.2. The Supreme Court's Case Law

One might raise a second objection that the Necessary and Proper Clause cannot grant Congress the power to do thing *X* in contemplation of enumerated power *Y* when *X* and *Y* are as indirectly related as they are here, at least in the sense that when Congress implements a treaty, it is not assisting in the "making" of that particular treaty, which has already been made, but only in the making of future treaties. Each treaty that Congress chooses to give domestic effect to has only a small influence over the negotiation of all future treaties. Does my argument permit Congress to continue implementing past treaties even if, for instance, the United States decides that it will not enter into any Article II treaties for ten years, thereby making any connection between today's implementing legislation and the post-moratorium treaties of ten years from now quite remote? In order to ground this in the Supreme Court's case law, consider that when it upheld the charter of the National Bank in *McCulloch*, it observed that the bank *assists with* "the power to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies" (*McCulloch* 1819: 407).

not *guarantee* the smoothness and mutual satisfaction of the making of future treaties in order to be constitutional.

A somewhat remote connection between the regulation at issue and the enumerated power does not prevent Congress from exercising its Necessary and Proper Clause authority. The Court's decision in *Sabri v. United States* is most relevant to the method of regulation I propose here. *Sabri* concerned the constitutionality of a federal law that proscribes bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds, regardless of whether a connection exists between the particular bribe or bribed official and any federal dollars. Sabri, the defendant, challenged precisely that element of the law, arguing that for it to be constitutional as an exercise of power collateral to the government's Spending Clause authority (Art. I, § 8, Cl. 4), there must be a connection between the federal funds and the bribe. In particular, the statute's application to all entities that received $10,000 in federal funds, whether or not the particular bribe involved federal money, was too tenuous (*Sabri* 2004: 603-04). Unimpressed, the Supreme Court held that although not every bribe the statute covers "will be traceably skimmed from specific federal payments …. the corruption does not have to be that limited in order to affect the [federal] interest" (*Sabri* 2004: 605-06).

In other words, it is sufficient that prosecuting people like Sabri generally "protect[ed] the integrity of the vast sums of money distributed through Federal programs," regardless of whether Sabri himself misused federal funds (*Sabri* 2004: 606). Prosecuting all bribery cases *near* federal funding helped facilitate that funding and contributed to the efficiency of that funding in other instances. Analogously, implementing a treaty does not help carry out Article II treaty-making authority with respect to that particular treaty, which has already been made, but it contributes to the efficiency and effectiveness of the treaty-making process in other cases.

Though the Court's overarching jurisprudence on the Necessary and Proper Clause has been ambiguous, the treaty-implementing power I have proposed here would be permissible under any test it has embraced. Chief Justice Marshall's famous formulation of the Necessary and Proper Clause in *McCulloch v. Maryland* remains good law (*McCulloch* 1819: 421).[XIII] He stressed that Congress may choose among the appropriate means plainly adapted to a constitutional end (*McCulloch* 1819: 410), and so it is difficult to believe that he

would have had trouble upholding the authority to implement treaties as necessary to and proper for the making of future treaties.

In the leading modern case on the Necessary and Proper Clause, however, the Court adopted a somewhat different test. In *United States v. Comstock*, the Court considered whether the Necessary and Proper Clause permits a federal law that provides for the civil commitment of a mentally ill, sexually dangerous state prisoner beyond the date he would otherwise be released. Premising its opinion on five considerations—the broadness of the Necessary and Proper Clause, historical precedent for federal prison-related mental health statutes, the reasonableness of the link between Congress's selected means and its desired end, the law's accommodation of state interests, and the connection between the law and an enumerated Article I power—the Court upheld the statute (*Comstock* 2010: 133-46).

Congress's Necessary and Proper Clause authority to implement a treaty would prevail under the *Comstock* test. Two of the Court's requirements—regarding the link between Congress's selected means and its desired end, and the activity's connection to an Article I power—spring from the Court's admonition that it will not "pile inference upon inference" in order to sustain an exercise of Article I authority (*Lopez* 1995: 567). No such piling is required here. As previously addressed, the only inference necessary is the utterly plausible one that the Nation's treaty negotiations will be better served if it adheres to its existing treaty obligations. In terms of the historical practice factor, ample evidence supports the view that Congress had authority to implement at least some treaties based on the Necessary and Proper Clause (Golove et al. 2014: 10-17; Galbraith 2014: 87-97); *Missouri v. Holland* then explicitly blessed that practice.[XIV] I will take up the factor concerning accommodation of state interests in the next Section.

Justice Kennedy wrote separately in *Comstock* to suggest that instead of avoiding inference-piling, "[w]hen the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain" (*Comstock* 2010: 150). Once more, since the link between carrying out current treaty obligations and entering into future beneficial treaty obligations seems so clear, my proposed grounding of Congress's treaty implementation authority coheres with Justice Kennedy's formulation of the Necessary and Proper Clause.

Even Justice Scalia, when pressed in *Bond* to marshal the strongest precedent supporting his restrictionist view, came up only with the *McCulloch* dicta that no "great substantive and independent power [can] be implied as incidental to other powers" (*Bond* 2014: 2101). But a non-self-executing treaty is already the law of the land. The Supremacy Clause states that "all" treaties are (Art. VI, Cl. 2). Justice Scalia is already asking Chief Justice Marshall's dicta to bear enormous weight; the citation becomes all the more implausible when one asks whether the power to take what is already law and render it judicially enforceable is truly of a piece with the "great substantive and independent power[s]" that Chief Justice Marshall cautioned against impliedly reading into the Constitution.

The many strands of the Supreme Court's modern Necessary and Proper Clause jurisprudence all coalesce around the conclusion that Congress has the requisite authority to implement non-self-executing treaties.

4.1.3. Constitutional Structure

In addition to arguments from text and from precedent, proponents of the restrictionist view offer arguments about the Constitution's structure, namely, the dual state-federal system. Before addressing those arguments in the next Section, however, I focus on one structural objection to my argument that pertains not to the dual-sovereign system, but to the power that my proposal allows foreign governments to acquire over United States law.

Professor Rosenkranz has argued that the expansionist view of the Necessary and Proper Clause leads to an "anomalous" result because it permits certain grants of Congress's legislative authority to come from treaties, not the Constitution (Cato Institute 2014: 16-18). If the President unilaterally withdraws from a treaty, he also renders its implementing legislation unconstitutional at his sole discretion because the legislation would no longer be necessary and proper to anything. This is a strange result. Stranger yet, a foreign sovereign can render a United States law unconstitutional by withdrawing from a bilateral treaty that the law implements.

But this situation is simply a feature of law making in the international arena.[XV] Consider a bilateral self-executing treaty. Once the United States has entered into it, it is binding on the United States, the constituent states, and U.S. citizens. It is enforceable in

domestic courts, as any other statute would be. If the other sovereign abrogates it, however, this all changes. There is no longer a treaty that one can bring to court as the basis for vindicating one's rights, just as one could bring any other statute. Another sovereign can change United States domestic law by abrogating a self-executing treaty. This is inherent in the process of making and dissolving contracts between parties.[XVI]

If it seems strange that foreign sovereigns (and possibly the President acting unilaterally) can render a law not just inoperative, but *unconstitutional*, this understandable concern also proves misplaced. Just as the power of foreign sovereigns is a feature and not a bug of international law making, the impermanent nature of what the Necessary and Proper Clause tolerates is a feature and not a bug of that Clause. Consider *Comstock*. One of the reasons that the federal government enacted a civil-commitment statute was that the cost of committing sexually dangerous persons was prohibitive for some states (*Comstock* 2010: 179).[XVII] If the states suddenly became awash in money and eager to spend it on civil commitment programs, that must weaken the federal government's claim that its own civil commitment statute is necessary and proper. Justice Scalia has succinctly summarized "the nature of the Necessary and Proper Clause" as "empower[ing] Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation" (*Raich* 2005: 39). One should readily admit that the power to implement non-self-executing treaties does not spring from the plain text of the Constitution in the way that the authority to regulate commerce among the several states does (Art. I, § 8, Cl. 3). But that is precisely the type of power that the Necessary and Proper Clause does confer—regulatory authority not plainly discussed in the Constitution.

Justice Scalia, the plain text of the Clause, and the Court's precedent all contemplate that circumstances beyond the four corners of the Constitution will affect what qualifies as necessary and proper. Although unusual in our constitutional system, this quality inheres in the Necessary and Proper Clause, and it has been recognized since the Nation's earliest days. Chief Justice Marshall wrote in *McCulloch* that the Necessary and Proper Clause contemplates "such powers as are most suitable and fitted to the object, such as are best and most useful in relation to the end proposed" (*McCulloch* 1819: 410). It is self-evident that if a President or foreign sovereign abrogates a treaty, the law implementing it is no longer suitable to, or useful in relation to, demonstrating that the United States abides by

its treaty obligations. No constitutional defect arises from determining that the statute then becomes unconstitutional.

Professor Rosenkranz offers a final structural rebuttal to challenge that Congress can implement treaties as an exercise of authority necessary and proper to making future treaties. He asserts that such an argument proves too much, for if Congress can act in contemplation of future treaties, it could pass a law beyond its authority before a treaty is enacted if the treaty partner demanded it as a condition for entering into treaty negotiations, and that if we applied this construction of the Necessary and Proper Clause to other enumerated powers, it would wreak havoc (Rosenkranz 2005: 1890). For instance, if a President refuses to discharge his authority to make appointments (Art. II, § 2, Cl. 2) until Congress reinstitutes the Gun-Free School Zones Act (GFSZA) invalidated on Commerce Clause grounds in *United States v. Lopez*, Congress cannot reinstitute the invalidated statute pursuant to its Necessary and Proper Clause authority to facilitate presidential appointments (Rosenkranz 2005: 1890). Similarly, Congress could not reinstitute the invalidated statute pursuant to the treaty power, even if France promised the United States more favorable terms in a treaty the two countries were negotiating if the United States banned guns near schools.

This argument, while powerful, functions in a different way than the other objections to I have considered. If giving domestic legal effect to a treaty never has anything to do with the treaty-making process, Congress can draw no treaty-implementation authority whatsoever from the Necessary and Proper Clause; it must look elsewhere altogether. If the American system of government never permits a foreign sovereign's behavior to influence what is constitutional, Congress can draw no treaty-implementation authority whatsoever from the Necessary and Proper Clause because any law passed pursuant to that Clause would become unconstitutional if the treaty dissolves. Again, Congress would have to look elsewhere altogether. The same conclusion does not follow from this final argument, however. If Congress does not have the *plenary* Necessary and Proper Clause treaty implementation authority that this argument disdains, it does not imply that Congress has *no* Necessary and Proper Clause treaty implementation authority. Professor Rosenkranz's argument operates orthogonally to mine: I suggest that the Necessary and Proper Clause provides Congress some treaty-implementation authority. I share his

discomfort with the *Lopez*/GFSZA scenario, and I agree with him that there are limits on that authority. I turn to those limits in the next Section.

4.2. The Constitution Permits Scrutiny of the Federal Government's Attempt to Accommodate State Interests When Implementing Treaties

Proponents of expansionist-treaty implementation power frequently raise the argument that the Framers believed that honoring international obligations was of paramount importance (Vázquez 2008: 940; Golove 2000: 1103-04). This is certainly true. But it does not necessarily follow that the federal government may enter into and then enforce any treaty it pleases. Perhaps sometimes the solution is that the federal government, out of deference to state prerogatives, simply should not conclude a treaty that treads on state sovereignty. That the President and the Senate can be the first movers in the constitutional treaty game should not grant them the privilege of entering into any obligations they choose and then forcing compliance because international obligations must be respected. The burden and the risk of landing the United States in a situation where it cannot comply with its treaty obligations could just as easily be placed on the federal government as on the states, perhaps with a rule of thumb such as "the President and the Senate should not, on their own accord, enter into international obligations that regulate conduct on the margins of federal authority to reach." That would also solve the problem of not having a war-causing treaty violation.

One might reply that the history of the Constitution's framing indicates a clear choice by the Founders not to place a subject-matter limitation on the treaty power (Corwin 1913: 71).[XVIII] This is true, but it is equally apparent that the Framers did not believe the treaty power to be unlimited. Madison said that "[t]he exercise of the [treaty] power must be consistent with the object of the delegation [...]. The object of treaties is the regulation of intercourse with foreign nations and is external" (Corwin 1913: 70-71). While the Framers declined to saddle the treaty power with subject-matter limitations that would bind all future generations, they expected the political branches to observe certain limits on that power.

Some have suggested that the structural checks embedded in the Constitution—such as the supermajority requirement for consent in the Senate—are sufficient to protect federalism interests (Hathaway et al. 2013: 304-20). Whatever merits the argument has, it

seems unlikely to persuade the target audience of this Article—those who believe that implementing a treaty is a distinct process constitutionally from ratifying one, and thus must be done only in accordance with Congress's other powers. In particular, the argument that procedural checks embedded in the Constitution are sufficient to constrain the treaty power seems unlikely to persuade important judges skeptical of the treaty power. At oral argument in *Bond*, Chief Justice Roberts pressed Solicitor General Verrilli on just how far Congress's authority to criminalize local conduct could extend if supported by a treaty. (*Bond* Argument Transcript 2014: 27-28). In response to one such question, General Verrilli replied "that it seems unimaginable that a convention of th[e] kind [of sweeping federal power proposed by the Chief Justice] would be ratified [sic] by two-thirds of the Senate" (*Bond* Argument Transcript 2014: 28). Justice Kennedy cut in to chastise the Solicitor General that "[i]t also seems unimaginable that you would bring this prosecution" (*Bond* Argument Transcript 2014: 28). Justice Alito, who pointedly did not join Justice Scalia's opinion clamping down on Congress's Necessary and Proper treaty implementation authority, also seemed displeased with reliance on internal checks on Congress. When General Verrilli protested that the hypotheticals being posed were not real cases, Justice Alito retorted that "they're not real cases because you haven't prosecuted them yet" (*Bond* Argument Transcript 2014: 37). He followed up that if General Verrilli "told ordinary people that [he was] going to prosecute Ms. Bond for using a chemical weapon, they would be flabbergasted" (*Bond* Argument Transcript 2014: 28). If any Justice of any ideological bent thought political checks sufficed to restrain the federal government from overzealously implementing non-self-executing treaties, none has said so.

In the Section that follows, I propose three possible means of respecting state prerogatives in the treaty implementation process, some of which are already in use, as a sampling of methods that the federal government can employ to demonstrate respect for state interests. Others are possible, and I intend for the ones outlined below to be neither necessary nor sufficient for treaty-makers to undertake in order to demonstrate a respect for states' rights, but instead to offer a sketch of what the "accommodation of state interests" factor of the *Comstock* test might mean in the treaty-implementing context (*Comstock* 2010: 144-45).

4.3. Mechanisms of Respecting State Interests in Implementing Treaties

Aside from simply not entering into treaties that endanger state regulatory prerogatives, I offer three ways by which the federal government can show respect to such prerogatives in the treaty-making process. First, Congress can pass implementing legislation before any treaty is entered into, eliminating the risk that failure to pass treaty legislation will throw the United States into violation of its already-undertaken treaty obligations were these steps to happen in the opposite order. Second, the President and the Senate can attach reservations, understandings, and declarations (RUDs) to treaties in order to make clear that aspects of the treaties that conflict with the federal system in the United States do not bind the United States. Lastly, Congress should hew closely to the text of treaties when passing legislation implementing the treaties in order to avoid the slippery slope that Justice Scalia outlined in *Bond*, whereby the government enters into broad treaties (a commitment to make schools safe, for instance), and Congress can then pass any legislation it wishes, free from federalism constraints, to implement the treaty obligations (the Gun-Free School Zones Act) (*Bond* 2014: 2101-02).

First, courts could expect that the President wait to ratify a treaty until Congress has passed implementing legislation, which would take effect conditional on the treaty's ratification. This has the advantage of permitting legislators to debate the legislation without the risk that failure to pass legislation will cause the United States to violate its treaty obligations, a risk so substantial that it might induce legislators to pass laws that they otherwise would not have.[XIX] The expectation that legislation should be debated before a treaty commitment is made removes from consideration the prospect of permitting treaty obligations to go unenforced: either Congress will pass legislation to enforce the treaty, or the treaty will not be ratified. That treaty obligations will not go unenforced absent legislation will lead to a fuller and less constrained debate over any implementing legislation, without the shadow cast by the possibility of unfulfilled treaty obligations. The government could also condition ratification on Congress's passing implementing legislation, so if no legislation is passed, no treaty obligation is created, and no treaty obligation will be flouted. The United States has entered into treaties in such a manner in the past.[XX] In and of itself, without any substantive decree that certain areas are beyond Congress's reach in treaty implementation, this method elevates states' rights arguments to a place of greater prominence.

Second, and perhaps most straightforwardly, the United States can attach RUDs to treaty obligations that impinge on state sovereignty. RUDs are a common mechanism to signal a country's objection to a particular aspect of a treaty, and to signal that it does not intend to be bound by it. They are almost universally accepted, both domestically and internationally (Chung 2015: 2). In the *Bond* case, for example, the United States could have attached a RUD stating that nothing in the Chemical Weapons Convention would be interpreted to dislodge the states' prerogative to prosecute crimes local in nature and effect. This RUD would have had the advantages of showing respect for state interests and permitting the federal prosecution of Bond to go forward anyway since state authorities repeatedly failed to respond to or investigate her behavior (United States 2014: 4-5). Moreover, such a RUD would parallel the situation in *Comstock*, where Justice Breyer pointed out that the federal law permitted states to assert jurisdiction over, and take responsibility for the civil commitment of, dangerous sexual predators if they so wished, and the federal government became involved only if states passed on the opportunity themselves (*Comstock* 2010: 144-45).

Third, courts can expect implementing legislation to track closely the text of treaties that they purport to implement, and be suspicious when such alignment does not exist. In *Bond*, Justice Scalia posed a hypothetical scenario in which Congress desires authority over the law of intestacy (*Bond* 2014: 2101-02).[XXI] To gain that authority, it enters into a non-self-executing treaty with another country that requires a national law of intestacy, and then can work out the details as it chooses in implementing legislation far more specific than the text of the treaty (and of course implementing legislation, in contrast with treaty legislation, requires only a bare majority in each house of Congress (Art. I, § 7, Cl. 2.)). Justice Scalia acknowledges that the United States may perhaps constitutionally enter into a self-executing treaty nationalizing intestacy law, but to the extent that such a treaty is sufficiently specific to be self-executing, it would essentially require inducing two-thirds of the Senate to agree to a comprehensive probate code, obviously a daunting task (*Bond* 2014: 2101-02).

To the extent that a non-self-executing treaty is used as the authority for a statute, the statute should contain language similar to the treaty's language in order to avoid the problem of ratifying general treaties with unobjectionable provisions and using them as the basis for detailed federal regulation of state prerogatives. Carlos Manuel Vázquez has

referred to such treaties as "aspirational" treaties, and has similarly argued that they present a greater danger to federalism interests (Vázquez 2008). They pose less danger, however, if implementing legislation can be only as specific as the language of the treaty (unless Congress can rely on its ordinary Article I authority to regulate more comprehensively, of course). In effect, expecting an equal level of specificity requires that the President, the House, and *two-thirds* of the Senate agree to a regulation before it can be implemented pursuant to a non-self-executing treaty. The Chemical Weapons Convention would easily pass the equal specificity test, as its implementing legislation copied large portions from the treaty itself.[XXII]

I conclude this Section with two final notes. First, each method of respecting state interests proposed here has the benefit of consisting of primarily procedural, rather than substantive, checks on federal power. On the procedure-substance continuum, some of the mechanisms I propose require more interrogation of substance than others. The timing of passing implementing legislation versus ratifying the treaty is a purely procedural matter. Looking at the content of RUDs is substantive, but examining a treaty to see if RUDs have been attached in a manner that shows federal attentiveness to and concern for state prerogatives is primarily procedural. In other words, nothing I propose categorically limits the treaty-implementation power. This is consistent with the Framers' design that the treaty power not have subject-matter limitations (Corwin 1913: 70-71).

Second, I do not mean to suggest that observing one or more of these methods is necessary for all treaty implementing legislation that otherwise exceeds Congress's Article I powers. *Comstock* refers only to "accommodating state interests" without giving a precise roadmap of how that is to be done (*Comstock* 2010: 144). Moreover, as previously discussed, accommodation of state interests is only one element of a five-part test, and how each of the five is to be weighed against the others is also indeterminate. In other words, many other creative mechanisms of accommodating state interests in treaty implementation are possible and would be approved under a *Comstock* regime.

Conversely, the federal government could eschew any of the methods that I proposed here if a significant national or international interest so required. Attaching a RUD, for instance, may require that the United States make concessions in other areas that it wishes to avoid. In such cases, the federal government would be expected to identify and explain the national or international interest that prevented it from using one of the federalism-

respecting mechanisms described here. The weightiness of that interest would be judged, consistent with the Court's Necessary and Proper Clause jurisprudence, under a standard somewhat more stringent than the Court's ordinary rational basis review, but still with much deference to the political branches and their role in managing international affairs (*Comstock* 2010: 144). While there are too few cases on the Necessary and Proper Clause to know exactly how such a test would work, the Court has applied a somewhat elevated level of rational basis review in other contexts, and sufficiently often that it has acquired its own name: "rational basis with bite" (Holoszyc-Pimentel 2014). Under such a test, the federal government would still have a wide array of options for entering into and implementing treaties, but it could be called to account for its various decisions and how it accommodated state interests throughout the process when a particular treaty regulates matters traditionally left to the states.

5. Conclusion

This Article has attempted to fill a need in the literature: given that many Justices seem unwilling to cede their authority to determine the propriety of treaty-implementing legislation, but that scholars have mostly lined up in support of plenary Necessary and Proper authority, or none at all, can a middle ground exist? I urge that it can. I have assumed arguendo that the narrowest reading of the treaty power and the Necessary and Proper Clause is correct: "make treaties" really means only making them, and not implementing them. Even then, Congress can rely on broad authority to implement treaties. But I have also demonstrated that there are real limitations on Congress's Necessary and Proper authority to implement non-self-executing treaties. These limits have teeth—and the political branches already customarily observe some of them by, for instance, passing implementing legislation simultaneously to consenting to the treaty—but they should not be read to hamstring the power of the national government to enter into treaties consistent with the national and international interests that it is tasked with assessing. This understanding of the Necessary and Proper Clause coheres with the text and structure of the Constitution as well as with the Supreme Court's broader Necessary and Proper Clause jurisprudence.

Many fruitful areas of research remain. To name several examples, I have addressed only a few of several possible ways that the political branches can accommodate state interests in the treaty implementation process. One could also wonder whether the Court's recent turn toward presuming against the self-execution of treaties[XXIII] justifies a broader understanding of Congress's implementation authority given that the Framers might have more readily considered treaties to be self-executing (Vázquez 1999).[XXIV] Another angle to consider is whether the Seventeenth Amendment to the United States Constitution, providing for the direct election of United States Senators, should reduce our comfort level with political and structural checks on implementing authority since directly elected Senators will be less responsive to states' rights than those elected by state legislatures (Amend. XVII).

Each of these questions calls to be grappled with further, and each informs the contours and boundaries of the treaty-implementing authority. Simply adopting a textualist methodology, however, does not in and of itself set the boundaries of the treaty-implementing power. Judicial proponents of an extensive treaty-implementing authority were on the defensive in *Bond*; only Justices Scalia and Thomas were willing to state explicit views on the Necessary and Proper Clause constitutional question, and theirs was a truly narrow view of that Clause. But textualists can and should boldly advocate for a broader construction of the treaty-implementing power, one consistent with both the Constitution and the case law. In this Article, I have put forth just such a construction.

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I In Edye v. Robertson, for instance, the Supreme Court wrote that, "[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." 112 U.S. 580, 598 (1884).

II While of course this assumption is debatable, James Madison observed that, although the treaty power must be exercised consistently with the other powers delegated by the Constitution, he did not think it possible to enumerate all the cases in which treaty regulation might be necessary, so the Treaty Clause lacked a subject-matter limitation (Corwin 1913: 70-71). Other scholars have similarly argued that the text and structure of the Constitution militate in favor of nearly unconstrained power to enter into treaties (Golove 2000), though with some dissenting views as well (Bradley 1998).

III Professor Golove is not alone in this characterization. A prominent foreign relations treatise has characterized it the same way (Bradley et al. 2006: 419).

IV The Chemical Weapons Convention Implementation Act, Pub. L. NO. 105-277, 112 Stat. 2681-2856 (codified at 18 U.S.C. § 229(a)(1)) et seq.

V Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. 103-21, 1974 U.N.T.S. 317.

[VI] The Court held that, despite the broad language of the implementation act, it did not cover Ms. Bond's local, non-terrorism-related behavior, so her conduct was not criminal under federal law.
[VII] Golove argued that "[o]ne of the principal goals of the new Constitution was . . . to ensure that the new nation would be fully capable of making good on its international commitments," an argument for congressional authority that, if adopted, seems to grant Congress plenary treaty implementation power.
[VIII] *But see* Hathaway et al. 2013: 266-79. The authors attempt to draw some affirmative limits on the treaty power, but mostly rely on the *ipse dixit* of various 20th century jurists to explain that no one thinks a treaty can abridge fundamental rights, rather than refuting the claim that many arguments for expansive treaty powers imply that they can.
[IX] For another example of the jeopardy in which the Scalia-Thomas view would place criminal law treaties, consider Baldwin v. Franks, 120 U.S. 678 (1887), wherein the Court held that Congress had the power to punish individuals guilty of depriving Chinese people in the United States of any of the rights guaranteed to them by treaties between the two countries. It is difficult to see an Article I foundation for this law other than the Necessary and Proper Clause.
[X] To be sure, Professor Vázquez has his opponents on this question, perhaps most prominently, Professor John Yoo, who argued that the Framers assumed that treaties would not operate as binding domestic law (Yoo 1999).
[XI] It is worth pointing out that the Necessary and Proper Clause, if conjoined with the Supremacy Clause, might also grant Congress treaty-implementation authority. The Supremacy Clause explicitly states that "all" treaties shall be the supreme law of the land, so one might contend that implementing legislation assists treaties in gaining their constitutionally supreme status (Art. VI, Cl. 2). But the Necessary and Proper Clause grants Congress authority to "carry[] into Execution the foregoing *Powers*, and all other *Powers* vested by this Constitution in the Government of the United States…." (Art. I, § 8, Cl. 18) (emphasis added). The Supremacy Clause is evidently not a power—it simply sets forth a hierarchy of laws—so it could not appropriately be conjoined with the Necessary and Proper Clause.
[XII] For instance, William Davie, a delegate to North Carolina's constitutional convention, remarked that "[a] due observance of treaties . . . is the only means of rendering less frequent those mutual hostilities which tend to depopulate and ruin contending nations." Writing in *The Federalist*, John Jay assessed the risk of violating treaties as follows: "The just causes of war, for the most part, arise either from violations of treaties or from direct violence."
[XIII] Chief Justice Marshall famously wrote, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."
[XIV] Professors Galbraith and Golove cite and discuss historical claims of Congress's broad treaty implementation authority from the Founding through *Holland*.
[XV] One need not even consider international law to see the weakness of Professor Rosenkranz's argument. The President cannot constitutionally begin a war with Spain today. If Spain attacks the United States tomorrow, the President can begin a war with Spain. *See generally* The Prize Cases, 67 U.S. (2 Black) 635 (1863) (discussing the President's inherent Article II authority to defend the nation). Ergo, what was unconstitutional became constitutional based on the behavior of a foreign sovereign.
[XVI] The same argument would apply mutatis mutandis to the President's seemingly strange authority to unilaterally render a law inoperative: he can do it by withdrawing from a self-executing treaty.
[XVII] *See* United States v. Comstock, 560 U.S. 126, 179 (2010) (observing that certain states appeared as amici on behalf of the Federal Government because they would prefer not to pay for a commitment program).
[XVIII] Madison remarked that he did "not think it possible to enumerate all the cases in which such external regulations [involving intercourse with foreign nations] would be necessary."
[XIX] One might object that to the extent that implementing legislation is passed before the treaty is ratified, the rationale I have proposed that undergirds the Necessary and Proper Clause authority to implement treaties falls apart. If there is not yet a treaty when the implementing legislation is passed, then passing implementing legislation does not facilitate entering into future treaties because failure to pass implementing legislation does not flout any treaty currently in force. Viewed this way, passing implementing legislation is no longer necessary and proper to carrying out any enumerated power.
There is less to this argument than meets the eye. First, by the time a treaty is in sufficiently definite form that implementing legislation can be passed, enormous resources will have been expended to negotiate it, leaving treaty partners unhappy if the United States repeatedly pulls out from such agreements at the final

opportunity. This means that passing implementing legislation still can contribute to future successful negotiations. Second, because the temporal order of passing implementing legislation before ratification is not a constitutional mandate, it may be abandoned at any time. Indeed, not even every treaty today follows this pattern, including the Chemical Weapons Convention. *See Bond*, 134 S. Ct. at 2083, 2085 (noting that the United States ratified the Convention in 1997 and passed implementing legislation in 1998). In these cases, the argument about facilitating future agreements applies with its full force.

[xx] One example is the Convention Between the United States of America and His Majesty the King of the Hawaiian Islands, Commercial Reciprocity, U.S.-Haw. art. V, June 3, 1875, 19 Stat. 625.

[xxi] *See* Bond v. United States, 134 S. Ct. at 2101-02 (Scalia, J., concurring).

[xxii] The definition of chemical weapons contained in the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. 103-21, 1974 U.N.T.S. 317, art. II, ¶ 1 (defining chemical weapons), is materially identical to the definition in the implementing legislation, The Chemical Weapons Convention Implementation Act, tit. II, § 229(f)(1), Pub. L. NO. 105-277, 112 Stat. 2681-2856 (codified at 18 U.S.C. § 229F(1)). Both definitions include a toxic chemical and its precursors, a device designed to cause death or other harm through toxic properties of those toxic chemicals, or equipment designed for use in connection with such chemicals or devices.

[xxiii] This had been the trend for a number of years, but was accelerated by Medellin v. Texas, 552 U.S. 491 (2008), which held that a treaty does not constitute binding domestic law unless Congress passes implementing legislation or the treaty itself conveys the intention to be self-executing and is ratified with that understanding.

[xxiv] As set forth elsewhere, *supra* footnote 10, it is not uncontroversial or universally accepted that the Founders presumed nearly all treaties would be self-executing.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Federalism in post-conflict states: Assessing Somalia's challenges and the way forward

by

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Perspectives on Federalism, Vol. 11, issue 2, 2019

Abstract

The prime objectives of this study are to examine the perceptions and attitudes of Somalis toward federalism, as well as the challenges related to its adoption. The study gathered data via a self-administered online survey using social media. A total of 1,073 respondents nationwide participated in this study. The major variables studied were: perceptions of federalism adoption; legislative power sharing; executive power sharing; judicial power sharing; and fiscal federalism. According to the research findings, poor knowledge of federalism, considering federalism as a clan-based system, and political corruption are the most challenging factors to federalism adoption in Somalia. Other challenges relate to the provisional Somali constitution, such as power distribution, fiscal management, regional boundary disputes, and the status of Mogadishu. The paper concludes with a series of recommendations to overcome these challenges. The study seeks to contribute new ideas to the current discussion on federalism in post-conflict states, and Somalia in particular. The findings of this study will inform Somali policymakers, the Somali populace, the international community, and academia concerning the performance and the practical challenges of Somalia's federal agenda.

Key-words

federalism, post-conflict states, Somalia, federal government; federal member states, power sharing, governance, Africa

1. Introduction

Somalia is a country located in the eastern Horn of Africa. It was once known as the Somali Republic but now it is called the Federal Government of Somalia. It gained independence from the UK and Italy on June 26 and July 1, 1960, respectively. Immediately following independence, the two regions (North and South Somalia) joined and became the Somali Republic and anew centralized government was formed. The country's first elected president was the famous politician Adam Abdullahi Osman, who was followed by Abdul Rashid Ali Sharmarke on June 10, 1967. Surprisingly, and tragically, Sharmarke was assassinated by a member of Somali Police Force in Lassanoud city on October 15, 1969. As a result, the parliament was forced into discussions regarding the election of a new president; however, these discussions were unfruitful and yielded no result (Ingiriis 2017).

A few days later, a military coup, led by Mohamed Said Barre, took control of the whole country. He suspended the constitution, abolished the national parliament, dissolved political parties, and prevented many politicians from participating in politics. He declared a socialist state and the country has been subsequently subjected to a scientific socialist ideology (the Utopian Socialism doctrine developed Karl Marx, which is distinguished from other socialist doctrines). He created a very strong bond with the then Soviet Union and other socialist states globally (Payton 1980).

After 20 years of Siad Barre's strict dictatorship, in 1988, resistance began to occur, and military conflict broke out. The national army began engaging various armed insurgent groups (militia), i.e. the Somali Salvation Democratic Front (SSDF) in the northeast of the country, the Somali National Movement (SNM) in the northwest, and the United Somali Congress (USC) in the south. These militia groups eventually overthrew the Barre government on January 26, 1991. As Barre was forced out of office, the governmental system of the country collapsed. He subsequently made several attempts to come back to power but failed (Lyons & Samatar 2010).

Civil war broke out in almost every part of the country. All efforts to establish a constitutional government in the country failed and the Northwest Territory (Somaliland) declared secession. The collapse of Siad's government led to continued political struggle

and civil war, resulting in the adoption of a federal system in the country in early 2000s (Powell et al. 2008).

The federal system had been a long-standing dream of tribes and political leaders, both before and after independence, as the best method to fairly share power and wealth. One of the first advocates of federalism in Somalia was the Independent Constitution Party, which was founded in 1948 (Mukhtar 1989). The party believed that the only option to unite Somalis, who were divided into small groups because of the primitive tribal system, was to develop a constitution based on a decentralized or federal system, which would ensure the democratic autonomy of the various Somali regions (Abubakar 2016). This vision, however, had not been achieved during the 30 years that followed independence because the prevailing political atmosphere was set against it. For example, a decentralized or federal system was considered by many Somali politicians at that time as a conspiracy to divide the country.

Somalia is now witnessing political, social, and demographic changes following a long and difficult political struggle. During the civil war, the fight for power and governance between tribes created mistrust and divided the country. Therefore, federalism became the only solution to keep Somalia united. This idea was put forward in all the reconciliation conferences held between 1991 and 1998 before being formally and legally approved at the Mbegatti Conference in Eldoret, Kenya between 2002 and 2004 (Hammond 2013).

Since the declaration of adopting federalism in 2004, most Somalis and the majority of policymakers are yet to understand the nature and effects of federalism, including the campaigners who had been leading the transformation of the Somali Republic into a federal government. In addition, Somalis have long been suffering from conflict and war and are yet enjoying the political and social stability that are fundamental to every individual's liberty and freedom of expression (Elmi 2014).

Furthermore, the transition from a central to a federal system has been problematic and beset by many complexities and difficulties. The Somali tribes had fought for a federal system and had shed a lot of blood in the process; a federal system suited the tribal situation prevailing in the country. The idea of a federal system and the justifications formulated by the political decision-makers in Somalia were mostly focused on such a system's ability to overcome political schisms by motivating and engaging politicians. This, however, served to increase mistrust among the tribes. Every tribe was increasingly

convinced not to trust the others, preferring to manage their own affairs without interference or blackmail. Some politicians argued that the day Somalia adopted federalism was the day that political will and decision-making was taken out of the hands of Somali politicians and placed in the hands of the regional powers (Ghedi 2015).

This seems to be borne out by the fact that Somalia requested foreign help in the form of 22,000 African Union (AU) troops from Uganda, Kenya, Ethiopia, Burundi, Djibouti, Sierra Leone, and Nigeria, as well as a United Nations (UN) mission to rebuild national transitional institutions (Williams 2013). Their presence provided an adequate environment for Somalis to discuss their issues and develop their political system without the constant fear of armed Islamist movements and tribal conflicts, allowing the expansion of the government in the country (Lotze & Kasumba 2012). Furthermore, service delivery to cities, villages, and rural areas was made through federal administrations.

In general, Somalia had been witnessing the creation of federal states since the term of President Hassan Sheikh Mohamud (2012–2016). The Ministry of Interior and Federal Affairs, which had been led by Minister Abdurrahman Odawa, had successfully created the southern-central states of Galmudug, Hirshabeelle, South West, and Jubbaland. Prior to that, the northern states (Puntland and Somaliland) had already been managing their own affairs. Somalia thus has six functioning states plus the Benadir region, which is home to the nation's capital and is under the direct control of the Federal Government.

The Federal Member States are now striving to shoulder their responsibilities towards their citizens, with the support of the international community, and to carry out their tasks without the need for direct federal assistance, achieving self-sufficiency at all levels. However, the federal member states and the central government do not cooperate with respect to the provisional constitution. States do not provide services to their people efficiently. Rather, they always challenge and challenged by the central government, hindering the overall development of the country. In extreme cases, some federal member states have released press statements declaring that they have cut ties with the central government on matters that fall in the latter's jurisdiction. This creates uncertainty and a threat to the unity and cohesion of Somalia (Hassan 2018).

Foreign policy and relations with foreign countries have, however, traditionally been the responsibility of the central government alone, according to the Provisional Constitution of Somalia. The Federal Government manages external relations to safeguard

national interests. This has been emphasized in the constitutions of all federal states. Similarly, the Constitution of Somalia does not grant the constituent units of the Federal Government any powers in international relations. Globalization, however, has led the states to play an increasingly important role in the fields of trade and investments, as stipulated in the Transitional Federal Constitution of Somalia in 2012.

The constitution gives the states the right to be consulted with in the field of international relations, especially if the treaty affects or relates to a specific federal state. Article 53 (I & II) of the Provisional Federal Constitution reads, "In the spirit of inter-governmental cooperation the Federal Government shall consult the Federal Member States on negotiations relating to foreign aid, trade, treaties, or other major issues related to international agreements … [w]here negotiations particularly affect Federal Member State interests, the negotiating delegation of the Federal Government shall be supplemented by representatives of the Federal Member States governments" (Hussein 2011).

In addition, the most challenging aspects of Somalia's federalization, both within the federal parliament and the population as a whole, are the high expectations regarding security and social dimensions. These challenges are undoubtedly signs of a real crisis that Somalia has been facing since it adopted federalism. It is an obstacle that hinders good governance in Somalia. Moreover, given the rise in tribal discourse and the emergence of polarization and tribal blocs, federalism has been considered by some as a harbinger of a return to tribal fighting.

In summary, federalism in Somalia requires regional coalitions and careful management of competition based on integration, incorporating national and tribal factors, which makes federalism in Somalia problematic and leads to other problems. The reality now proves that the intense exploitation of the principle of federalism, based on the desire for containment and supremacy and including the dissemination of conspiracy theories and tribal interpretations of events, does not help create what the country needs most in the present period, i.e.to improve the lives of Somali people by fostering tolerance and national reconciliation and by replacing the desire for domination, containment, and tyranny with the desire for participation and interaction.

This study aims to investigate the research question: Has the federalism system of governance been successful in Somalia and what are the challenges related to this system that the country faces? To address this question, the paper attempts to present the

constraints faced by the application of federalism in Somalia and, by providing in-depth research and analysis into various federalism models, to increase awareness and knowledge of both the Somali people and leaders regarding different federalism models and their possible challenges and advantages. It also addresses the questions regarding the compatibility of the federal system with the Somali people and its appropriateness in the current situation. In conclusion, to address differing national and strategic interests, the paper presents some policy recommendations to meet current challenges.

The researchers faced multiple study limitations that have impacted the results and conclusions. First, the time in which the study was conducted coincided with high tension between the Federal Government of Somalia (FGS) and the Federal Member States (FMSs). During the data collection, five FMSs (Puntland, Hirshabelle, Galmudug, Jubbaland, and Southwest) severed ties and suspended their cooperation with the FGS. The regional leaders accused the FGS, among other things, of failing in its responsibilities towards the states in accordance with the country's federal structure (Hassan 2018). The researchers believe this tension have impacted the views of the study participants, which majority of them hail from the FMS. Second, the complex nature of Somalia's federal project and the lack of clarity regarding its process make it difficult for the respondents to genuinely assess its performance and general applicability to the country. Finally, one of the major limitations in the study was that male participants outnumbered females due to cultural factors in Somalia, which cause males to have more opportunities than females. Males have access to education and are favored by parents, thus they dominate in almost every sector. Future research conducted in times of low tension among the FGS and the FMSs, as well as following the provision of adequate information and discussion on federalism in the public arena, would help significantly in exploring the changes in public perception regarding the federal system in Somalia.

2. Literature review

2.1. Power distribution

Power sharing is a core feature of federalism; the constitution is supposed to create the power-sharing mechanisms for the federated states to enable them overcome power-based conflicts that could emerge between the levels of the government. The model for sharing

power depends on the preference of the constitution's creators, taking into account the contiguous circumstances of federalism (Kttafah & Hassan 2017).

Among several theories that have been proposed regarding federalism, the work of William Riker is one of the most known. Riker (1975), who proposed a more viable theory on federalism, described the main features of a "federal government" as a central administration and another set of governments that exercise their authority over the same population and territory, with every side having some degree of jurisdiction to decide on its own matters, "independent" of the other. In all types of federations, conflict among its components is inevitable. The constitution must create the appropriate discretionary mechanisms for settling these issues as they arise. This includes the separation of state and federal powers among the levels of the government and the setting up of an independent judiciary to mediate between the different areas of the administration (Hersi 2016).

It has been reported in the literature that many states in Africa have been engaged in establishing power transfer to sub-national governments politically, financially, and administratively. Among the African countries that have embraced some form of decentralization, although most of their political systems are inefficient, are Ethiopia, South Africa, Nigeria, Malawi, Senegal, and Uganda. As far as decentralization is concerned, there are justifications everywhere in Africa for power devolution that exist for three main reasons: diversity; democracy; and development (Fessha & Kirkby 2008).

Despite the arguments of some scholars who believe that federalism is not compatible with underdeveloped countries for two reasons (first, the lack of social transformations so the concept of nation state is new and, second, low economic development and distribution of resources) and that federalism is dangerous to the unity of the country/state (Mawhood 1984), the most populous African countries [Nigeria (since 1966) and Ethiopia (since 1991)] use federalism as system of governance. In Nigeria, some literature asserts that federalism was imposed by the British, under colonial rule, in order to safeguard their national interests and sustain their neocolonial links by establishing weak and unstable states (Afigbo 1991); in contrast, Chief Obafemi Awolowo argues that Nigerian federalism came from a choice given to representatives between 1949 and 1950 (Uche 1967).

In terms of power distribution, power is biased toward the Federal Government rather than the individual states' governments. The logic behind this is that, when dealing with external threats and safeguarding the national unity, for example, if the individual states are

more powerful than the Federal Government, divisive forces could take advantage of the situation (Committee of Experts on Public Administration [CEPA], 2011). The Federal Government has responsibilities that it performs exclusively, including defense, foreign affairs, regulation, security services, and monetary policy. On the other hand, some responsibilities are concurrently shared with states and local government authorities, such as education and technological research, health, infrastructure, agriculture development, and industry. Individual states also have exclusive legislative power in residual matters (Khemani 2001).

In contrast, the federalism in Ethiopia was driven by giving full self-determination to ethnic autonomies (Habtu 2003). As stated by the constitution of the Federal Republic of Ethiopia, the Federal Government has 21 exclusive functions. According to Tsegaw (2009), these powers fall in to four groups. The first comprises powers regarding a common interest for all constituent units. These powers include national defense, international or foreign relations, citizenship, and immigration. The second comprises commercial powers. This group includes the largest number of powers, including postal and telecommunication services, domestic currency coinage and foreign currency usage, banking, insurance, patents copyright, and interstate commerce. The third group comprises a number of laws regarding law-making powers being kept central while, in practice, reserving the regulating and adjudicating power to the states. The finally group concerns legislating social and political issues, including electoral laws and procedures, as well as ensuring the political rights established by the constitution.

A study in the US regarding the lessons to be learnt from modern federalism questioned whether the federal system ought to decentralize or centralize and whether the federal system should be made competitive or cooperative (Shin 2018). The study found that a mixture of more federal- and state-oriented policy yielded the best results. Federalism in the US is required to be embedded in a balanced and effective association and cooperation among the different tiers of government to achieve a more productive public policy.

A study conducted by the Heritage Institute for Policy Studies stated that there is little disagreement among Somalis that decentralization of power is "necessary" for the reconstruction of the governance of collapsed institutions and structures (Elmi 2014). However, any consensus on the right and appropriate kind of decentralization for the

country is an illusion. The study suggested that there is no "panacea" as to the type of government that could meet all of the political challenges that Somalia has faced since the system's collapse in the early 1990s. Also, another huge challenge lies in finding a balance for the "contradictory trends" that exist in the Somali people.

Most often, governments in Africa use a rhetoric that is related to democracy and development to justify the decentralization of power, but it is seldom strongly linked to diversity issues. Adamolekun (2005), as cited by Fessha and Kirkby (2008), stated that Nigeria is a good, if not ideal, example of an African states practicing subnational autonomy. According to Nahum (1997), Ethiopia is another country in Africa that has adopted subnational autonomy to find a solution for ethnic conflict.

In politics, there are commonly disagreements regarding the distribution of power and, in many federal states around the world, the judicial branch of the government is an essential tool in interpreting the various responsibilities and duties of the three tiers of the government. Therefore, an understanding of the dynamics of federalism makes the development and inception of constitutional courts indispensable and necessary in most countries, in particular in countries that have adopted a federal (Hessebon & Idris 2017).

According to Simeon (2009), the constitution of federal states should address in its design the following issues: vertical and horizontal division of powers (legislative, judiciary, and executive); fiscal management and resource distribution; the number and character of the constituent units; and inter-governmental relations.

In Somalia's fragile, nascent federalism, there are complications, such as contradictions within the constitution, ambiguities, and other mistakes resulting from neglecting essential issues. There are important elements that are crucial for a federal system and whose definitions have been omitted, including power divisions of governance and revenue, as well as resource sharing among the different levels of government, the appropriate model of the electoral process, and a number of other essential issues (Galvanek 2017).

Somalia has been dealing with a hybrid political system for which it has been hard to create a consensus among the various branches of the government. According to Hassan (2017), the current system has mixed quite indistinct roles and responsibilities that overlap with each other, making it complicated and prone to the rise of conflicts among the major political actors and stakeholders since its inception.

2.2. Lack of social cohesion

Social cohesion refers to the willingness of the people a given society to work together to form meaningful partnerships and create the means to achieve the preset goals of the society. It helps the members of society to work together for their shared wellbeing, to reject marginalization, and to engage with each other to generate a sense of belonging, increasing trust and confidence among the members of the society (Stanley 2003).

There are many studies regarding secessionism and the emergence of break-away regions. Deiwiks et al. (2012) provided a substantial proof that both the wealthy and less developed constituents of federal systems are have higher tendencies toward secessionism and the rise of self-proclaimed break-away sections than the more equal areas or regions. This study was conducted in 31 independent federations globally.

Somalia's adoption of a federal system differs from that of many countries in Africa. The choice of federalism was based on satisfying the requirements of different clans in Somalia; it was not due to ethnic diversity. Therefore, a federal government is not suited to a country like Somalia and does not promote stabilization and peace building but, rather, might lead to the loss of social cohesion (Abubakar 2016).

In recent times, it has been stated that federalism is equated with "territorial pluralism" because there is a multitude of territorial subdivisions in a federal system, given different names, including "states" in the US, "cantons" in Switzerland, and "Laender" in Germany. The federal constitution assigns each unit in a federation its respective authority, which leads to relative semi-parallel sovereign states in one territory. Thus, neoclassical state theorists claim that federalism creates disunity and breaks the homogeneity and territorial integrity of the state. In this way, federalism becomes a major root of political conflict and disharmony, as both the center and the periphery seek and claim to possess their own relative share of sovereignty (Preuss 1997).

Previous research has suggested that there are two potential arguments regarding Somalia's federalism regarding the weakening of social cohesion and the likelihood of federalism leading to secessionism. The first is that it will encourage clan-based politics and, in the worst-case scenario, might lead to the dissolution of Somalia's statehood. The second argument puts the blame on foreign actors with specific respective interests whose political agenda is to exploit the fragmented nature of the people (Mohamed 2015).

Many existing studies in the broader literature have examined the importance of the proper mechanisms for societal integration. Unless equal access to resources, as well as an even power distribution, is granted to all citizens, irrespective of race, religion, color, or creed, ethnic conflict and the dismantling of the social fabric will continue to affect the people. Being a homogeneous nation culturally, ethnically, and religiously fails to stop the demise caused by a civil war like the one in Somalia (Mengisteab 1997).

A study on constitutional reform and federalism in Spain conveyed a narrative about the issue of secessionism in the Basque region and Catalonia, which are very similar in some respects to the case of Somaliland, which has been seeking political recognition as an independent state. This study mentioned that the constitutional court of Spain denied the "right to decide" on the independence of Catalonia, in line with the Spanish constitution (Alberdi 2018).

2.3. Fiscal management

Fiscal federalism involves the allocation of the governmental activities and financial shares among the tiers of government. It is related to fiscal management and decision-making, which entail the distribution of taxes, spending, and other fiscal-policy-related issues among the different orders of the administration. Large and diverse countries have usually been associated with federal fiscal policies because there are incentives for the various levels of government to ensure the provision of services, efficiently and competitively, for their own citizens (Shah et al. 2007).

Another study found that, regarding jurisdictions in federal systems, sub-central governments compete to obtain more capital on the grounds of relatively lower tax rates. Furthermore, both spending and taxation are higher in centralized systems than decentralized systems. Nevertheless, both proponents and opponents of "fiscal federalism" do share a common point of view in terms of anticipating that the size of the government is inversely proportional to the adoption of fiscal federalism. Lessmann (2009), as cited in Sorens (2011), found that economic inequality was reduced by the decentralization of taxation.

The issue of fiscal-based conflicts is highly prevalent in almost all current federations, in particular newcomers to the federalism experiment, and huge challenges arise in terms of dealing with them, with different approach to addressing them in every context. Afonso

(2007) recommends reconciliation of contradictions and the careful coordination of political differences. In addition, the assignment of tax to the respective levels of the government needs to be clearly defined.

As Williams and Orokpo's (2014) article on fiscal federalism states, it is crucial that a federal system should develop a consistent financial-relations-management system to mitigate the contradictions that arise in the allocation of resources in all three tiers of the government. There is usually an essential question about "who gets what of the national cake, when and how" because the development of a formula for just and fair distribution of resources is what usually takes center stage in socio-political and economic public debates. In most federations, the "constitutional wrangling" most often arises from the sharing of resources, as there are both relatively rich and poor sectors in the constituent units of the federation.

2.4. Regional boundary disputes

One of the most critical challenges facing the reconstruction of Somalia's federal state has been the demarcation of disputed areas along clan boundaries. For instance, the South West State of Somalia claims that six regions belong to it: Lower Shabelle; Bakol; Bay; Gedo; Lower Jubbaland Middle Juba. There are also similar boundary disputes between the self-proclaimed State of Somaliland and the Puntland state over the regions of Sool and Sanaag. Galmudug and Puntland states also have border disputes (Mohamed 2016).

According to Lockhart (2014), what is fascinating about federalism is the uniqueness of each country's own version, suited to its particular shared interests and circumstances. Switzerland, for example, is an extraordinary example of a state that has adopted a successful version of federalism to build a lasting peace and end conflict among its "multi-ethno-linguistic-religious society." Somalia is not, however, a multi-ethnic state, which is the "theoretical justification for a country to combine self-rule with a shared rule." Unlike other federal states in the world, there are more uniting factors in Somalia than the dividing lines.

2.5. The status of Mogadishu

Mogadishu, the biggest city and probably one of the oldest cities in Somalia, has been plagued by violence and destruction for the past three decades. It used to be inhabited by

diverse people from all corners of Somalia. Some Somalis questioned the possibility of Mogadishu gaining the status and glory it used to enjoy several decades ago amidst claims that Mogadishu has turned into a "clan enclave" that can no longer "symbolize" the national identity of the Somali people (Farah 2015).

The status of Mogadishu as the capital city will be decided through a constitution review process by the two chambers of Somalia's federal parliament. As far as the status of Mogadishu is concerned, there are two points of view on this issue. One argument proposes that Mogadishu remains the capital city of the country and comes under the jurisdiction of the Federal Government of Somalia. The other argument considers that Mogadishu be given a federal-member-state status. The arguments are held both by opponents and proponents from within the Somali political elite and the general populace (The Heritage Institute for Policy Studies 2017).

There are many capital cities whose countries have adopted a federal system where the capital is part of a province and has its representation in the parliamentary seats. For example, Ottawa is the capital city of Canada, while also a part of the Ontario Province. Mogadishu, being the home of many Somalis should, therefore, not be underrepresented in the federal structure while smaller cities with less than one-tenth of the population in Mogadishu have more seats in Somalia's federal parliament (Ulosso 2010).

3. Methodology

The target group of this study comprised Mogadishu residents who have some experience with federal government, state members, and other districts in Somalia. We utilized social media users as the sample frame of this study.

The research design for the current study involved a survey to tap on the uniqueness of gathering primary data for unbiased representation of the population of interest, and for the standardization of measurement. The study employed a questionnaire consisting of 69 items as the main instrument for data collection. Before the collection of the data, the researchers pilot tested the tool and checked the internal consistency of the items and found that the tool was fine and easy to understand, since we translated into the Somali language.

Descriptive techniques were used in this investigation. Since descriptive is conclusive in nature, meaning that descriptive research gathers quantifiable information that can be used for statistical inference on the target audience through data analysis. In this survey, the researchers gathered the data from different sectors including Politicians, Members of Parliament, University lecturers, Public Servants and Scholars. Also, the researchers collected the data from Mogadishu residents and regional capital cities.

This study employed purposive convenience sampling due to lack of availability of the information of the population. However, the study selected participants from five Federal Member States, Somaliland and Benadir Region to provide somewhat representativeness regarding issues under study. The prime objective of this study was to examine the perceptions and attitudes of Somalis as well as the related challenges of adopting federalism. The study used a self-administered online survey. A total of 1,073 respondents nationwide participated in this study.

A reliability test was conducted for the major study variables, i.e. perception of federalism adoption, legislative power sharing, executive power sharing, judicial power sharing, and fiscal federalism. This was to ensure that the items were sufficiently reliable and coherently captured the intended meaning. Cronbach's alpha coefficient was employed to test the reliability of these variables.

A variable is considered reliable if its items receive a score of above 0.70, while a score of 0.50 is acceptable in exploratory contexts. The study also tested whether the normality assumptions were achievable before conducting additional tests. The results suggested that all variables demonstrated an acceptable level of reliability: perception of federalism adoption (α=0.703); fiscal federalism (α=0.662); executive power sharing (α=0.649); judicial power sharing (α=0.611); and legislative power sharing (α=0.597). Skewness and kurtosis were employed to examine normality. A variable is considered to fulfill normality assumptions if the scores for skewness and kurtosis are below 2 and 7, respectively. Scores for both techniques were below the required threshold. As the study variables, were sufficiently reliable (see Table A1 in the Appendix), further analysis could be performed.

Research ethics the investigators considered included being honest with the potential respondents regarding all aspects of the project, such as providing clear and concise description of the study to make sure the respondents were fully informed about the project. Additionally, the researchers utilized all the information gathered only for the

intended purpose of the study. The investigators signed a pledge of confidentiality that none of the responses would be connected to any identifying information. The study participants were informed about this and were then politely asked to fill out the online form.

4. Data analysis and findings

4.1. Demographic profile of respondents

The demographic profile of the study participants is presented in Table 1. The majority (89.5%) of respondents were male (10.5% were female). The participants' ages ranged from below 20 years to above 50 years, with the highest percentage (59.6%) aged 20–30 years, followed by 31–40 years (24.7%). Very few participants were below 20 (4.4%) or above 41 (11.3%) years old.

Regarding educational background, 55% of the participants had a bachelor's degree and one-third held a master's degree. A very small number (2.2%) of the participants had a PhD, while the second least percentage (8.6%) held only secondary education certificate. Approximately 50% of the respondents were married, 48% were single, and only 1.5% were either divorced or widowed. Regarding regional background, all states were well represented: Benadir (24%); Galmudug (17.1%); Somaliland (14%); Hirshabeelle (13.1%); Puntland (12.9%); Jubbaland (10.8%); and South West State (8.1%).

Table 1: Demographic profile

Variables	Categories	Frequency	Percentage
Gender	Male	960	89.5
	Female	113	10.5
	Total	**1,073**	**100.00**
Age	Less than 20	47	4.4
	20–30 years	639	59.6
	31–40 years	265	24.7
	41–50 years	81	7.5
	Above 50	41	3.8
	Total	**1,073**	**100.00**
Education Level	Secondary	92	8.6
	Bachelor	590	55.0
	Master	354	33.0
	PhD	24	2.2
	Other	13	1.2
	Total	**1,073**	**100.00**
Marital Status	Single	515	48.0
	Married	542	50.5
	Widow/divorced	16	1.5
	Total	**1,073**	**100.00**
State of Origin	Jubbaland	116	10.8
	South West State	87	8.1
	Benadir	257	24.0
	Hirshabeelle	141	13.1
	Galmudug	184	17.1
	Puntland	138	12.9
	Somaliland	150	14.0
	Total	**1,073**	**100.00**

4.2. Reasons and potential benefits for adopting a federalism system

Four items were made available to the respondents to solicit their feedback on possible reasons for adopting federalism in Somalia. As shown in Table A2 in the Appendix, 44% of respondents believed that federalism was suitable in Somalia, compared to 56% who believed the opposite. More than half of the participants (56.8%) believed that a federal system was a laboratory for democracy and 56.7% believed it strengthened regional economic autonomy. About six in ten of respondents believed that federalism was an obstacle to Somali unity.

4.3. Potential benefits of a federalism system

Close to half (47.1%) of the participants believed that a federalism system could help overcome civil war and inter-clan conflicts, while 44.2% believed that this system encouraged a separation of powers and prevented dictatorship, which the country had been experiencing during military rule (see Table A3 in the Appendix). In addition, almost, four in ten of the participants believed federalism contributed to democratization and enhanced political participation among citizens. Finally, more than 23% of the respondents believed that adopting federalism kept the country together and boosted pluralism, i.e. leadership access and minority representation in government.

4.4. Perceptions of federalism adoption in Somalia

Table 2 presents descriptive statistics for perceptions of the federal system's adoption. Almost two-thirds of respondents believed federalism boosted competition between regional states, which in turn raised economic prosperity (64%). In contrast, almost two-thirds (62.4%) believed that federalism led to the uneven distribution of wealth among the states. Moreover, respondents also provided positive feedback regarding federalism enhancing regional accountability (59.4%), while about six in ten, perceived federalism as having a negative impact as it could erode national unity and lead to secession. Generally, however, respondents provided positive feedback on these items, as 56.6% believed that federalism led to peace and political stability, 56.4% that it rendered clan reliance obsolete, and 59% that it fostered state loyalty. They also perceive federalism adoption positively as an effective governmental system for Somalia (56.8%). Finally, the aggregated concept of perception was high: 60% of the total respondents agreed on the overall concept.

Table 2: Perceptions on federalism adoption in Somalia

Item label	Items (*N*=1,073)	Mean	SD	%
Percep1	Federal system leads to peace and political stability	2.83	1.52	56.6
Percep2	Federalism enhances regional accountability	2.97	1.40	59.4
Percep3	Federalism renders clan reliance obsolete	2.82	1.30	56.4
Percep4	Federalism erodes national unity and leads to secession	3.01	1.37	60.2
Percep5	Federalism fosters state loyalties	2.95	1.22	59.0
Percep6	Competition between states raises economic prosperity	3.20	1.34	64.0
Percep7	Federalism leads to uneven distribution of wealth among states	3.12	1.25	62.4
Percep8	Federalism is an effective governmental system for Somalia	2.84	1.51	56.8
	Overall perception (composite variable)	**2.97**	**0.780**	**59.4**

4.5. Federalism challenges and solutions

The study also examined both internal and external challenging factors, as well as applicable solutions, to the federalization of the country. Table 3 presents the prominent internal and external challenges as well as potential solutions as perceived by the study respondents. The top three internal challenges facing federalism were perceived to be a poor understanding of federalism (71.2%), clan-based federalism (64%), and political corruption (49.5%). Respondents also raised concerns over the poor and deteriorating relationships between the Federal Government and regional states (46.8%), constitutional confusion (45.6%), and misunderstandings between the government and the public regarding matters associated with federalism (36.9%). However, boundary disputes (21.7%)

and lack of resources (20.9%) were not perceived as pertinent factors hindering the adoption of federalism.

Regarding external challenges, the study participants demonstrated more positive perceptions of the potential external factors that could influence the country's adoption of a federal system. Table 3 reveals that the two top external challenges were conflicting interests of the international community regarding Somalia (83%) and constant interventions from neighboring countries (74%). In addition, about one-third of the participants believed that insufficient funds, particularly from the donors as the current Federal Government is partially funded by these donors, could be a potential external challenge (33.2%).

Participants were asked to indicate their level of agreement or disagreement with a number of items pertaining to probable solutions. As shown in Table 3, participants perceived the formation of honest and reliable justice system (66.5%), the establishment of constitutional courts (51.7%), and the finalization of constitutional reforms (48%) as the top contingent solutions to the current federal crisis in the country. Allowing the public to vote for their representatives for local, state, and federal posts (46.7%), organizing a public referendum on federalism adoption (32%), and choosing the right type of federalism (37.8%) were among other possible solutions. Only about one quarter of the respondents agreed that creating strong relationships with neighboring countries (20.3%) and the international community (18.4%) were viable solutions.

Table 3: Federalism challenges and solutions

Items	Frequency	Percentage
Most challenging internal factors (*N*=1,073)		
Misunderstanding between the people and government	396	36.9
Poor knowledge of federalism	763	71.2
Clan-based federalism	686	64
Political corruption	531	49.5
Demarcation disputes (boundary disputes)	233	21.7
Poor relationship between federal and regions	502	46.8
Constitutional confusion	489	45.6
Lack of resources (shortage of funds)	224	20.9
Most challenging external factors (*N*=1,073)		
Different interests of international community	890	83
Intervention of neighboring countries	793	74
Insufficient funds from donors	356	33.2
Most appropriate solutions (*N*=1,073)		
Formation of honest and reliable justice system	713	66.5
Creating strong relationship with international community	197	18.4
Creating strong relationship with neighboring countries	218	20.3
Choosing the right type of federalism	405	37.8
Finalizing constitutional reforms	515	48.0
Creating constitutional courts	554	51.7
Referendum for federalism adoption	343	32.0
Democratic election (one man, one vote)	501	46.7

4.6. Status of Mogadishu City

The study attempted to gauge the respondents' perceptions of the status of the capital city of Mogadishu because of the existence of different and conflicting ideas, apparently

represented in media narratives and the political discourses of elites from government and opposition blocs. The results in Table A4 in the Appendix reveal that 69.1% of the nationwide participants agreed that Mogadishu should remain a federal city, directly administered and financed by the Federal Government. In contrast, about a quarter of the participants felt that the city should be a city in a state (24.7%) while one-fifth believed it should be a regional state (Benadir state) with the same mandate as other regions (21.5%).

4.7. Power sharing

Respondents were asked to indicate their level of agreement towards seven items that measured legislative power sharing. The descriptive statistics presented in Table 4 suggest that seven out of ten respondents agreed that laws of the country should be formulated and enacted by the Federal Government or that it should formulate and enact framework legislations, leaving details to the federal member states. Also, slightly more than two-third of the participants agreed that both levels of government (federal and state) should clearly have exclusive, concurrent, joint, and shared powers of law making with regard to each level's relevance of service provision.

Respondents also agreed upon the necessity of upper-house representation, standing for the interests of federal member states (67.8%). Six in ten respondents believed that the representation may vary depending on population, area, or revenue, while they also provided similar positive feedback on equal representation in the second chamber, regardless of their size and source of revenue. Finally, only half the respondents agreed that every state member should formulate and approve its own laws independently, achieving the lowest score among items in this variable (52.8%).

Table 4: Power sharing

Item label	Legislative power sharing items (*N*=1,073)	Mean	SD	%
Legis_power1	Laws of the country should be formulated and enacted by the Federal Government	3.62	1.205	72.4
Legis_power2	Central government should formulate and enact framework legislations leaving details to the federal member states	3.48	1.238	69.6
Legis_power3	Both levels of government (federal and state) should clearly have exclusive, concurrent, joint and shared powers of law making with regard to each level's relevance of service provision	3.26	1.322	65.2
Legis_power4	Every state member should formulate and approve its own laws independently	2.64	1.401	52.8
Legis_power5	Upper-house legislative is necessary to represent and stand for interests of federal member states	3.39	1.304	67.8
Legis_power6	Federal member states should have equal representation in the second chamber regardless of their size and source of revenue	3.06	1.316	61.2
Legis_power7	Upper-house representation may vary, depending on population, area, or revenue	3.22	1.305	64.4
Item label	**Executive power sharing items (*N*=1,073)**	**Mean**	**SD**	**%**
Exec_power1	The country should have parallel administrative institutions at federal and state levels, with each of them implementing their own programs	2.73	1.379	54.6
Exec_power2	State administrations should implement laws and policies made by the central government	3.70	1.270	74.0
Exec_power3	Federal and federal member states should cooperate and implement together	3.82	1.191	76.4
Exec_power4	Division of power and responsibilities should be based on state demand and capacity	3.22	1.294	64.4

Exec_power5	Division of power and responsibilities should be shared equally	3.07	1.376	61.4
Exec_power6	All armed forces and intelligence should be under the Federal Government	4.05	1.278	81.0
Exec_power7	States may have regional police	3.75	1.196	75.0
Item label	**Judicial power sharing items (*N*=1,073)**	**Mean**	**SD**	**%**
Jud-power1	According to the three layers of the government (federal, state, and local), each of them should have its own court system	2.95	1.384	59.0
Jud-power2	There should be a unified judicial system in the whole country	3.79	1.240	75.8
Jud-power3	States should have trial and appeal courts only while the Federal Government has the supreme court	3.56	1.229	71.2
Jud-power4	There should be one constitutional court	3.92	1.189	78.4
Jud-power5	Each state should have its own constitutional court that protects the regional constitution only	2.83	1.377	56.6
Jud-power6	Somalia should have federal prosecution services only	3.13	1.159	62.6
Jud-power7	Each state should have its own prosecution services	2.99	1.227	59.8

Executive power sharing was the second dimension of power sharing variable measured, with seven items using a five point Likert scale for agreement/disagreement. Table 4 reveals that the majority (81%) of respondents agreed that all armed forces and intelligence should be under the Federal Government. However, they also believed that federal member states could have regional police (75%). Regarding policy implementation, about three-quarters of participants agreed that the Federal Government and federal member states should cooperate and implement policies together, while states basically implemented the laws and policies made by the central government.

Remarkably, the division of power received much contradictory feedback from the study participants. Almost one-third perceived that the division of power and responsibilities should be based on state demands and capacity or shared equally between federal member states. Finally, the item regarding having parallel federal and state administrative institutions received the lowest score (56.6%).

The final dimension of power sharing concerned the judicial system, using seven items. Respondents were asked to indicate their agreement or disagreement with these items using a five-point Likert scale. Table 4 shows that more than three-quarters (78.4%) of respondents believed that the country should have only one constitutional court and, in general, a unified judicial system in the whole country (75.8%). Respondents agreed that state members should have trial and appeal courts only, while the Federal Government should maintain the Supreme Court (71.2%).

Nevertheless, about two-thirds (62.6%) believed that the country should have prosecution services at the federal level, while close to six in ten believed that each state should have its own prosecution services. On the other hand, 59% of participants suggested that the three levels of government (federal, state, and local) should maintain their own court system. Finally, more than half (56.6%) of respondents believed that each state should have its own constitutional court, protecting the regional constitution only.

4.8. Fiscal federalism

Fiscal federalism concerns the management and distribution of resources including tax, natural resources, and debt. This variable was measured with 12 items. As shown in Table 5, around three-quarters of participants agreed that the Federal Government should manage and take the revenue from natural resources. Two-thirds of participants believed that the revenue from natural resources should be shared equally by all states (65.4%). In contrast, below average, 49.4% of respondents believed that natural resources should be managed by regional governments, with 50.4% believing that this revenue should belong only to the state of origin.

Table 5: Fiscal federalism

Item label	Items (*N*=1,073)	Mean	SD	%
Fiscal1	All taxes should be assessed and collected by the Federal Government	3.11	1.451	62.2
Fiscal2	Federal and state governments should assess and collect taxes together	3.39	1.334	67.8
Fiscal3	Each level should have exclusive tax collections	3.12	1.255	62.4
Fiscal4	Revenue from natural resources should belong to the state in which they have been found	2.52	1.296	50.4
Fiscal5	Natural resources should be managed by the regional government of where they have been found	2.47	1.308	49.4
Fiscal6	Revenue from natural resources should belong to the central government	3.47	1.369	69.4
Fiscal7	Natural resources should be managed by central government	3.83	1.261	76.6
Fiscal8	Revenue from natural resources should be shared by all states equally	3.27	1.366	65.4
Fiscal9	The central government should take largest portion of revenue from natural resources	3.44	1.303	68.8
Fiscal10	State governments can borrow money from international banks	2.25	1.374	45.0
Fiscal11	Provinces can borrow money from other provinces within the country	3.23	1.174	64.6
Fiscal12	State governments can borrow money from national banks only	3.44	1.122	68.8
	Overall variable	3.13	0.600	

Table 5 also describes the feedback related to tax management and loans. About two-thirds (67.8%) believed that the Federal Government and states should assess and collect

taxes together and that each level of government should have exclusive tax collections (62.4%). In contrast, two-thirds believed that all taxes should be assessed and collected by the Federal Government only (62.2%).

Finally, in relation to loans, about seven in ten respondents believed that state governments should only borrow money from national banks (68.8%), as well as other states within the country (64.6%). Only four in ten agreed that state governments should borrow money from international banks (45%).

4.9. Research objectives and hypothesis testing

4.9.1. Bivariate correlations among the study variables

Bivariate correlation was conducted to examine the inter-correlations among the major study variables (Table 6): perceptions of federalism adoption; legislative power sharing; executive power sharing; judicial power sharing; and fiscal federalism. The perceptions of federalism adoption were found to positively and strongly correlated with legislative power sharing (r=0.500, p=0.000) and positively and moderately correlated with executive power sharing (r=0.403, p=0.000), judicial power sharing (r=0.366, p=0.000), and fiscal federalism (r=0.310, p=0.000). This indicates that those who demonstrated higher agreement towards federalism adoption also demonstrated higher agreement level towards both power sharing dimensions and fiscal federalism.

Table 6: Inter-correlations among major study variables

No.	Variables	1	2	3	4	5
1	Perception of federalism adoption	1				
2	Legislative power sharing	0.500**	1			
3	Executive power sharing	0.403**	0.589**	1		
4	Judicial power sharing	0.366**	0.492**	0.628**	1	
5	Fiscal federalism	0.310**	0.419**	0.472**	0.476**	1

Note: ** p< 0.000.

The dimensions of power sharing were also found to have higher positive inter-correlation indices. The results suggested that legislative power sharing was strongly correlated with executive power sharing (r=0.589, p=0.000), but moderately correlated with

judicial power sharing (r=0.492, p=0.000). In addition, executive and judicial power sharing were strongly and positively correlated (r=0.628, p=0.000). Finally, fiscal federalism was found to have a positive and moderate relationship with perceptions of federalism adoption (r=0.310, p=0.000), legislative power sharing (r=0.419, p=0.000), executive power sharing (r=0.472, p=0.000), and judicial power sharing (r=0.476, p=0.000).

4.9.2. Differences in perceptions on power sharing

A paired sample t-test was conducted to examine differences among the study respondents in terms of their perceptions of power sharing dimensions. The results, presented in Table 7, showed a significant difference between legislative and executive power sharing (t=–12.01, p=0.000). This means that the respondents showed higher levels of agreement towards executive power sharing (M=3.48, SD=0.729) than towards legislative power sharing (M=3.24, SD=0.703). In addition, a significant difference between legislative power sharing and judicial power sharing was observed (t=–3.41, p=0.001) and between executive power sharing and judicial power sharing (t=8.83, p=0.000). This indicates that the study participants perceived judicial power sharing (M=3.31, SD=0.690) more positively than legislative power sharing (M=3.24, SD=0.703), but not executive power sharing (M=3.48, SD=0.729).

Table 7: Paired sample t-test for respondents' perceptions of power sharing

No.	Variables	Mean	SD	*t*	df	*p*
Pair 1	Legislative power sharing	3.24	0.703	–12.01	1072	0.000
	Executive power sharing	3.48	0.729			
Pair 2	Legislative power sharing	3.24	0.703	–3.41	1072	0.001
	Judicial power sharing	3.31	0.690			
Pair 3	Executive power sharing	3.48	0.729	8.83	1072	0.000
	Judicial power sharing	3.31	0.690			

4.9.3. Demographic differences in perceptions of federalism adoption, power sharing dimensions, and fiscal federalism

The study examined demographic differences in relation to the major study variables of perceptions on federalism adoption, power sharing dimensions, and fiscal federalism. One-way ANOVA test was performed with a post hoc Scheffe test with state of origin as variable of interest to determine if participants from different regions held the same opinions on federalism-related concepts.

Regarding the perception of federalism adoption (Table 8), the results suggested that respondents from different states differed significantly in their perceptions of federalism adoption ($F_{6,1066}$=7.320, p=0.000). The post hoc Scheffe test determined differences within categories and suggested that respondents from the Puntland region (M=3.26, SD=0.757) had a more positive perception of federalism adoption than those from the Benadir (M=2.96, SD=0.768), Galmudug (M=2.87, SD=0.748), and Somaliland regions (M=2.72, SD=0.829). Moreover, respondents from South West State demonstrated higher positive response on this variable compared to those from Somaliland region (M=2.72, SD=.829). The rest of the respondents hold similar opinions on the federalism adoption.

Table 8: One-Way ANOVA and post hoc Scheffe test showing differences among state of origin groups in terms of perception on federalism adoption

Variable	State of origin	*N*	M	SD	*F*	df	*P*	Comparison
	Jubbaland	116	2.98	0.797				South West
	South West State	87	3.15	0.711				–Somaliland,
Perception	Benadir	257	2.96	0.768				Puntland–
of	Hirshabeelle	141	2.97	0.731	7.320	6, 1066	0.000	Benadir,
federalism	Galmudug	184	2.87	0.748				Puntland–
adoption	Puntland	138	3.26	0.757				Galmudug,
	Somaliland	150	2.72	0.829				Puntland–
	Total	1073	2.97	0.780				Somaliland

Regarding the dimensions of power sharing, ANOVA tests were also conducted to examine whether state of origin had an impact on perceptions held by the respondents towards legislative, executive and judicial power sharing. A statistically significant difference regarding legislative power sharing in terms of state of origin was observed ($F_{6,1066}$=6.128, p=0.005) (Table 9). The post hoc test revealed a significant difference

between respondents from Somaliland and the states of Hirshabeelle and Puntland. This means that respondents from Puntland (M=3.34, SD=0.780) and Hirshabeelle (M=3.33, SD=0.703) held more positive opinions on legislative power sharing than Somaliland respondents, who demonstrated less agreement to the items (M=3.05, SD=0.702).

Table 9: One-Way ANOVA and post hoc Scheffe test showing differences among state of origin groups in terms of power sharing dimensions

Variable	State of origin	*N*	M	SD	*F*	df	*P*	Comparison
Legislative power sharing	Jubbaland	116	3.17	0.735	3.128	6, 1066	0.005	Somaliland–Hirshabeele, Somaliland–Puntland
	South West State	87	3.25	0.642				
	Benadir	257	3.23	0.723				
	Hirshabeelle	141	3.33	0.703				
	Galmudug	184	3.30	0.588				
	Puntland	138	3.34	0.780				
	Somaliland	150	3.05	0.702				
	Total	**1073**	**3.24**	**0.703**				
Executive power sharing	Jubbaland	116	3.47	0.762	3.305	6,1066	0.003	Somaliland–South West, Somaliland–Hirshabeele
	South West State	87	3.67	0.692				
	Benadir	257	3.44	0.697				
	Hirshabeelle	141	3.57	0.655				
	Galmudug	184	3.48	0.646				
	Puntland	138	3.52	0.787				
	Somaliland	150	3.29	0.845				
	Total	1073	3.48	0.729				
Judicial power sharing	Jubbaland	116	3.18	0.702	2.255	6, 1066	0.036	No significant differences were observed
	South West State	87	3.45	0.643				
	Benadir	257	3.32	0.652				
	Hirshabeelle	141	3.40	0.625				
	Galmudug	184	3.30	0.599				
	Puntland	138	3.34	0.777				
	Somaliland	150	3.21	0.821				
	Total	1073	3.31	0.690				

Executive power sharing was tested in the same way. The results presented in Table 9 reveals significant difference among respondents from different states regarding executive power sharing ($F_{6,1066}$=3.305, p=0.003). The results of the post hoc test reveals revealed significant differences between respondents from Somaliland compared to those from the South West and Hirshabeele sates. This denotes that respondents from the South West (M=3.67, SD=0.692) and Hirshabeele (M=3.57, SD=0.655) sates had more positive perceptions towards executive power sharing than respondents from Somaliland (M=3.29, SD=0.845). Respondents from the remaining regions held similar opinions regarding this variable.

The results of the ANOVA analysis judicial power sharing (Table 9) showed a significant difference among respondents from different states ($F_{6,1066}$=2.255, p=0.036). However, further post hoc testing did not produce any significant differences within the categories. This indicates that the differences among respondents from different states were minimal. Thus, it can be concluded that there were no significant differences among respondents regarding their perceptions of judicial power sharing.

Fiscal federalism was the last variable tested against state of origin (see Table 10). Results revealed that respondents from different states were statistically different in terms of their perceptions of fiscal federalism ($F_{6,1066}$=2.643, p=0.015). However, these differences were not across all regions. The post hoc test revealed a significant difference between Benadir and Somaliland, where the respondents from the former (M=3.19, SD=0.571) held more positive opinions towards fiscal federalism than the respondents from the latter (M=2.99, SD=0.721). The remaining states held similar opinions on this variable.

Table 10: One-Way ANOVA and post hoc Scheffe test showing differences among state of origin groups in terms of fiscal federalism

Variable	State of origin	*N*	M	SD	*F*	df	*p*	Comparison
Fiscal federalism	Jubbaland	116	3.04	0.672	2.643	6,1066	0.015	Somaliland–Benadir
	South West State	87	3.16	0.596				
	Benadir	257	3.19	0.571				
	Hirshabeelle	141	3.18	0.560				
	Galmudug	184	3.16	0.522				
	Puntland	138	3.11	0.561				
	Somaliland	150	2.99	0.721				
	Total	1073	3.13	0.600				

5. Discussion of the findings

The purpose of study was to highlight the challenges and advantages of applying federalism to Somalia as well as the Somali people's perceptions of the suitability of a federal system; the discussion and analysis of various federalism models was also provided. In accordance with existing literature on federalism in Africa (for example, that conducted by Fessha 2010), this study has shown that the logic for federal arrangement in post-conflict Somalia has been to reconcile the conflicting interests of the clan-based Somali society, and to maintain the country's political and territorial integrity.

In reference to the significant results of the study, it was found that the Somali people are still afar from having a deep understanding of a federal system. The findings of the study also suggested that there are both possible negative and positive impacts of federalism in Somalia in terms of national unity, distribution of wealth, economic prosperity, and several other important issues regarding the people's overall perception of federalism. In addition, the results provided further evidence to support the notion that poor knowledge of federalism, combined with clan-based federalism (internal issues) and the conflicting interests of the international community and neighboring countries (external

factors), are among the major challenges that face the adoption of a federal system. In federal African states, courts have played a leading role in arbitrating intergovernmental conflicts (Dickovick 2014; Kimenyi et al. 2010). In Nigeria, for example, the Supreme Court has been involved in federal–state conflict litigation and arbitration (Suberu 2009). In line with these studies the results of this research showed that an honest and reliable justice system and the creation of a constitutional court are necessary for the smooth functioning of, and presumably reducing friction among, the Federal Government and its member states. However, it must be acknowledged that there is considerable debate both among Somali political actors and scholars regarding the status of Mogadishu. The results of the study demonstrated, to some extent, these disagreements among the political class and the general populace.

As far as legislative power sharing is concerned, the results showed that the consent of a substantial number of the people rests on giving more constitutional power to legislate to the federal parliament. This does not conflict with the notion of decentralization and the substantive nature of federalism and power sharing, as there is an upper house in the parliament that represents the voice of the member states when it comes to the matter of legislation. But there seemed to be a slight difference in the case of executive power sharing, as the results showed conflicting opinions regarding the executive distribution of power, which might be due to the poor understanding of federalism-related contradictory issues in the principle of the separation of powers. Similarly, judicial power distribution was found to demonstrate a relatively slight level of conflict regarding the creation of a constitutional court, both at the federal level as well as the state level.

The adoption of federalism in Somalia faces many considerable challenges, one of which is the management of resources between the central government and the federal member states, as well as among the states themselves, because some states claim that the distribution of wealth should be based on size rather than equally, while others already had access to more physical resources than others. The results revealed a difference of opinion as to how the fiscal revenue from all sorts of tax and other non-tax sources should be distributed. This conflicting scenario, which is evident in the study results, might lead to fiscal wrangling that could possibly cause major disruptions in the fragile peace process of this war-ravaged country. Problems related to the equitable division of national resources, such as revenue-sharing or the distribution of large, but regionally concentrated, resources,

are constant points of political contention in federal African states (Suberu 2009). In Somalia, for that reason, fiscal-federalism issues, as well as debt financing through borrowing both by the central government and the federal member states, need to be dealt with and considered seriously both in the federal constitution and the other laws of the land.

Regarding the correlation results of the major variables in the study, it was found that federalism adoption was positively and significantly correlated with legislative power distribution, executive power sharing, judicial power distribution, and fiscal federalism. Similarly, all dimensions of power distribution were found to be correlated significantly and positively among themselves and with all other variables in the study. This is in line with several other previous studies. Conversely, the study result also suggests that there was significant difference among the dimensions of power sharing.

Despite ongoing criticism, the federalization process in Somalia continued with the hope that it will end the decades-long civil war that has claimed the lives of thousands of innocent Somalis. The current federal states cut across "clan lines" such as Puntland and Galmudug states (Tawane 2017).

Comparison of the results from the ANOVA analyses supports previous literature on Somalia's adoption of federalism. There is an argument that state of Puntland, and most of its residents, support the creation of a federal state more than the other states in Somalia, although it has often been claimed that the inhabitants of the South West state of Somalia suggested the adoption of a federal system in early 1960s following Somalia's independence.

There seems to be considerable consensus between the results of the current study and the previous notion of federalism with respect to its proponents and opponents among Somaliland, Puntland, Galmudug, Hirshabeelle, Benadir Province, South West State, and Jubbaland. The desire for the adoption of the researched key variables of federalism (power distribution, perception of federal adoption, and fiscal federalism) was relatively higher in Puntland and South West State but relatively lower in Somaliland, Galmudug, and Benadir regions.

6. Conclusion and recommendations

Subsequent to decades of dictatorship and 28 years of chaos, Somalia adopted a federal system as a governance method to bring back trust and resolve grievances among Somali people. This new system has faced both internal and external challenges, as found in this study.

According to the research findings, poor knowledge of federalism, considering federalism as a clan-based system, and political corruption are the most challenging factors to federalism adoption in Somalia. Other challenges relate to the provisional Somali constitution, such as power distribution, fiscal management, regional boundary disputes, and the status of Mogadishu.

Thus, the formation of an honest and reliable justice system, creating constitutional courts, and finalizing constitutional reforms are the most appropriate solutions, as suggested in the study.

To overcome the above challenges, this paper provides the following recommendations to the Somali leadership both at federal and state level:

1) Finalize the national constitution to put an end to conflicts between the various levels of government (i.e. between the center and the peripheries).
2) Make every effort to forge a national reconciliation (politically and socially) to put an end to accusations among various sections of society.
3) One of the primary federal challenges in Somalia is the public's poor understanding of the federalism. Both the Federal Government of Somalia and its member states should provide proper civic education and public awareness, which can play a significant role in the successful adoption of federalism in Somalia.
4) The Federal Government should facilitate the federalization of the governance by giving the state administrations major roles in making decisions regarding socioeconomic development and the building of democratic structures
5) The federal state authorities should accelerate political as well as fiscal decentralization by creating local administration at village level and also ensuring the participation of the local communities.

6) Communities and polities in each federal member state should gain the freedom to choose their leaders and the Federal Government should refrain from intervention of the federal states affairs.
7) The most convincing proposition is that post-conflict state building is a bottom-up process. Somali authorities must embark genuine reconciliation, which effectively addresses and rehabilitates clan/tribal grievances to achieve inclusive federal polity in Somalia.
8) Poor governance (i.e. rampant corruption and nepotism in public institutions) is a leading challenge to Somalia's federalization agenda and its recovery process, as this study revealed. Somali officials should take a critical stance against corruption by taking and implementing anti-graft measures to restore the country's prestige in the eyes and minds of its people and strength their hopes and aspirations for recovery.
9) The federal governance system was adopted to bridge the trust deficit among Somali people and reconstitute the unity and territorial integrity of the Somali Republic. In this regard, the Federal Government of Somalia should, in good faith, re-start the unity talks with Somaliland.
10) The Federal Government of Somalia as well as Federal Member States should commission, and utilize, more studies related to federalism and state formation.

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Acknowledgement: The authors wish to thank SIMAD University, Center for Research and Development for funding this research project under Research Grant No-SU-DA-RG-2018-001.

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Appendix

Table A1: Reliability and normality tests

No.	Variables	Number of items	Mean	SD	Skewness	Kurtosis	Cronbach's alpha
1.	Perception of adoption of federalism	8	2.9682	0.77950	–0.172	–0.425	0.703
2.	Legislative power sharing	7	3.2375	0.70303	–0.380	0.286	0.597
3.	Executive power sharing	7	3.4760	0.72937	–0.898	1.374	0.649
4.	Judicial power sharing	7	3.3106	0.69030	–0.564	1.223	0.611
5.	Fiscal federalism	12	3.1281	0.60012	–0.328	2.025	0.662

Table A2: Reasons for adopting federalism system

No.	Items	Categories			
		Yes		No	
		Frequency	%	Frequency	%
1.	Federalism is not suitable to Somalia	600	55.9	473	44.1
2.	Federal system is a laboratory for democracy	609	56.8	464	43.2
3.	Federalism is an obstacle to Somali unity	629	58.6	444	41.4
4.	Federalism strengthens regional economic autonomy	608	56.7	465	43.3

Table A3: Potential benefits of federalism system

Items (*N*=1,073)	Frequency	Percentage
It contributes to democratization and political participation among citizens	432	40.3
It overcomes civil war and inter-clan conflicts	505	47.1
It is a bridge that can keep the country from falling apart	251	23.4
It encourages pluralism – leadership access and minority involvement in government	249	23.2
It encourages separation of powers and prevents tyranny	474	44.2

Table A4: Status of Mogadishu City

Items (*N*=1,073)	Frequency	Percentage
Federal city which is directly administered and financed by the federal government	741	69.1
Regional state, with the same mandate as other regions	230	21.5
City in state	265	24.7

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PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Subnational Constitutional Adjudication and Judicial Activism in Germany

by

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Perspectives on Federalism, Vol. 11, issue 2, 2019

Abstract

In this paper, I examine the degree and causes of judicial activism in a German subnational constitutional court. This research goal entails two dimensions. On the one hand, I explore whether and to what extent a German subnational constitutional court affects the scope of maneuvering of subnational parliaments and has thus developed a tendency towards judicial activism. I determine the degree of judicial activism with a newly developed "strength index" that measures possible reverberations of decisions made by constitutional courts in the political realm. In this respect, the project addresses a central theme of constitutional democracies: the tension between political self-determination and constitutional adjudication. On the other hand, I assume that judicial activism in the German Länder depends on the competencies and the composition of the court. The project thus combines attitudinal/behaviorist and institutional-theoretical approaches to provide answers to the research question at hand. To provide a comprehensive understanding of the role, subnational constitutional courts play in the German Länder. I apply two methods: linear regression and crisp-set Qualitative Comparative Analysis.

Key-words

federalism, constitutional adjudication, judicial activism, constitutional courts Germany

1. Introduction

According to Ran Hirschl we can see a "global trend toward juristocracy" which is "part of a broader process, whereby political and economic elites, while they profess support for democracy, attempt to insulate policymaking from the vicissitudes of democratic politics" (Hirschl 2004: 73). As many other scholars examining the effects of judicial review on politics Hirschl presupposes that there is a tension, maybe even a contradiction, between major branches of government. In the end, the democratic "rule of law" will be replaced by an elitist or even semi-authoritarian "rule by law". At the same time, like many other scholars addressing such questions Hirschl ignores subnational constitutional courts. They just do not play any role in these concepts (e.g. Halberstam 2009; Williamson 2006, 2018). Even though constitutional democracies seem to require strong and effective constitutional courts it seems sufficient if there is one at the national level. Furthermore, studies on constitutional courts use different theories, apply varying methods, and refer to multiple data sets and cases (Rehder 2007; Epstein et al. 2013: 65-100; Maveety 2003).

I address both shortcomings in the research on constitutional adjudication in this paper: From a broad perspective, I hit the same path as other European researchers who examine the role of constitutional courts in political systems (Hönnige & Gschwend 2010; Hönnige 2011; Dyevre; 2010). In the same vein as these researchers, I focus on the question as to how "legal activity ... unfolds at the expense of political action" (Rehder 2007: 10). To put it differently: I strive to describe and explain judicial activism. Yet, distinct from other studies I take a different approach in three respects. Firstly, I limit my analysis to a subnational constitutional court in Germany. So far, German research on constitutional courts ignored the subnational level and failed to explore how far the constitutional courts of the Länder affect politics. Secondly, most research on the effect of constitutional courts is either based on a few examples and rulings or rather general measurements. I will determine the effect of judicial activism with a newly developed "strength index" to measure possible reverberations that decisions of subnational constitutional courts might have in the legislative realm. Thirdly, I will try to answer my research question by integrating two methods that should allow me to substantiate my findings in a robust manner. In a nutshell: Empirically, I study an institution overlooked by political scientists in Germany. Theoretically, I try to combine

attitudinal and institutional-theoretical approaches, and methodologically, I use a multi-method approach to study judicial activism at the subnational level.

To answer my research question about the causes and effects of subnational constitutional adjudication in the German Länder[I] I will first present the basic theoretical approaches that try to explain judicial behavior and judicial activism. In the second step, I describe my methodological approach. Thirdly, I will identify causes as well as sufficient and necessary conditions that might give a reason for judicial activism. Finally, I will draw some tentative conclusions.

2. Constitutional Courts and Politics: Theoretical Perspectives

Research by political scientists on German subnational constitutional adjudication is almost non-existent. Apart from introductory overviews that describe some basic features of German state constitutional courts (Leunig 2007: 200-208; Lorenz 2016), there are just studies by Martina Flick (2008, 2009, 2011a, 2011b) and an edited volume that includes articles on all 16 German Land constitutional courts (Reutter 2017a, 2017b). However, these studies address the question I am interested in not systematically. Thus, I must refer to theories mostly based on research on national constitutional courts.

The term "judicial activism" is dazzling. It is an offspring of the theoretical debate on how the separation of powers can best serve democracy (Green 2009; Kmiec 2004). According to Keenan D. Kmiec (2004), the term was introduced by Arthur M. Schlesinger in an article in the Fortune magazine in 1947. With this term, Schlesinger described a group of judges that was "more concerned with the employment of the judicial power for their conception of the social good" (Schlesinger 1947: 201). The other group that Schlesinger coined as "Champions of Self Restraint" (Schlesinger 1947: 76f) saw the Supreme Court as an instrument "to permit the other branches of government to achieve the results the people want for better or worse" (Schlesinger 1947: 201). Even though the term judicial activism has been defined many times since then there is still no understanding that seems to be generally acceptable. In consequence, many scholars see judicial activism as an "empty term" (Kmiec 2004: 1444) that hardly carries little more "than a pejorative connotation" (Kmiec 2004: 1444). Others, however, use the term to examine and measure the outcome of judicial decision-making (Hagan 1998; Cross & Lindquist 2007; Solberg & Lindquist 2006; Canon

1983). All studies using this concept endorse the idea that judges are not human computers but might pursue political preferences (Hönnige 2011). From this perspective constitutional courts encroach on the competencies and the functioning of the political system. Alec Stone Sweet provides a more catchy and quite well-known understanding of the relationship between the legislature and constitutional courts: He concludes: „In the end governing with judges means governing like judges" (Stone Sweet 2000: 204). This also means that the separation of powers risks of losing its balance. In both perspectives, the judiciary is not just a check on the legislature or politics anymore but either influences or even takes over legislative functions. This understanding of the relationship between the judiciary and the legislature triggered different interpretations and explanations (Dyevre 2010; Epstein et al. 2013: 25-64; Rehder 2007; Hönnige & Gschwend 2010; Hönnige 2011). We can distinguish normative-legalistic theories, behaviorist concepts, and institutionalist approaches (table 1). All these approaches try to capture the forms and the degree of judicial activism and explain judicial behavior that might give reason to strong decisions.

Table 1: Research perspectives on constitutional courts and politics (according to Rehder)

	Normative-legalistic approaches	Behaviorist (American)	Institutionalist (European)
Level of analysis	Court (macro-level)	Judge (micro-level)	Court (macro-level)
Dimension of analysis	Judicial decision making based on legal reasoning	Process: politics of judicial action	Effects: political impact and function of judicial action
Perception of the legal system	Autonomous sphere	Extension and part of the political system	Autonomous sphere
Interaction of legal and political system (judicial activism)	Constitutionalization of politics; check on politics	Politicization: politics invades legal sphere	judicial action invades or displaces politics

Source: based on Rehder 2007: 17; my amendments.

Normative-legalistic approaches, mostly represented by legal scholars, already challenge the idea that judges can be "politicians in robes" at all (Epstein et al. 2013: 2). Researchers adhering to this view describe the role of courts in legalistic terms and deny that other factors than judicial reasoning affect constitutional adjudication. The godfather of this strand of theory is nobody else but Charles-Louis de Secondat, Baron de La Brède de Montesquieu. According to Montesquieu judges are mere "the mouth that pronounces the words of the law", "la bouche, qui prononce les paroles de la loi" (Montesquieu 1748/1979: Book XI, chapter VI). Thus, for Montesquieu and his disciples judicial behavior is immune to extralegal considerations. Personal interests, policy preferences, or the social background of a judge ruling on a case will not affect the outcome of a trial. Even though I simplified this understanding (but not much), it describes the way German scholars understood the role of courts and judges in the German legal system for a very long time quite accurately (Beyme 2001; Rehder 2007; Dyevre 2010: 297f.). In consequence, nobody else but the legislature creates law. Judges merely discover laws and are supposed to apply these laws to facts in case of disputes "literally and in strict accordance with the legislator's will" (Kommers 1976: 44). In other words, politically neutral judges decide or adjudicate upon laws according to methods well-established. In this perspective, a German judge is a "human computer" (Epstein et al. 2013: 50) or "a cog in the wheel of judicial administration, unmoved by feeling or even conscience" (Kommers 1976: 44). This theory of judicial behavior has been coined "legalism"; it is rooted in "legal positivism" most intriguingly developed by Hans Kelsen (1942; cf also Epstein et al. 2013: 2). Insofar constitutional adjudication is purely jurisdictional reasoning. Constitutional courts as "negative legislatures" (Kelsen 1927) do not perform legislative functions at all, but just apply constitutional law to political issues. In consequence, judicial activism is a necessary and legitimate consequence of decisions made by constitutional courts that make politics comply with constitutional stipulations. In this perspective, judicialization or judicial activism is but "constitutionalization" of politics.

For obvious reasons, political scientists can hardly endorse such a view. Already due to their professional identity, they have to challenge the normative-legalistic understanding of judicial review and constitutional adjudication because many scholars of political science share a realistic view on judicial behavior and try to find out whether there are extralegal variables that shape rulings made by judges. Besides, they prefer to interpret the preconditions for and the effects of constitutional adjudication in terms created by political

scientists. Even though attempts to explain "judicial behavior in causal-positive rather than legal-normative terms [were] initially an all-American enterprise" (Dyevre 2010: 297), we also find important studies on German political justice going as far back as the early twenties. Emil Julius Gumbel, a legal scholar from the Weimar Republic, pioneered in this respect. According to his findings, criminal courts sentenced communist or leftist perpetrators to long-term imprisonment or even to capital punishment far more often than nationalistic or rightist criminals who committed significantly more and significantly more severe political crimes. Gumbel (1922) assumed that one reason for the differences in sentencing was the social and political background of the judges. Gumbel's study triggered a lasting debate on "class" or "political justice" and about judges that seemed to be more committed to conservative – or "Prussian" – values and to protecting privileges of incumbent elites than to apply impartially laws to facts (Kirchheimer 1993; Fraenkel 1927/1999; Jasper 1992). Hence, to understand judicial behavior, we cannot ignore the social and political background of the judiciary. Even though the American debate on "legal realism" has been triggered by other precedents and developments it shares the same underlying premise that judges are not "human computers" and court rulings are not just about applying laws to facts.

In spite of this common starting point, the European and the American research on judicial behavior, judicial activism, and judicialization took two different paths: Since Charles Hermann Pritchett's (1948) seminal study on the Roosevelt Court, the American research focuses on judicial behavior of single judges. In addition, all seminal studies on judicial behavior and judicial activism share a data analytic perspective covering all conceivable aspects of the judiciary (Pritchett 1948; Segal & Spaeth 1993; Murphy 1964; Epstein & Knight 1998; Epstein et al. 2013). Nonetheless, it would be misleading to assume that there is just one American approach to studying judicial behavior. According to Hönnige (2011; cf. also Dyerve 2019; Epstein et al. 2013: 26-64) we can distinguish three schools in the American literature on constitutional courts and judicial behavior: The "attitudinal model" strictly speaking stresses political preferences of judges. According to this approach, ideology is crucial for understanding the decisions made by courts. Political preferences and values count as the essential variables in explaining judicial behavior. The "strategic model" that Britta Rehder (2007: 14) regards as a "more sophisticated version of the attitudinal model" takes judges "as participants in the labor market" (Epstein et al. 2013: 25). In this broader rational choice perspective, the judges rule according to a utility function that shapes

decisions. This approach takes other actors and the institutional environment into account. Judges make their choices because they can only realize their goals when they consider choices other actors make. Finally, "interpretativists" attempt to explain judicial behavior with historical and sociological factors (Hönnige 2011). This approach can also be coined "personal attribute model" (Tate & Handberg 1991) which is a spin-off from the attitudinal model, as well. According to the personal attributes model, the social, professional, and economic background make the judges decide their cases in the way they do. Even though these concepts very often are lumped together under the heading of "legal realism" (Epstein 2013: 5) they take different stances on the issue at hand. Nonetheless, they share the premise that judges are not "calculating machines". On the contrary, judges enjoy a large degree of discretion (Epstein et al. 2013: 26). This leeway is shaped by extralegal motives.

Distinct from these dominant American approaches "research on European courts has never strived to explain judicial decision-making, but it confines itself to analyzing the effects of judicial action on politics and the political system" (Rehder 2007: 5). This focus on the effect of rulings and the institutional set-up is partly due to the fact, that researchers lacked data on judges and judicial decision-making in European constitutional courts. Very often, we do not even know whether a constitutional court has made its decisions unanimously or not. Making the best out of this lack of data, studies on European constitutional courts conceptualize these institutions as unitary actors. In this perspective, it is not the single judge, his or her background or the professional ambition that is supposed to explain the outcome of a judicial process. Instead, European researchers focus on the effects of judicial actions on politics and the political system. However, this perspective presupposes that the legal and the political system still operate differently. According to Rehder and others (Rehder 2007), from the European perspective the judicial and the political system act according to different logics. Legal action is supposed to be governed by "rules" while political action is "interest laden" (Stone 1994: 446; Vallinder 1994: 91). Accordingly, judges have to argue while politicians must bargain, and judicial decisions are based on deliberation while political decisions are ruled by the "majority principle". In this perspective, courts remain autonomous institutions and the judicial system invades or dominates the political system (table 1).

The assumptions that I try to verify in the following analyses are spin-offs from two of the aforementioned theories. I, thus, try to bridge the gap between the American and the

European paradigm. My level of analysis will be a single court, and I will try to determine judicial activism, i.e. the effects of court rulings by measuring the strength of decisions the BCC has made. Insofar I assume the legal system as an autonomous sphere that might encroach on state politics. At the same time, I will ask whether the composition of the court has had any effects on the outcome. Hence, it is not the individual values, the behavior, or the utility function of a single judge that I refer to. Instead, I will refer to the background of the judges that I will regard as a ruling body. In addition, I have to take into account the aforementioned institutional set-up. I do, thus, justice to the idea that judicial activism might be due to multiple causes.

3. Analyzing Judicial Activism with a Multi-Method Approach

From a methodological point of view, there are three ways to verify hypotheses or test theories: qualitatively with case studies, quantitatively with statistical techniques, and with a hybrid method called qualitative comparative analysis (QCA) (Reutter 2014). In this paper, I will use the last two methods, i.e. a crisp-set Qualitative Comparative Analysis as well as regression analysis. By using two methods to analyze the data at hand I strive to improve the validity of my results and broaden the understanding of the phenomenon to be explained. This kind of "sophisticated rigor" (Denzin 1989: 235) aims to better comprehend political and social phenomenon (Meuer & Rupietta 2016; Flick 2011b; Creswell 2014; Reutter 2018b: 161-163). As many researchers are not very familiar with QCA and as this is the first time that this tool is used to study constitutional courts and judicial activism, I will briefly outline the basic features of this method. Chapter 5 will provide further information on how I applied this method to study the causes of judicial behavior and the effects of constitutional adjudication by a German subnational constitutional court.

According to Charles C. Ragin who invented this method QCA is a means to "simplify complex data structures in a logical and holistic manner" (Ragin 1987: viii; cf. also: Legewie 2013; Rihoux & De Meur 2009; Reutter 2014, 2019, 2018: 101-129). QCA thus tries to "integrate the best features of the case-oriented approach with the best features of the variable-oriented approach" (Ragin 1987: 84). In other words, a QCA should preserve the information and the detailed knowledge qualitative research can acquire about single cases. Any QCA is, hence, case-oriented. It accepts the fact that outcomes are rarely due to just a

single cause, and cases are described as „configurations of conditions", to capture the complexity of cases in an encompassing and holistic way. At the same time, a QCA aims to overcome a major shortcoming of qualitative research: to compare cases. A QCA thus tries to make cross-case comparisons possible that meet the standards used in quantitative research and in statistics. QCA is a tool that allows comparing cases in a systematic, transparable and replicable manner und „to determine the different combinations of conditions associated with specific outcomes or processes" (Ragin 1987: 14; cf. also Rihoux & Ragin 2009). To identify patterns across cases, QCA applies the "Boolean logic" that helps to minimize complexity and explore causal links between conditions and outcome (Marx & Dusa 2011: 105 f.). It has to be pointed out, that QCA is based on the analysis of relations between a small or intermediate number of „sets". From this perspective, causal relations are set relations. For example, if we want to test the assumption that all „liberal courts" make „strong decisions" we have to define when we regard a court as a member of the set of liberal courts and when we see a decision as strong enough for being part of the set of strong decisions. Based on these definitions and our findings we can explore if the courts that are a member of the set of liberal courts make are also part of the set of courts that make strong decisions (Schneider & Wagemann 2007: 31ff.; Rihoux & De Meur 2009). Finally, QCA privileges parsimonious explanations. It leads to lean case descriptions and triggers basic equations that the researcher must interpret.

Yet, as Meuer and Rupietta QCA (2016) have rightfully pointed out, QCA and statistical analysis show specific features and differ in their epistemological premises. Distinct from QCA, statistical analyses rely on much larger data sets and explore correlational relations between independent and dependent variables. It is a deductive approach that allows to improve the predictive powers of theories and to test hypotheses derived from these theories (Meuer & Rupietta 2016: 6f). In contrast, qualitative research like QCA aims at inductively enriching concepts or identifying new constructs and thus improve the explanatory power of theories. These two methodological views resonate in the way how hypotheses are constructed (table 2). While linear regression analysis needs variables that quantitatively measure attributes across cases, QCA describes features of cases by defining conditions. Concerning the research question addressed in this paper and based on the theories outlined above I will try to verify four hypotheses. Depending on the methodological perspective these hypotheses take different forms, though (table 2). Furthermore, I have to

operationalize and to calibrate the outcome as well as the conditions resp. the variables in varying ways and based on the methodology used. Yet, before describing the variables and the conditions that might give reason to judicial activism I will lay out some basic features of the Berlin Constitutional Court.

Table 2: Linear Regression Analysis and Qualitative Comparative Analysis: Types of Hypotheses and Outcome

		Type of Hypotheses to be tested with	
	Condition / Variable	Regression Analysis	Qualitative Comparative Analyis
H1	Type of proceeding (abstract judicial review)	Decisions of the BCC tend to be stronger in cases of abstract judicial reviews	If a decision qualifies as an abstract judicial review it will be a strong decision
H2	Age of decision	Older decisions show a lower degree of strength than more recent ones.	An old decision will be a strong decision
H3	Oppositional judges (ideology)	Courts with a higher number of "oppositional" judges make stronger decisions than courts with a lower number of those judges.	If there are more than three "oppositional" judges decisions will be strong
H4	Professional Judges	Courts with a higher number of professional judges make stronger decisions than courts with a lower number of professional judges.	If there are more than three professional judges decisions will be strong
Outcome	Judicial Activism	Strength of decisions	Strong / weak decisions

Source: my compilation.

Berlin established its constitutional court after unification. After a lengthy and complicated process, the Berlin Constitutional Court (BCC) came into force in March 1992 when the state parliament, the House of Representatives of Berlin, elected the first judges to the court (Reutter 2017c, Reutter 2018a). The BCC consists of the president, the plenary meeting of all judges, members of the research staff, and the administration. The president chairs the plenary meetings, manages the general administration, and represents the constitutional body externally. According to the rules of procedure, the plenary deals with basic questions and decides on cases with the majority of votes. The court is entitled to come to a decision if at least six judges are present. Abstention from voting is not an option. On average, the judges meet once per month. If we take reports of former presidents and vice presidents as a reliable source, we should find teamwork, expertise, and collegiality reigning among the judges (Finkelnburg 2001; Schudoma 2012, 2014; Sodan 2008). Most importantly, the judges serve on a part-time basis at the court. They make their living as a judge at an ordinary court, as a professor at a university, or as a lawyer in a law firm and fulfill their duties at the BCC in some moonlighting fashion. This is possible because the caseload is limited. On average the Berlin Constitutional Court has to deal with about 180 motions per year. Apart from constitutional complaints that create the major chunk of the workload, the BCC's most important cases concern disputes between state organs and electoral complaints. There are only a few judicial reviews, which according to Hans Kelsen (1942) is a core element of constitutional adjudication.

4. Operationalizing the Variables for the Regression Analysis and Calibrating the Conditions for the csQCA

Ragin and others stress the point that operationalizing variables for regression analysis and calibrating conditions in a csQCA are two different things notably because variables are just measuring characteristics of cases without taking the contexts in which these variables operate properly into account. In contrast, a csQCA requires me to describe cases as configurations of conditions and to determine when a case is a part in a set and when it is not. In other words, I have to define thresholds to build a dichotomous data table. Hence, in a first step, I describe and explain the variables I use in the regression analysis and calibrate

the conditions for the csQCA. As the rules of "Good Practices" require (Schneider & Wagemann 2007: 266-271) I start with the outcome and then proceed with the variables that are supposed to explain the outcome resp. the conditions that are supposed to give a reason for the outcome.

4.1. Judicial Activism as Dependent Variable and as Outcome

As pointed out, I equal judicial activism with strong decisions made by the constitutional court of Berlin. The assumption, then is, that strong decisions manifest a "lack of deference" (Hagan 1988: 98: cf. also: Canon 1983: 238; Solberg & Lindquist 2006: 240-241) to the parliament in Berlin. To determine the strength of decisions I use an index that has been invented by Kálmán Pócza, Gábor Dobos, and Attila Gyulai who however try to measure judicialization with this index (Pócza et al. 2017; Pócza & Dobos 2019). I assume that strong decisions equal strong judicial activism while weak decisions lead to weak or no judicial activism. The preconditions inherent in these equations need some explanations. Three aspects are important in this respect.

First, I do not take into account whether politicians, political institutions, or the bureaucracy comply with prescriptions made by the BCC. Like Pócza et al. (2017) I just measure the strength of decisions, not their actual impact. To highlight what they mean with the term "strength", Pócza et al. refer to a boxing metaphor: In boxing terms, mapping out the strength means to measure "the power of a punch", not the impact the punch had on the other boxer. Pócza et al. (2017: 1563) do thus not consider whether the opponent "could side-step or has been only a little shaken" regardless of the strength of the punch. They just refer to the power of the punch and to the power of the punch alone. For my study, this means that I only refer to decisions of the Berlin Constitutional Court and nothing else and thus exclude reactions of the legislature to rulings of the court, which is in line with the term judicial activism that also exclusively refers to decisions courts have made (Pócza & Dobos 2019).

Second, Barbara Geddes (2003: 131-174) has rightfully pointed out that the evidence used in a research project affects the answers of this project. Of course, this truism holds for my study, as well. So, what is the evidence I use? The evidence can only be decisions made by the BCC. However, I do not include all decisions the BCC has made since 1992. That is not only far too many but most of them will not contribute to answering my research

question in the first place. More than 95 percent of all motions submitted to the BCC are constitutional complaints of which just 3 to 4 percent find a positive outcome for the claimant. Even if a constitutional complaint has a positive outcome for the claimant this does not entail legislative actions. At the state level, such decisions just trigger a change in the way in which laws will be applied by public authorities. These proceedings do not force the legislature to adjust or change a law, though. Even at the federal level only a few constitutional complaints caused legislative consequences and triggered "important decisions" (Lembcke 2019). Hence, I excluded constitutional complaints from my analysis. This leaves me with 128 proceedings for the period between 1992 and 2015. These proceedings address disputes between state organs (64), electoral complaints (45), abstract and concrete judicial reviews (11), and popular petitions (8). However, as I focus exclusively only on politically "salient decisions" as recommended by Pócza and Dobos (2019: 25f.) I further reduced the number of cases by including only decisions that have been regarded as important enough to be published in print since 1993. In sum, this leaves me with 45 decisions, including 5 abstract and 5 concrete judicial reviews, 14 disputes between state organs, 2 disputes concerning rights of city districts, 10 proceedings concerning the scrutiny of elections and 9 on direct democracy.

Third, as pointed out, I understand judicial activism as the degree as to which decisions of constitutional courts might infringe upon the legislature's competencies. In cooperation with an international group of comparative scholars, Kálmán Pócza and his colleagues developed a "strength index" that should allow to mapping out the strength of decisions made by constitutional courts. I have modified this approach slightly, to make the index more suitable for the purposes and goals of my research (Pócza et al. 2017; Pócza & Dobos 2019: 11-21). My index is composed of four elements (table 4):

- *Ruling*: The ruling captures the basic decision made by the court normally laid down in its tenor. For example, the court can reject a motion or find a law unconstitutional due to omissions or due to some procedural issues. In these cases, the legislature can easily remedy these problems. It is different if the law has been found unconstitutional for substantive reasons. In this case, the court provides guidelines for the legislature.
- *Completeness:* A court can invalidate a law completely or partially.

- *Timing:* Furthermore, a court can annul a law *pro futuro*, *ex nunc* or *ex tunc,* which has different consequences for the legislature.
- *Prescription:* Finally, the court can make binding prescriptions for the legislature or no prescriptions at all.

Decisions receive a score based on these four dimensions, with a maximum of 12 points possible. A low score means little or no judicial activism, higher scores mean strong judicial activism.

Table 3: Components and elements of judicial decision.

Ruling	Rejection or refusal (0.0)	Unconstitutionality by legislative omission (0.25)	Procedural unconstitutionality (1.0)	Constitutional requirements (2.0)	Substantive unconstitutionality (5.0)	Constitutional interpretation in abstracto (7.0)
Completeness	Qualitative partial annulment (0.0)	Quantitative partial annulment (1.0)		Complete annulment (2.0)		
Timing	Pro futuro (0.0)	Ex nunc (0.5)		Ex tunc (1.0)		
Prescription	No prescription (0.0)	Non-binding prescription (1.0)		Directive / binding prescription (2.0)		

Source: According to Pócza et al. 2017: 1564.

This strength index enables me to measure the outcome in such a way that I can use it for the regression analysis as well as for the QCA. Taking 45 decisions made by BCC into account, the strength index ranges between 0 and 8.5; its mean value is 2.2 (standard deviation is 2.4). For the regression analysis, I can use the data constructed with this tool without further modification. Yet, before I could use the data in the csQCA I had to modify the original information about the strength of a decision by defining a threshold that tells me when a case is a member of the set of strong or in the set of weak decisions. As this is the first time, a csQCA is applied to identify causes of judicial activism, I had to create the threshold from scratch. I assume that only those rulings that lay out some guidelines to the legislature contribute to judicial activism. Such a decision should at least interpret the law by making constitutional requirements (at least 2 points), and make non-binding or binding prescriptions (at least 1 point) that should apply ex nunc or pro futuro (at least 0.5 points). Rulings fulfilling these criteria receive a total of at least 3.5 points, which I take as the cross-over point. Thus, rulings with 3.5 or more points would be "in", that is part of the set of decisions contributing to judicial activism. Rulings with less than 3.5 points would be "out". In consequence, I have to set the threshold at 3.5. Admittedly, this threshold is not very high. It takes into account the aforementioned precondition that the BCC can dispose of only limited resources and that the judges serve only on an honorary and part-time basis on the court. Nonetheless, the threshold is high enough to make the parliament adjust laws to decisions made by the court.

4.2. Operationalizing Independent Variables and Calibrating Conditions

In the same manner as the outcome, I calibrated the conditions for the csQCA as well as the variables for the regression analysis. Table 4 provides some basic information on the variables used in the regression analysis.[II] Based on the review of the literature two aspects seem crucial: institutional and attitudinal/behaviorist dimensions. I operationalized the institutional dimension with two variables/conditions: the age of a decision and the type of proceeding (a). The attitudinal/behaviorist dimension is represented by the professional and ideological background of judges (b).

(a) Institutional factors (the type of proceeding and age of decisions): Neo-institutionalist theory sees norms, organizations, and rules as the major cause for policy outcomes or for political behavior (March and Olsen 1989). I take institutions to affect judicial behavior, as well,

because I assume that the degree of judicial activism is also due to institutional effects. This assumption can be tested in two ways: On the one hand, I presume that the type of proceeding affects the degree of judicial activism. In other words, the BCC court should make strong decisions if it has to decide abstract judicial reviews. In theory, abstract judicial reviews entail the greatest leeway to the court. They "provide courts with crucial opportunities to construct constitutional law, to extend jurisprudential techniques of control, and (the same thing) to make policy" (Stone 1994: 447f.). Alec Stone even claims that this proceeding may increase the "potential for higher levels of judicial activism" (Stone 1994: 448). A value of 0 means that the proceeding is not an abstract judicial review; a value of 1 indicates that the court had to deal with an abstract judicial review. For a csQCA the binary nature of this condition poses no problem at all. On the contrary, it indicates whether this case belongs to the respective set. Yet, in a regression analysis, it is common to replace such a binary variable with a dummy variable and thus include a nominal scale variable.

Table 4: Independent and Dependent Variables: Descriptive Statistics

	Mean	Median	Standard deviation	Minimum	Maximum	N
Age of Decision	9.6	7.6	7.1	0.60	22.20	45
Type of Proceeding	0.1	0.0	0.3	0	1	45
Number of "oppositional" judges	2.7	2.0	1.3	2.0	5.0	45
Number of professional judges	3.8	4.0	1.1	2.0	6.0	45
Degree of judicial activism	2.2	2.0	2.4	0.0	8.5	45

Source*:* my compilation.

On the other hand, I believe that each public institution bears the tendency to broaden its influence and its power. That assumption also holds for constitutional courts because over time they can refer to a higher number of decisions and knit a closer net of rules and decisions the legislature has to comply with. In consequence, decisions should become stronger over time. Thus, more recent decisions will tend to be stronger than the ones made

in the early years of the court. Once again, with regard to the regression analysis, this raises no problem at all, as I just used the age of decision (table in appendix). Yet, for the csQCA I have to calibrate this condition and define the threshold. The 45 decisions included in the analyses are on average 9.6 years old (the median is at 7.6 years). However, if possible it is recommended to define the threshold based on theoretical considerations and not on statistical calculations. Thus, I set the threshold at 8 years because then all judges elected in 1992 have been replaced by new judges. And I presume that later generations of judges might be more inclined to invalidate laws and infringe upon privileges of the legislature because they stand on the shoulders of founding judges that established the court and set it in motion.

(b) Attitudinal factors (ideology and profession): As pointed out, I will combine institutional and attitudinal variables: By attitudinal variables, I mean the professional and the ideological background of the judges. To start with ideology: Charles Herman Pritchett (1948) was the first who strove to prove statistically that ideology or political preferences might influence judicial behavior. Since then, we find countless attempts trying to take the ideological stance of a judge into account to explain judicial decision-making. The obvious challenge is, of course, to tell what kind of political preferences judges might have. To determine such values some scholars refer to rulings of a judge on politically salient issues; other scholars see party affiliations as an indicator to locate a judge on a left-right scale. One of the most common approaches in these studies rests on the assumption that a judge would endorse the policies of the party that has nominated him or her for the post at a court (e.g. Epstein 2013: 101-151). For example, in her study on the Federal Constitutional Court Christine Landfried assumed that judges proposed by the SPD would support left-wing policies and share basic ideological principles of this party (Landfried 1984).

I will use this indicator, as well, to capture the ideological dimension. In Berlin, the state parliament, the House of Representatives, has to elect all judges to the Constitutional Court. Table 5 provides some basic information on the number of judges that each parliamentary party has nominated for election to the Berlin Constitutional Court. Two candidates proposed by the leftwing party "PDS/The Left" failed to receive the necessary majority. Between 1992 and 2016 there have been 10 ballots and 37 judges have been elected to the BCC (Reutter 2018a). Quite surprisingly, for just one exception it did not matter at all whether the party in power or the party in opposition has proposed the candidate. All judges have been endorsed and supported by on average more than 76 percent of all members of

parliament. The only exception has been the two candidates of the FDP which received on average just 70 percent.

Table 5: Judges of the BCC According to Nominating Parliamentary Parties

	SPD	CDU	Green	Left[c)]	FDP	Pirates	All
Number of proposed candidates	13[a)]	14	5	5	2	1	40 [a)]
Number of elected judges	13[a)]	14	5	3	2	1	38[a)]
Yeas as share of ...							
- ... the valid votes	90,4	89,0	92,0	92,3	90,3	89,9	89,3
- ... the votes cast	86,5	84,8	85,5	87,1	80,4	87,9	82,6
- ... all members of parliament	80,1	78,7	79,8	85,0	70,4	82,6	76,6
Share of Judges at BCC[b)]	34,2	36,8	13,2	7,9	5,3	2,6	100,0
Share of seats in parliament (1990 bis 2017)[d)]	30,0	35,5	13,0	15,6	4,4	1,4	100,0

a) Including the election of Margret Diwell as president of the court; b) share of judges nominated by parliamentary party; c) only for the elected judges; d) average share of seats; at the beginning of the legislative period.

Sources: my calculations; Reutter 2018a: 491.

Yet, for methodological reasons, some annotations are necessary. To start with, I do not know the criteria according to which parliamentary parties in Berlin picked their candidates. The ideological proximity of the judge to the party in question might be just one aspect in the parties' considerations. Other aspects might be important, too, because the parties must comply with the criteria laid down in the constitution and the law on the constitutional court. In addition, a possible judge nominated by a parliamentary party does not necessarily share the views the party has on a specific policy not to mention the fact that a judge might give judicial reasoning precedence over political preferences. Nonetheless, I take the ideological proximity between the nominating party and the nominated judge as an indicator for the political preferences of judges because I assume that judges sustain some loyalty to the party

in parliament that nominated him or her as a judge to the BCC. Theoretically, this can be conceptualized as a specific type of "divided government" because the majority in the state legislature and the majority in the constitutional court might represent different political parties. I do not expect a judge to endorse all or some of the policies of the party that nominated him or her to the court. I simply figure that judges feel obliged or loyal to the party that supported him or her in the appointment process. Hence, if those judges proposed by parties in opposition have a simple majority in the court they will probably restrain the room of maneuverability for an incumbent government composed of other parties. Thus, I assume that the decisions of the BCC are „strong" if we have a „divided government" in the aforementioned sense. This variation of a „divided government" in which the constitutional court is composed of judges nominated by a party in opposition, lasted for six years since the Constitutional Court came into effect in 1992 (until 12/31/2017). For almost two-thirds of this time (03/26/1992 until 06/16/2001 and 06/21/2007 and 12/31/2007) the parties of the incumbent government had proposed a majority of the judges that served at the BCC. Hence, I would expect that in times of a „divided government", the Berlin Constitutional Court would be more active and make stronger decisions than in times of a unified government. Once again, in the regression analysis, I used this data without modifying them. However, in the csQCA I tested this assumption by examining whether the court will make strong decisions if judges nominated by a party in opposition can dispose of at least four seats. Thus, I set the threshold for this condition at 3.

Table 6: Main Profession of Judges at the BCC (1992-2017)

Main profession	Abs.	(%)
Judges at an ordinary court	16	44,4
Lawyer in a law firm	12	33,3
Professor of Law	5	13,9
Others	3	8,3
Total	a)36	100,0

a) For one judge the main profession is missing.

Source: Reutter 2018a: 494.

As pointed out, judges serve on an honorary and part-time basis at the BCC. They make their living in their main professions. As table 8 shows, 44.4 percent of the judges of the BCC served at an ordinary court when they got promoted to the BCC. A third of the judges were lawyers in a law firm, and 13.9 percent were tenured professors at a university. The three remaining judges also held a law degree and used to work as a lawyer before they became a member of a parliament and then elected to the BCC. In sum, constitutional adjudication in Berlin is a monopoly of judges and lawyers. Apart from these representational deficits, another question arises from the composition of the court. Does it affect the rulings? As already indicated, I assume that professional judges tend to make stronger decisions and thus contribute to the judicial activism of politics. This might be due to a sort of "déformation professionelle" because judges might be inclined to prove that they are the better legislators and can make better laws than the parliament. In the csQCA, I assume that if the number of professional judges lies above the threshold of 3 I expect strong decisions. In the regression analysis, I used the raw data once again.

5. Analyzing Causes of Judicial Activism

So far, I have tried to develop indicators and describe conditions that describe cases and help to find causal links or correlations between dependent and independent variables or between sufficient or necessary conditions and the outcome. In the next step, I analyze and compare the 45 decisions which I have included in my study. As pointed out, this will be done with a regression analysis followed by a csQCA.

5.1. Regression Analysis

According to Lee Epstein and Andrew D. Martin a linear regression model is the "workhorse of empirical legal studies", notably because the model "allows us to include more than one independent variable in our analysis (…) and draw causal inferences" (Epstein & Winter 2014: 173). In this paper I use linear regression to examine if and to what degree the age of a decision, the type of the proceeding, the ideology and the profession of the judges affect the strength of decisions and thus the degree of judicial activism. It has to be pointed

out that the number of cases is rather low for regression analysis with four independent variables. Yet, this might be justified due to the exploratory nature of this paper.

Table 7: Causes of Judicial Activisma) (OLS regression)

Independent Variables	Unstandardized CoefficientsB	T-Values	Standardized Coefficients (Beta)
(Constant)	-0.732	-0.464	-
Age	-0.072	-1.119	-0.218
Proceeding	2.401**	2.144	0.322**
Ideology	0.696**	2.373	0.371**
Profession	0.388	0.933	0.181
Cases	45	–	–
R^2	0.186	–	–
Adjusted R^2	0.104	–	–

*** p-value < 0.001; ** p-value < 0.05; * p-value <0.10.

a) We used the program "SPSS" and run a multiple linear regression.

Source: W. Reutter.

Table 7 presents the results of the regression analysis. Any regression model assumes that there is no or at least only little autocorrelation among the independent variables. This precondition is fulfilled as the Durbin–Watson test, that measures autocorrelations among variables, produced the value of 2.389 that is slightly below the acceptable value of 2.5.[III] The coefficient of determination in this model explains 10 percent of the amount of variances of the dependent variable, which is, in fact, not very impressive. Even though it still is close to a medium-sized effect (Cohen 1992: 156f.), this low r^2 makes it difficult to draw robust conclusions based on the analysis. Nevertheless, some coefficients are significant at the 5-percent level. There are four independent variables in the model. Two of these variables are statistically significant. Proceeding with a regression coefficient of b=2.401 (p=0.038) has a larger explanatory effect (beta=0.902). Ideology shows a regression coefficient of b=0.696

(p=0.23) and beta=0.835.[IV] Overall, these findings indicate that institutional (type of proceeding) and attitudinal factors (ideology) played a role in the behavior of the judges at the BCC. It is noteworthy that two variables failed to trigger significant coefficients. The age of the decisions and the profession of the judges do not seem to have affected the rulings of the court. In addition, the csQCA failed to corroborate the findings of the regression analysis, as well.

5.2. Crisp-set Qualitative Comparative Analysis

As pointed out, QCA is an encompassing research design that has been applied to various fields of research (Legewie 2013; Arvind & Stirton 2010; Schneider & Wagemann 2007; Berg-Schlosser et al. 2009; Meuer & Rupietta *2016;* Reutter 2014, 2016, 2018: 103-130). In this paper, I will use a special type of QCA: the crisp-set Qualitative Analysis (csQCA) as a tool that should help me to provide "a meaningful interpretation of the patterns displayed by the cases under examination" (Wagemann & Schneider 2007: 3). To my knowledge, this is the first time that csQCA is used to explain sufficient and/or necessary conditions that might give reason for judicial activism. While there are many qualitative and even more quantitative studies examining the politicization of judicial behavior or judicial activism of courts this is the first one using QCA.

The first step in any csQCA is to build a dichotomous data table (Rihoux & De Meur 2009: 39-44) which means that I have to adjust the original data in such a way that they are compatible with the binary logic on which the csQCA rests. In other words, I have to define when a decision of the BCC is either weak or strong. In the same way, I have to determine when I believe the conditions to meet the criteria mentioned above. As a matter of fact I have already explained and determined the thresholds for the outcome as well as for the conditions in the preceding chapter. The result of this transformation can be found in the dichotomous data table, which includes the raw data as well as their dichotomized csQCA values.

Table 8: Truth Table for 45 Decisions

Row	AD (8)	AJR (1)	IJ(3)	PJ (3)	dj (0)	DJ (1)	Cases(Outcome)
1	0	0	0	0	14	0	BE1(0), BE2(0), BE3(0), BE4(0), BE5(0), BE6(0), BE7(0), BE8(0), BE9(0), BE22(0), BE24(0), BE25(0), BE26(0), BE27(0)
2	0	0	0	1	11	2	BE10(0), BE11(0), BE12(0), BE13(0), BE14(0), BE16(1), BE17(0), BE18(1), BE19(0), BE20(0), BE21(0)BE44(0), BE45(0)
3	0	1	0	0	0	1	BE23(1)
4	0	1	0	1	1	0	BE15(0)
5	1	0	0	1	6	0	BE38(0), BE39(0), BE40(0), BE41(0), BE42(0), BE43(0)
6	1	0	1	0	5	1	BE28(0), BE29(0), BE30(0), BE31(1), BE33(0), BE34(0)
7	1	0	1	1	2	1	BE35(0), BE36(1), BE37(0)
8	1	1	0	1	2	0	BE44(0), BE45(0)
9	1	1	1	0	0	1	BE32

AD = age of decision (as of 03/22/1992; threshold = 8); AJR = abstract judicial review (= 1); IJ = Judges nominated by parties in opposition (threshold = 3); PJ = Professional judges (threshold = 3); DJ = Degree of judicial activism (threshold = 3.9); Frequency with outcome 0 = Number of weak decisions; Frequency with outcome 1 = Number strong decisions.

Source: my calculation; calculated with TOSMANA 1.54

Based on this dichotomous data table I constructed a truth table which means I compared all logical combinations of conditions with those that I found in the real world. If there are four conditions with a value of either 0 or 1, there are 16 logical combinations possible, that is 2^k (k = number of conditions). The truth table, a common tool in Boolean algebra, helps to reduce complexity and allows to compare cases in a systematic, transparent, and replicable fashion to identify necessary and/or sufficient conditions for an outcome. Table 9 tells us, which logically possible configurations are empirically existent.[V] However, as table 9 proves, not all logical configurations are causally linked to the outcome I want to explain. So, by checking the logical possible configurations against reality I can find out whether a cause is associated with a specific outcome. On this basis, I can identify the coherence of the data by examining whether all logical possible configurations of conditions meet a corresponding configuration in the real word. As it turns out, the reality is complex but not complex enough.

It has to be noted, though, that we find several contradictory cases that are configurations that triggered strong as well as weak decisions (rows 2, 6, and 7). These contradictions could be eliminated by adjusting the configurations, or by including new or removing existing causal conditions, by adding new cases, or by recalibrating the data (Ragin 1987: 113-118; Marx & Dusa 2011: 109-111.; Rihoux & De Meur 2009: 48-56). It will be a major challenge for future research to make these adjustments. Furthermore, there is no condition that figures in all cases in the same way and with the same effect. The outcome [O] occurred when the aforementioned conditions were present [AD+AJR+IJ+PJ] or when they were absent [ad+ajr+ij+pj]. In consequence, none of the conditions qualifies as sufficient or as necessary. Besides the same is true with regard to weak decisions. Here, we also find different paths leading to the outcome.

In the next step, I have to further minimize the information in the truth table. The truth table does not carry any theoretical content. Yet, it is striking that two variables identified in the regression analysis as significant – ideology and proceeding – do show no effect whatsoever in the csQCA. They are neither sufficient nor necessary. At least the outcome occurs with and without these conditions present. In addition, only 6 out of 45 decisions qualify as strong in the sense defined above. All other decisions did not require any political adjustment by the legislature even though I have set the threshold for strong decisions rather low. This finding confirms the assumption that subnational constitutional courts do hardly

dispose of the resources to develop strong decisions or judicial activism. Finally, we find only five configurations of conditions that seem to be linked to at least one strong decision (rows 2, 3, 6, 7, and 9). In Boolean terms[VI] these solutions can be expressed as follows:

ad*ajr*ij*PJ + ad*AJR*ij*pj+ AD*ajr*IJ*pj+ AD*ajr*IJ*PJ+ AD*ajr*IJ*pj → O.

In addition, we find only two configurations that exclusively trigger strong decisions, and these configurations explain just two cases. All other configurations lead to strong as well as to weak decisions, thus confirming the notion that multiple causalities are possible.

6. How to Interpret Contradictory Results: (Very) Tentative Conclusions

Apparently, my research did not produce the robust and comprehensive findings that I hoped for. Neither the regression analysis nor the csQCA led to unequivocal and definite results. Keeping these limitations and the exploratory character of this paper in mind, we still can draw some tentative conclusions based on the two analyses.

First, there are countless outstanding studies examining constitutional courts, judicial decision-making, and judicial activism. Nonetheless, there are still some blind spots and lacunas in this field of research. I focused on a blind spot of this research: the subnational level. I explored the role of a constitutional court in a German Land. This empirical focus raises the question of whether constitutional adjudication means the same thing at the national and the subnational level. As a matter of fact, my findings challenge the idea that any constitutional court can be treated in the same manner. At least as far as the Berlin Constitutional Court is concerned it is striking that only 13 percent of all politically salient decisions this court has made between 1992 and might contribute to what has been coined judicial activism. This low share of important decisions hardly proves the BCC as a major source of judicial activism. Distinct from Alec Stone Sweet (2000) my study did not corroborate the assumptions that ruling with a constitutional court means ruling like a constitutional court or that there is a global trend towards "juristocracy" (Hirschl 2004). At least not at the subnational level.

Second, according to Pócza et al. (2017: 1557) the "main deficiency of the systematic empirical research on constitutional adjudication consist[s] in an unsophisticated dichotomous approach that separates the merely positive and negative decisions of constitutional courts [...]". They developed a strength index to paint a "more nuanced and

[...] more systematic picture of the practice of constitutional adjudication" (Pócza et al. 2017: 1559) I, too, used this strength index to measure the degree of judicial activism in a German Land. Even though I found only a few decisions that would qualify as "strong" enough to make the parliament adjust laws the strength index proved to be an innovative and helpful tool that allows to determining whether a court decision might affect future legislative actions. It helps to differentiate among decisions and capturing various dimensions of decisions in a sophisticated manner.

Third, my analysis of the aforementioned 45 decisions of Berlin Constitutional Court failed to provide a definite answer to the research question at hand. Even though the regression analysis indicated that ideology and the type of proceeding might give reason to judicial activism, the csQCA failed to corroborate these findings in a satisfactory way. In this perspective the conditions mentioned above are neither necessary nor sufficient for judicial activism. Distinct from the Constitutional Court in Thuringia that Oliver W. Lembcke saw as a "learning" institution becoming more self-confident over time and in consequence more active, the Berlin Constitutional Court did neither made stronger decisions over time nor did abstract judicial reviews necessarily trigger strong decisions. At the same time, there are cases where both the institutional preconditions and attitudinal factors qualify as a reason for the outcome. Furthermore, notably the contradictory cases raise serious questions about the theoretical concepts mostly used in studies on judicial behavior and judicial activism. Because: "if several competing theories try to explain the same result, QCA techniques will quickly disqualify the theories that are unable to discriminate correctly between cases with and without the outcome under study. This will be indicated by the presence of so-called contradictory configurations (…)," which also occurred (Berg-Schlosser et al. 2009: 10). Overall, these findings might raise the question as to how the background of judges impacts on the degree of judicial activism in the German Länder. It will be up to future research to find out under what conditions subnational constitutional courts in Germany might contribute to judicial activism. Overall, the study made clear, that as far as political science is concerned the analysis and the explanation of judicial activism in the German *Länder* are still in its infancy.

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werner.reutter@rz.hu-berlin.de. – This work was supported by the Deutsche Forschungsgemeinschaft under grant no. RE 1376/4-1; AOBJ: 644495). I am grateful to Christin Engel; without her assistance, I would have been at a total loss with the statistical part of this paper. Maria-Lena Muckelbauer helped to collect the data. The usual disclaimer applies.

[I] I use the terms "Land" and "state" interchangeably.

[II] Furthermore it has to be noted that "ideology" as measured by the number of oppositional judges leads to only two expressions, 2 and 5. It is a metric variable (number of judges), but with a small variance only.

[III] The regression has been calculated by Christin Engel.

[IV] This finding is partly confirmed if we examine the bivariate correlations between the dependent and the independent variables. If we take proceeding as a metric variable we have a weak correlation (r=0.262) at the 10 percent level of significance. Due to the property of the variable, I have calculated the relationship with the nominal or interval measure Eta. In this case proceeding explains 26.2 percent of the variance on the dependent variable. The Chi-square test shows a value of p = 0.153. As p is greater than the level of significance (5 %) the null hypothesis cannot be rejected. As the null hypothesis is the default assumption that nothing happened this indicates that there is no causal link between proceedings and judicial activism. We can explore a possible causal link between the dependent variable and ideology if we also calculate the nominal or interval measure Eta. With p=0.012, the p-value remains below the level of significance. That is, the nullhypothesis can be rejected and there is a statistically significant association between the variables.

[V] The software needed for the analysis can be retrieved for free from: http://www.compasss.org/software.htm or from http://www.socsci.uci.edu/~cragin/fsQCA/software.shtml.

[VI] In Boolean algebra an uppercase letter means that a condition is present [1], while a lowercase letter indicates that the condition is absent [0]. Furthermore, the mathematical term "AND" is represented by an asterisk [*], and the term "OR" by the plus sign [+]. The arrow symbol at the end of a term links a set of conditions to the outcome to be explained.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Brexit and Saint-Pierre's Peace Project

By

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Perspectives on Federalism, Vol. 11, issue 2, 2019

Abstract

The Euroscepticism that led to the result of the Brexit referendum is not new, but can actually be traced back hundreds of years. This article explores Euroscepticism by comparing the modern EU with the European federation that was proposed in the 18th century by the Abbé de Saint-Pierre. The 'peace project' that he outlined generated many objections from philosophers including Rousseau, Kant and Voltaire. Although these objections were aimed at an abstract political proposal this article shows that similar arguments are in fact made today by contemporary Eurosceptics against an existent political institution – the EU. Whilst acknowledging that the federation proposed by Saint-Pierre and the structure of the modern EU differ greatly, this article highlights how they share one important aim, namely the maintenance of peace in Europe - an aim that makes their comparison so fruitful but one which was largely ignored by activists during the Brexit referendum campaign.

Key-words

EU, UK, Brexit, Eurosceptic, Saint-Pierre, Hobbes, Rousseau, Social Contract

1. Introduction

Since its conception, the European Union (EU) has faced many difficulties, but never more so than over the last 10 years. These include the Eurozone recession of 2008, the European debt crisis and the necessity for financial bailouts for some member states, the huge influx of refugees into the Union largely as a result of conflicts in Syria, Afghanistan and Iraq, and the largely unhindered migration of EU citizens between member states. Whilst there has always been Euroscepticism amongst many EU citizens these particular issues have driven disillusionment of the European project to a new high, culminating in the referendum held in the UK on 23rd June 2016 on whether it should withdraw from the EU altogether - the so-called 'Brexit' (Ornek & Ultan 2015). This referendum, and the result in favour of the UK leaving the EU has, like never before, brought to the fore questions concerning the fundamental purpose of the EU as well as the appropriate structure it should take in order for this to be satisfied.

The history of the EU can only be traced back 60 years but the concept of some sort of Europe-wide political union goes back centuries. An early example of this is that of Charles-Irénée Castel, Abbé de Saint-Pierre (1658-1743) who, in 1713, published *A Project for Settling an Everlasting Peace in Europe* in which he outlined the way a European federation could be formed as a means of bringing peace to Europe.[I] Although much ridiculed at the time by authors such as Leibniz (Hinsley 2004: 31) and Voltaire (Perkins 1965: 93), others were more sympathetic. Following his death, Jean-Jacques Rousseau edited and published a shortened version of the work, titled *Abstract of Saint-Pierre's Project for Perpetual Peace*, (although this diverges significantly from Saint-Pierre's original (Spector 2013)), as well as a 'Judgement' of the work in which he raised various objections.[II] In 1784 Immanuel Kant acknowledged the importance of Saint-Pierre's proposal and proceeded to publish, in 1795, his own essay entitled *Toward Perpetual Peace,* in which he likewise laid down conditions he thought would be necessary for peace to be attained in Europe.

The political events that have occurred in Europe over the subsequent centuries show, however, that whatever wisdom was conveyed in these works and reflections, they made very little practical difference to the lives of the average citizen of any European nation. However, perhaps Kant was right – maybe it was simply that the time was not right for

such proposals to be achievable. For eventually, out of the ashes of Western Europe following the Second World War, treaties were signed that led to ever closer political union in Europe culminating in what is now the EU (Staab 2011). Accordingly, the peace projects of the Enlightenment now seem less idealistic and fanciful and, by re-examining them in light of the problems currently facing the EU, they can proffer many insights.

In this article I concentrate on the project proposed by the abbé de Saint-Pierre, because, firstly, the extent of European political unity that he proposes has much in common with the modern EU. Secondly, he was a negotiator at the Peace of Utrecht, which, to a large extent, established the modern boundaries of the countries of Western Europe (Mallat 2015: 100).[III] In the first section I examine the philosophical background to Saint-Pierre's work by comparing it to the social contract theory of Thomas Hobbes (1588-1679). In section two I outline Hobbes' view of the international domain and examine why Saint-Pierre, although agreeing with much of Hobbes' political theory, diverged greatly in regard to international relations. In the third section I offer a summary of the most important aspects of Saint-Pierre's solution to the problems facing the international domain – namely, his proposal for a European federation. In the final section I investigate various objections that were raised against Saint-Pierre's project by Rousseau and others, and relate these to the current crises facing the EU particularly the arguments that were presented by the opposing sides during the 2016 Brexit campaigns.

2. Saint-Pierre, Hobbes and man in the state of nature

Saint-Pierre's political background sits firmly in the social contract tradition and bears striking similarities to the theory proposed by Thomas Hobbes over 70 years prior to his own European peace project. As Hobbes' political theory is so familiar, and Saint-Pierre's is relatively obscure, I will compare them before considering their views of international relations in section two.

Hobbes describes the situation mankind would be in if there were no common power or rule of law. He calls this the 'natural condition of mankind', commonly referred to in the social contract tradition as the 'state of nature'. He explains that 'during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man'. The state of nature is therefore

a state of war and the life of man is 'solitary, poor, nasty, brutish, and short' (Hobbes 1951: 82). He claims that this is the result of man's natural equality and the mutual will men possess for hurting each other (Hobbes 1951: 80; see also 1949: 25). As a consequence of this he claims that man has a natural right of self-preservation and 'a right to use all the means, and do all the actions, without which he cannot preserve himself' (Hobbes 1949: 27).[IV] Saint Pierre agrees with much of this analysis of the characteristics of man in the state of nature. He says that men in the state of nature are 'predatory animals, defiant, jealous, presumptuous, proud and arrogant' (Saint-Pierre 1714: xxiv). As there is natural equality, i.e. men are relatively similar in strength and intelligence, no one is able to gain total control over others and so violence is all that can be used to settle arguments. In such a situation men have an unlimited right to that which they judge is necessary for self-preservation (Saint-Pierre 1714: 4-6).

However, for Hobbes the state of nature is not, in principle, a moral vacuum and he posits nineteen laws of nature. He defines a law of nature as the 'dictate of right reason, conversant about those things which are either to be done or omitted for the constant preservation of life and members, as much as in us lies' (Hobbes 1951: 84). Since war is the very state in which the preservation of life is impossible, it follows that 'the first and fundamental law of nature is, that peace is to be sought after, where it may be found; and where not, there to provide ourselves for helps of war' (Hobbes 1949: 32). Similarly, for Saint-Pierre, the 'first rule of natural equity' is the silver rule, which states that man should 'never use violence against any of his peers, as he would not want any of them to use it against him' (Saint-Pierre 1714: 52-54).[V] However, given the lack of 'sufficient safety' in the state of nature, man has the right to use violence for self-preservation (Saint-Pierre 1714: 41-42).

Hobbes proposes that the only way out of this situation is for individuals to convey their right to all things to a third person and enter a contract (Hobbes 1949: 34). Each man must consent to 'subject his will to some other one, to wit, either man or council' (Hobbes 1949: 67). In doing so, each individual conveys to the man or council 'the right of his strength and faculties; insomuch as when the rest have done the same, he to whom they hath submitted hath so much power, as by the terror of it he can conform the wills of particular men unto unity and concord' (Hobbes 1949: 67). This union is called 'civil society' or 'commonwealth'. The person or council, in whom the will of all is invested, has

absolute power and is called the 'sovereign' (Hobbes 1951: 112). This sovereign has the right to make civil laws and to punish transgressors (Hobbes 1949: 74). For Hobbes, individuals enter civil society for peace and security, but security can only be achieved through fear – the fear of punishment if the laws are transgressed (Hobbes 1951: 219). Similarly, Saint-Pierre says that it is only through the fear of punishment that peace can be secured and this requires an agreement amongst equals fearful of 'their total destruction' (Saint-Pierre 1714: 52-54). The agreement establishes an absolute power capable of creating legislation and enforcing compliance. For both Hobbes and Saint Pierre this power can take the form of monarchy, aristocracy or democracy (Saint-Pierre 1714: 45-46 & Hobbes 1951: 112-114).

3. Saint-Pierre, Hobbes and the international state of nature

Given the similarities in their fundamental social contract theories we might expect the authors to agree about the nature of the international domain and, furthermore, for both to offer similar solutions to the problems it faces. However, as we shall see, although they do agree on the former, their views of the latter diverge significantly.

Both Hobbes and Saint-Pierre equate the international domain with a state of nature and hence a state of war. For Saint-Pierre, since sovereigns 'have as yet no permanent society among them, they have no law whereby to decide their differences without war' (Saint-Pierre 1714: 3). Thus, the international domain is a constant state of war because it 'can never procure any sufficient security for the execution of treatises' (Hobbes 1957: 2). Similarly, Hobbes says that because states are independent, sovereigns 'are in continual jealousies, and in the state and posture of gladiators…which is a posture of war' (Hobbes 1957: 83). As is the case in the inter-personal state of nature, the reason for this situation is because there is no common power in the world to punish injustices that may arise between states (Hobbes 2008: 57).[VI] Each state, therefore, has a national right to pursue its interests by whatever means it deems necessary and hence the international domain is a state of war. Although there are international laws of nature, analogous to those that exist in the inter-personal state of nature, without a power sufficient to enforce compliance it would be irrational to obey them (Hobbes 1997: 228). As Saint-Pierre says, any treaties that may exist between sovereigns in the state of nature are insufficient as a means to perpetual

peace because, as each sovereign has the power to violate them, they have 'nothing in them that's binding, any longer than during the pleasure of the allies' (Saint-Pierre 1714: 4).

Although the two philosophers offer similar characterisations of the international domain, they present very different solutions to the problems inherent in it. Given that Hobbes uses the analogy of the individual and the state when characterising the international domain, one might expect Hobbes to propose an analogous move and assert that, in order for the international state of nature to become a state of peace, sovereigns should give up their right to all things to a common power and thus form a global civil society. Furthermore, this common power would need to be powerful enough to enforce compliance to the international laws of nature. Hobbes does not, however, make this move probably because he does not think the analogy between the individual and the state is perfect.[VII] Rather, he thinks that for much of the time there will be a balance of power between states in the international state of nature, and whilst this is not a situation of true peace it does, to a large extent, enable citizens to live satisfactory everyday lives (Hobbes 1951: 83). The same cannot be said of individuals in the inter-personal state of nature and so the analogy of the individual and the state does not strictly hold.

Saint-Pierre, on the other hand, does not believe that true security can be obtained for citizens of any state if there is simply a balance of power existing in the international domain because, at any time, this balance can be upset through war and conquest. For Saint-Pierre, war between sovereigns wholly interrupts both domestic and international commerce and it is commerce, not war, which enriches both states and citizens, something that cannot be accomplished effectively in an international state of nature (Saint-Pierre 1714: 11). Furthermore, he thinks that many of the obstacles preventing sovereigns acting justly towards their own people are due to the state of international relations. So to truly solve the problems that exist within civil societies there has to be true peace, not only within the state, but also in the international domain (Saint-Pierre 1714: 87-89). In contrast to Hobbes, therefore, Saint-Pierre does propose the analogous move - just as individuals did in the inter-personal state of nature he thinks that states must form a union of states with a common power of sufficient strength to enforce compliance to international laws. This international union should be entered into voluntarily and it will not compromise national sovereignty. It is to the nature of his proposal that I shall now turn.

4. The European federation of Saint-Pierre

Saint-Pierre presents his solution to the problems endemic in the international domain by concentrating on Europe. I shall, therefore, likewise restrict my discussion to Europe although there is no reason why, in principle, his solution should not be applied globally. Following his lead, and restricting the discussion to Europe, also enables direct comparisons to be made with the present-day EU.

Saint-Pierre's solution to the problem of the international state of nature is to take precautions against national wars, analogous to the precautions already taken to prevent violence between individuals. Rousseau gives an excellent overview of the general aims and motives of Saint-Pierre's European federation: To ensure an end to European wars would require a 'federal government as shall unite nations by bonds similar to those which already unite their individual members, and place the one no less than the other under the authority of the law' (Rousseau 1991: 55). Such a government would have the force to be able to hold 'the subject, the ruler, and the foreigner equally in check' (Rousseau 1991: 55). This is because states 'stand to each other strictly in a state of war' and any treaties that may exist 'are in the nature rather of a temporary truce than a real peace' (Rousseau 1991: 66). If a lasting federation is to be created, all its members must be 'in a state of such mutual dependence that no one of them is singly in a position to overbear all the others, and that separate leagues, capable of thwarting the general league, shall meet with obstacles formidable enough to hinder their formation' (Rousseau 1991: 66). Self-interest will, therefore, ensure loyalty to the federation. Saint-Pierre proposes twenty-four fundamental Articles necessary for this European federation to both form and remain stable. For brevity I have condensed the central ideas contained in these articles into eight main points:

1) Saint-Pierre claims that initially the contracting sovereigns must enter into a 'permanent and perpetual union.' This will involve a permanent European congress, in which all states are 'perpetually represented.' The function of the congress is to settle disagreements between the parties. The federation can begin when as few as two like-minded states sign up and then should expand slowly. (Saint-Pierre 1714: 106-107).

2) 'The European Society will not at all concern itself about the Government of any State' (Saint-Pierre 1714: 290-293). Thus, whether a state is a republic, democracy or monarchy is irrelevant. Saint-Pierre thinks that if the federation has the right to dictate the

form of government that member states must have in order to join then it is unlikely that any will do so and thus Europe will remain in an international state of nature.

3) The European federation must have the power, through the representatives of each member state, to pass measures that are in its best interests. Majority voting is the rule, although unanimity is required to change the fundamental articles (Saint-Pierre 1714: 131). Interestingly, he toys with the idea that votes in the assembly ought to be in proportion to population size, but settles on one member one vote (Saint-Pierre 1714: 129).[VIII] To ensure equity, the federation must have a rotating presidency.

4) In terms of financing the European federation he says that 'the members...shall contribute to the expenses of the society, and to the subsidies for its security, each in proportion to his revenues' (Saint-Pierre 1714: 129).

5) Saint-Pierre believes that it is commerce that enriches the lives of citizens and so for the European federation to be stable there must be agreed trade rules between member states. Writing in the 18th century he did not have a modern understanding of the science of economics so he does not expand on what these should be, but he thinks that if effective rules were in place such a federation would, as Rousseau puts it, produce 'a marked progress in agriculture and population, in the wealth of the state' (Rousseau 1974: 93).

6) Saint-Pierre says that the European federation must recognise the territory held by each member. 'Each sovereign shall be contented, he and his successors, with the territory he actually possesses, or which he is to possess by the treaty hereunto joined' (Saint-Pierre 1714: 293-319). After all, most states can make some historical claim to foreign territory and so the only way to avoid future destabilising problems is if all states relinquish such claims on entering the federation. He does acknowledge, however, that the federation must have the right to help member states deal with any internal conflicts, rebellions or revolutions that may arise, because such problems can potentially spread across borders and effect the federation as a whole (Saint-Pierre 1714: 290-293).

7) It is absolutely essential that each state fears the repercussions of acting against the federation - 'there can be no durable union...unless each member is retained in it, not only by considerations of pleasure and profit, which are sufficient for those that are wise and sensible; but also by some great fear, which is necessary to retain those in it that are not so' (Saint-Pierre 1714: 123). He thinks that enlightened sovereigns will realise that it is in their best interests to be active members of the federation anyway. However, for those that are

ignorant, fear, induced by the threat of punishment, will be necessary to ensure that they recognise that continued membership is in their best interest.

8) The European federation is initially to be one of Christian states although this does not mean it is to be governed as such (Saint-Pierre 1714: 123). Rather, the central authority must ensure that disputes over articles of faith do not lead to inter-state or intra-state violence (Saint-Pierre 1714: 382-385). However, this might simply reflect the fact that at the time of writing Western Europe only consisted of Christian states. For he also says, with respect to Islamic states, that the 'union, to keep up peace and commerce with them, might make a treaty with them, take all the same securities, and grant each of them a resident in the city of peace.' They would be 'either members or allies of the union' (Saint-Pierre 1714: 105-106).

Saint-Pierre thinks that a European federation thus outlined would succeed in its aim of replacing the international state of war in Europe with abiding peace. In the international state of nature states are led to take up arms for reasons of conquest, protection against aggression, the maintenance of rights, economic advantage, the settlement of differences, or to fulfil the obligation of a previously entered treaty. He thinks the federation he outlines removes all these reasons for war and would therefore lead to perpetual peace.

Now it might seem that Saint-Pierre's project, with its ultimate aim of maintaining perpetual peace in Europe, is not really relevant to the present day EU as superficially this seems to exist in order to improve the everyday lives of its citizens rather than to prevent wars between European states. However, if we briefly examine the history of the EU we see that a significant component of the original motivation for its establishment was in fact to maintain peace in Europe (Judt 2006). It seems reasonable to characterise Europe in the 1930s and 1940s as akin to a Hobbesian international state of war. Following the horrors of the two 20th century world wars, the Council of Europe was established in 1949. At a speech following its inauguration the French Foreign Minister Robert Schuman said, 'We are carrying out a great experiment, the fulfilment of the same recurrent dream that for ten centuries has revisited the peoples of Europe: creating between them an organization putting an end to war and guaranteeing an eternal peace' (Nordvig 2014: 14). He went on to say 'Audacious minds, such as…Abbé de Saint Pierre, Rousseau..[and]..Kant, had created in the abstract the framework for systems that were both ingenious and generous'

(Hagger 2015: 20). In 1951 the Treaty of Paris resulted in the creation of the European Coal and Steel Community, which was the world's first supranational institution and would, as Shuman put it, ensure that 'any war between France and Germany becomes not only unthinkable but materially impossible' (Schuman 1950). Subsequent treaties, aimed at ever closer political and economic ties followed until, via the Maastricht Treaty of 1993, the EU was born and finally, in 1999, there came the launch of the single Euro currency (Teasdale 2012). Furthermore, so essential is the EU regarded as an institution for the preservation of peace in Europe that in 2012 it received the Nobel Peace Prize, the committee stating that 'the Union and its forerunners have for over six decades contributed to the advancement of peace and reconciliation, democracy, and human rights in Europe' (Telò 2014: 342).

When we consider the historical development of the EU we see, therefore, that it is very much a project for maintaining peace in Europe and this fact should not be overlooked or forgotten. Having acknowledged this point it is obvious that the projects for peace proposed by writers of the Enlightenment are worth considering when discussing the structure of the EU and the problems that it faces. In the following section I shall discuss some objections that have been raised against Saint-Pierre's European federation and show that they are relevant to the contemporary EU, particularly the Eurosceptic arguments that were made during the Brexit campaigns in the UK.

5. Objections to Saint-Pierre's federation and the European Union

In Rousseau's 'Judgment' of Saint-Pierre's project, and in his other writings on political philosophy, we find many insightful objections to the federation.

5.1. A large European federation would be impractical

Although Saint-Pierre thinks that a European federation could start with just a small number of states agreeing to his fundamental Articles he says that, for it to be sufficiently stable, it should 'increase as much as possible the number of sovereigns party to the grand alliance' (Cooper 1974: 26). Rousseau, however, argues that a large federation would in fact be weak. Throughout his political writings, he makes reference to the ideal size or extent of states. He says that just as 'nature has set limits to the statute of a well-formed man...so with regard to the best constitution of a state there are limits to the dimensions it should

have, in order that it be neither too large to be well governed, nor too small to be self-sustaining.' For, 'the more the social bond stretches, the looser it becomes, and that in general a small state is always proportionally stronger than a large one' (Rousseau 1991: 122). In fact, he goes as far as advising Poland to reduce its size - its size being its 'radical defect' (Rousseau 1991: 173).

Rousseau gives two main reasons why he thinks this is the case. Firstly, administration becomes more burdensome and expensive the more levels of bureaucracy that exist, i.e. town, county, province, state, inter-state, and so on. Secondly, no single set of laws will be acceptable in a large federation given the diversity of religious and cultural beliefs that will be held by the citizens (Rousseau 1991: 122-123). This second reason will be discussed later.

The first claim was also cited as one good reason for the UK to leave the EU in the Brexit discussions (Malpass 2016). The EU has expanded dramatically since the days of the Council of Europe, which had only six signatories, to the present-day Union, which has 28 member states, and it has been suggested that this is one reason why it faces such problems today (Verdun 2007: 14). However, there have been many studies undertaken to see whether the expansion of the EU has slowed down decision making within the Union but all are inconclusive (Hertz & Leuffen 2011). Part of the reason for this is that EU expansion has occurred in conjunction with ever increasing political union, thus making comparisons difficult to draw (Hertz & Leuffen 2011: 193). As for Rousseau's worry that administration becomes more expensive the more levels of bureaucracy that exists, this may be true in the case of the EU. Speaking on behalf of the Leave campaign, British Conservative MP Michael Gove claimed that, on leaving the EU, Britain would not have to spend 600 million pounds per week on EU regulations (Gove 2016). However, in reality administration costs for the EU accounted for less than 6% of the EU budget in 2015 (McColl 2015) and, in order to claim that this figure is excessive, it has to be balanced against the economic advantages that a larger single market brings with it - a move that the Leave campaign failed to make. What is interesting is that, contrary to Saint-Pierre's proposal, member states of the EU do not contribute to the expenses in proportion to their revenue. For example, due to the UK rebate that has been in place since 1985, the UK contributed in 2015 less of its Gross National Income to the EU budget than any other member state (McColl 2015).

However, what is actually at the heart of Saint-Pierre's support for a large European federation emerges directly from his Hobbesian political theory and the central notion that the international state of nature is a state of war. For the main reason that he advocates a federation is to bring about perpetual peace in Europe and thus an end to this international state of war. He thinks that such a peace is not going to be achieved if only two or three European states form a federation, for they will still be in a Hobbesian state of war vis-à-vis the other European states. Rather, the only way for European states to leave this international state of war is if *all* the states agree to join the federation.

Applying this to the EU we find that this is also at the heart of the EU's policy of expansion, which holds that 'the extension of the zone of peace, stability and prosperity in Europe will enhance the security of all its peoples…In addition it will boost economic growth and create jobs in both old and new member states' (European Commission 2001: 5).[IX] Thus EU expansion is motivated by both economic and political interests. With respect to some states the motivation has been largely economic, as was the case with the 1995 enlargement which saw the accession of Austria, Finland and Sweden to the EU. On the other hand, the enlargement of 2004, which took in the bulk of the ex-communist countries of Eastern Europe, was motivated in the main by concerns for peace and stability in Europe (Avery et al 2009). Given that the EU has helped to maintain peace in Europe for over 60 years it is surprising that this was not emphasised by Britain Stronger in Europe (the official organisation established to campaign for a Remain vote in the Brexit referendum) when it presented its 'six reasons' why the UK should remain in the EU (Britain Stronger in Europe 2016).

5.2. Problem of Diversity of Culture

As mentioned earlier, Rousseau also thinks that a large federation would be unstable because no single set of laws will be acceptable given the diversity of religious and cultural beliefs that will be held by the citizens (Rousseau 1991: 122-123). Saint-Pierre does not see this as a problem because he proposes that the European federation be comprised only of Christian states, which he assumes will all hold relatively similar beliefs.[X] Furthermore, he insists that the federal authority is not to legislate on matters of Church doctrine (Saint-Pierre 1714: 382-385). However, if we examine Rousseau's view in more detail we see that his objection is only really effective against some types of federations and is actually

enlightening when we consider why the EU has managed to grow relatively successfully, helping to maintain peace in Europe, over the last 60 years.

Rousseau believes that the opinions of subjects are their own private concerns, unless they are of importance to the community. He explains that, for there to be a stable society, there has to be a shared conception of justice and a belief in the sanctity of the social contract. With respect to religion he thinks that it is important to the state that religious belief leads one to respect one's duties as a citizen. Therefore, 'the dogmas of...religion are of no interest to the state...except as they have a bearing on the morals and duties which the citizen professing it should hold and perform in dealing with others.' (Rousseau 1991: 437). He points out that 'one should tolerate all those religions that tolerate others, provided that their dogmas are in no way contrary to the duties of the citizen', for 'it is impossible for intolerant men joined by the same dogmas ever to live in peace among themselves' (Rousseau 1991: 136-138).

So, for Rousseau, diverse religious and cultural beliefs are not *necessarily* an obstacle to civil society. As long as there is a shared conception of justice, an acceptance of the fundamental constitution of the state and tolerance towards other citizens, then any society should be possible, including an international multi-cultural federation such as that proposed by Saint-Pierre. However, Rousseau thinks that, in reality, peoples with differing religious and cultural beliefs never can have a common conception of justice, and if he is right about this then a European federation comprised of a mixture of such peoples would never be stable.

If we apply this to the EU we can see why it has been able to grow in size, despite the fact that it is comprised of a vast array of cultures. For in the case of the EU, the acceptance of a fundamental conception of justice *is* required for states to join. The Treaty on European Union (TEU) asserts, in Article two, that the Union is:

> founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. (TEU 2007)

Furthermore, Article 49 affirms that 'Any European State which respects the values referred to in Article two and is committed to promoting them may apply to become a member of the Union.' Article three stresses that the EU 'shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced' (TEU 2007). All this is summed up in the motto of the EU which, in English, is 'United in diversity' (Kjœr & Adamo 2016: 2).

From this we can see that there is a significant difference between the EU and the federation proposed by Saint-Pierre. Saint-Pierre holds that his European federation should not be concerned with the internal constitution of any member state. Contrary to this, however, the constitution of member states is *fundamental* to the EU - for it insists that membership is only open to European states that fulfil the 'Copenhagen Criteria' which, in addition to economic conditions, proclaims that states must have 'stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' (Krygier 2006: 15). It is surprising that this issue was not also central to Saint-Pierre's project for he was, after all, proposing a democratic European federation. Did he really think that a European federation based on democratic principles could function if comprised of member states that were, themselves, undemocratic?

It was this that was in fact the main criticism of Saint-Pierre's project made by Voltaire in 'De la paix perpétuelle', which he published in 1769. He said, 'the peace imagined by a Frenchman named Abbé de St. Pierre is a chimera which will never subsist between princes any more than between elephants and rhinoceroses, between wolves and dogs. Carnivorous animals always tear each other apart at the first occasion' (Riley 1974: 191). Rather, he thought peace in Europe could only come about when 'men shall know that there is nothing to gain in the happiest wars, except for a small number of generals and ministers' and when citizens of states perceive those that support war to be 'the enemy of all nations' (Riley 1974: 192). He was, therefore, acknowledging that peace could only eventuate when the attitudes and beliefs of citizens and sovereigns had changed. So for Voltaire the main reason Saint-Pierre's federation would never form is because it accepted states that had governments whose beliefs were at odds with the democratic principles that were necessary for the federation to be permanent and successfully perform its function of maintaining peace in Europe.

It is true that in the 18th century there were no truly democratic states in Europe (Cesa 2010) and so Voltaire's criticism of Saint-Pierre's proposal seems reasonable. Turning to the EU, over half the current members have not been democracies at some point during the last 60 years. However, what was important to the initial success of the EU project was that the original six signatures to the EU project *were* democratic and it only grew in size by accepting states that fulfilled the criteria that would become known as the 'Copenhagen Criteria'.

However, although the EU only accepts as members those states that, from a constitutional point of view, share a fundamental conception of justice, this does not mean that all the citizens of the EU, on a personal level, share this conception. Furthermore, as the EU requires that member states be democracies, the personal conceptions of justice held by its citizens will be reflected in the policies adopted by each government. Nowhere is this more apparent than in the Brexit referendum where an issue of upmost importance to both the UK and the EU as a whole was determined by the citizens of one member state. In granting such a referendum the British government enabled individuals' feelings of xenophobia and nationalism potentially to direct the course of foreign policy (Versi 2016). In addition to the problems arising from a diversity of cultures at a state level, Rousseau likewise claims that nationalism would also be a big problem for a large federation.

5.3. Nationalism

Although Rousseau thinks that nationalism, a devotion to one's own country, would prevent any form of large federation from being stable, he does not necessarily see nationalism as a bad thing. Although he says, 'Today...there are no longer any Frenchmen, Germans, Spaniards or even Englishmen; there are only Europeans' (Rousseau 1991: 168) he is actually being ironic. For he goes on to say,

> incline the passions of the Poles in a different direction, and you will give their souls a national physiognomy which will distinguish them from other peoples, which will prevent them from mixing, from feeling at ease with those peoples, from allying themselves with them...Loving the fatherland, they will serve it zealously and with all their hearts (Rousseau 1991: 168-169).

Rousseau goes on to advise that national tastes, dress, games and so on, should be promoted at the expense of foreign alternatives. Children ought to be taught from the moment of birth that they are Poles and different from other Europeans. However, put into context, these statements seem less xenophobic and more understandable. In his writings on Poland and Corsica, Rousseau is trying to give practical advice to nations that have been tyrannised by larger, aggressive neighbours. His advice is intended mainly as a means to help them with self-determination in an international state of war. As he says, he can see only one way to establish a stable Poland; 'it is to establish the Republic so firmly in the hearts of the Poles that she will maintain her existence there in spite of all the efforts of her oppressors' (Rousseau 1991: 168). Rousseau does not, therefore, advocate nationalism for aggressive reasons, but rather *defensive* ones (Hoffmann & Fidler 1991: 1xi; see also Cobban 1964). This means that, for Rousseau, there is nothing intrinsically inconsistent with advocating nationalistic feelings whilst at the same time pushing for the formation of a European federation. In an international state of war such feelings are perhaps necessary for the survival of the state, but they may be detrimental once a European federation is established.

As is obvious from the current difficulties facing the EU, nationalist sentiments do not necessarily diminish with close political unity and can in fact be extremely detrimental to political stability. Article nine of the TEU asserts that 'Every national of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.' (Bogdandy 2012: 315). However, being legally classed as a citizen, and considering oneself to be a citizen, do not necessarily coincide. Studies have shown that, across the Union as a whole, a majority do consider themselves to be EU citizens, but a significant minority – 31% – do not consider themselves to be 'European' at all (European Commission 2015: 27). The figures differ widely across the Union and this is reflected in the level of Euroscepticism felt in member states. In 2015 only 15% of people in the UK as a whole considered themselves to be 'European' (Ormston 2015: 7) and this played a substantial part in the final outcome of the Brexit referendum.

During the referendum campaign those advocating a withdrawal from the EU made a significant appeal to nationalist sentiments when discussing immigration. Article three of the TEU guarantees the free movement of EU citizens across the Union and Article 45 of the Treaty on the Functioning of the European Union (TFEU) guarantees the rights of EU

citizens to work in all member states without discrimination based on nationality (Rogers et al 2012: 90). If everyone considered themselves to be 'European' this might not cause problems. However, in a member state, such as the UK, where the vast majority of the population do not identify this way, the presence of those from elsewhere in the Union living and working can cause serious resentment (Migration Watch UK 2015). As part of their Leave campaign the United Kingdom Independence Party (UKIP) produced a poster showing a huge line of people from ethnic minorities alongside the caption 'Breaking Point', with the subtitle 'we must break free of the EU and take back control of our borders.' (Chambre 2016). Although it was compared to Nazi propaganda footage by a large proportion of the British population (Stewart and Mason 2016) the then leader of UKIP, Nigel Farage, defended its use by explaining that it was a genuine photograph of people who have entered the EU via Slovenia and who have subsequently become EU citizens (Stone 2016). Due to Article 45 of the TFEU these people are now free to enter the UK whenever they desire. His overall argument was that a UK outside the EU could directly control its borders thus preventing such people from entering. Furthermore, he argued that allowing the free movement of EU citizens was a threat to national security because it made it easier for terrorists to enter the country (Goodwin 2016).

The issue of internal migration within a European federation was not really an issue in the time of Rousseau and Saint-Pierre and so neither considered it a problem. However, in the EU, which has fundamental Articles that respect human rights, migration will occur and nationalism will cause problems if citizens consider the migrants to be detrimental to their own welfare. Thus Rousseau is right – nationalism can seriously destabilise any kind of European political union.

More generally, nationalist sentiments are often exploited by Eurosceptics in the EU when they assert that the EU weakens the sovereignty of member states.

5.4. Federation weakens sovereignty

Immanuel Kant objected that a federation such as that proposed by Saint-Pierre destroys, or at least weakens, the sovereignty of member states. Saint-Pierre actually foresaw such an objection and offers an interesting response. He says, 'whosoever has a cause to fear is in dependence…Thus we may truly say, that all the sovereigns, howsoever independent they may be imagined, are really dependent upon each other, because they

have really cause to fear each other' (Saint-Pierre 1714: 74-75). It follows from this that states are more *independent* the *less* they fear each other, as in his proposed European federation, when arbitration rather than force is used to settle disputes. Therefore, on this account, European federation actually strengthens, not weakens, state sovereignty. However, in common parlance what is more commonly meant by independence is the freedom to do that which one desires; and if independence is characterised in this latter way then surely his European federation does limit independence and thus does weaken sovereignty.

To fully understand Saint-Pierre's view - that dependency consists of fear - it helps to compare his federal sovereignty with Rousseau's concept of the general will. Rousseau says that when individuals form a civil society, via the social contract, they lose 'natural' freedom but gain 'agreed' freedom, for they all form part of the general will, i.e. the sovereign. Each individual may lose some advantages of natural freedom - the 'unqualified right to lay hands on all that tempts him' - but he gains 'Moral Freedom, which alone makes a man his own master' (Rousseau 1991: 263). Rather than

> giving anything away, he makes a profitable bargain, exchanging peril and uncertainty for security, natural independence for true liberty, the power of injuring others for his own safety, the strength of his own right arm - which others might always overcome - for a right which corporate solidity renders invincible (Rousseau 1991: 281).

Individuals also gain equality - 'However unequal they may be in bodily strength or in intellectual gifts, they become equal in the eyes of the law, and as a result of the compact into which they have entered' (Rousseau 1991: 268).

The same can be said for the national sovereigns that leave the international state of nature to form Saint-Pierre's European federation, for the federation secures the rights and hence the 'agreed' freedom of the national sovereigns. They might lose their 'natural' freedom, but instead they gain all the advantages of a system of arbitration - true liberty, equality and safety. As Rousseau says, freedom 'would be forfeited, if lodged with a superior', but 'it is confirmed, when lodged with equals' (Rousseau 1991: 81). Therefore, as each national sovereign forms part of the federal sovereign, which is analogous to the general will, no national sovereignty is lost on joining the European federation.

Considered in this way, Saint-Pierre's remarks on dependency make more sense. In the international state of nature sovereigns feel independent, for there is no superior power to dictate and command. But because of the insecurity of the international domain, this independence, or natural freedom, does not amount to much because the fear that exists in the state of nature limits the actions of the state. For example, in a state of war the economy is less secure and substantial money needs to be spent on defence. On the other hand, in the European federation, each sovereign may not feel as independent, for there are federal laws limiting their actions with respect to one another. But these federal laws are the result of a process of arbitration in which each sovereign played as great a part as any other, for they all form part of the federal sovereign. Therefore, from a practical point of view, the state sovereigns have greater freedom than before. The consequences of peace - ease of commerce, freedom of movement, a vast reduction in arms budgets and so on - will help to relieve the suffering of the subjects and increase the wealth of the state. Therefore, federation strengthens rather than weakens sovereignty - the acceptance of the federal authority does not 'compromise national sovereignty more than the contract among individuals compromises individuality' (Perkins 1955: 264).

Turning to the EU, we see that one of the major arguments against its continued existence, advanced by Eurosceptics, is that membership of the EU weakens the national sovereignty of member states. In the UK the political party that directly advocates withdrawal from the EU actually calls itself the 'United Kingdom Independence Party' (UKIP) which, by its very name, is appealing to the view that somehow the UK, whilst remaining in the EU, is no longer an independent sovereign state (UKIP 2015). During their Brexit campaign this claim was central to their argument for a UK withdrawal from the EU.

Saint-Pierre's analysis of sovereignty, as outlined above, can be used to argue against this Eurosceptic view, for in the EU all member states are part of the European sovereign and so their individual state sovereignty is in no way weakened. More explicitly, as all member states of the EU are represented in the European Parliament, they all have input into the formation of European law and thus any laws that are enacted are not forced upon any of them. What is particularly ironic in the case of the UK is that, due to the nature of its parliamentary system, it is actually *impossible* for its sovereignty to be limited. As Kellerman says, with respect to the UK, 'legislative sovereignty in Parliament, due to the

lack of a codified constitution, can never truly be challenged. No Parliament can restrict the sovereignty of future Parliaments, thus making any delegation of power to the EU voluntary and ultimately retractable' (Kellerman 2011: 1-2). The very fact that a referendum on membership of the EU is permissible in the UK shows that sovereignty ultimately lies with the British people and not with the EU. Furthermore, as codified in Article 50 of the TEU, 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements' (Bickerton 2013: 53).

However, although the presence of Article 50 of the TEU shows that state sovereignty is not, *in principle*, weakened by EU membership, it could be argued that it is weakened, *in practice,* due to the dire consequences that could befall a state if it were to leave the Union. As noted earlier, Saint-Pierre thinks that for his European federation to be stable it is essential that each member state fears the repercussions of acting against the union and so recognises that prudence dictates continued membership. Given his Hobbesian background he thinks that the only way this will happen is if the federal sovereign is strong enough to ensure compliance to laws by force. The EU is not of course grounded in Hobbesian political theory and any notion of holding the Union together by force is anathema to its fundamental principles. However, in the modern world there are other significant reasons for why a member state may fear the idea of leaving the EU and thus believe that self-interest dictates continued membership. One of the reasons used extensively by the Remain side during the Brexit debates was that leaving the EU would be financially damaging for the UK.[XI] If this is true then it could be argued that although membership of the EU does not weaken state sovereignty in principle (given the existence of Article 50), in practice it is weakened because, for financial reasons, rationality dictates that withdrawal is not an option. Furthermore, if this is not true and it is in fact in the UK's financial interest to leave the EU then, contrary to the claims of the Leave campaign, continued membership neither undermines sovereignty in principle or in practice.

However, even if we grant that by being a member of the EU state sovereignty is weakened in practice, the same can be said whenever there is an intergovernmental organisation withdrawal from which may have dire consequences for member states. Such organisations include the WTO, IMF and NATO. For example, NATO has 28 members and Article five of the NATO Treaty commits member states to mutually defend each other (McCauley 2008: 196). As Article 13 asserts that any state is free to leave the

organisation (McCauley 2008: 197) the sovereignty of member states is not, *in principle*, weakened by membership. However, in reality withdrawal from NATO could be seen as such a perilous thing to do that rationality dictates continued membership. Thus, fear of leaving does limit the actions of member states and so, *in practice*, membership of NATO does weaken state sovereignty.

Ultimately, in a globalised world, national sovereignty will, *in practice*, always be limited by an array of factors. One such factor, as important as any other, is international commerce and the necessity of European commerce to the success of his federation is not lost on Saint-Pierre.

5.5. European commerce

Saint-Pierre says that international commerce is in the interest of all states and the 'loss to the nations which are at war is the revenue derived from trade.' (Cooper 1974: 59). In fact, one of Saint-Pierre's main reasons for advocating European federation is because war is so detrimental to international commerce. He therefore proposes that for his federation to be stable there must be economic rules for fair commerce between the states and such rules will provide a great incentive for them to maintain peaceful relations.

Rousseau does not deny that the 'advantages resulting to commerce from a general and lasting peace are in themselves certain and indisputable' but, he goes on, 'being common to all states, they will be appreciated by none' (Rousseau 1991: 93). As was the case with individuals, he thinks that it is through *comparison* that states feel weak or strong. Given that all states benefit from international trade, they will all remain relative to each other weak or strong. But it is through inter-state commerce and communication that it is possible to compare wealth, and so commerce, rather than being conducive to peace, actually harbours reasons for war. He thinks that the only way to avoid comparison is to have self-sufficient states, and so he proposes that no state should be so populated that it cannot sustain its people (Rousseau 1991: 125). As he says to the Corsicans, 'no one who depends on others, and lacks resources of his own, can ever be free' (Rousseau 1953: 280), and to the Poles, 'pay little attention to foreign countries, give little heed to commerce; but multiply as far as possible your domestic production and consumption of food stuffs' (Rousseau 1991: 181).

In the age in which Rousseau was writing there may have been some wisdom in these words, for international commerce was not as expansive and integral to the everyday lives

of citizens as it is in the present day (Persson and Sharp 2015). However, in a world where consumer demands go way beyond that needed for basic subsistence, national self-sufficiency is not an option. For example, modern consumer products such as mobile phones and computers are dependent upon international trade because the total resources needed to produce them do not exist in any one state.

In terms of the EU, one of the main reasons for its success in maintaining peace in Europe is due to the mutual economic benefits felt by member states. The single market has allowed free trade and movement of labour making European commerce easier and therefore cheaper. Any member state that leaves the EU will have to negotiate its own trade agreements both with the EU and the rest of the world and, once established, prudence will dictate adherence to their terms in order to avoid financial difficulties (Springford and Tilford 2014). In the debate over Brexit the Remain campaign claimed that such agreements are more advantageous for the UK within the EU (Britain Stronger in Europe 2016) whilst the Leave campaign claimed that individualised trade agreements would be the most beneficial (Better Off Out 2016). Judging by the lack of progress in the brexit negotiations (as of July 2018) it is likely that it will be a long time before any firm conclusions on this issue can be drawn.

6. Conclusion

As we have seen in this article, in many important respects the sort of European federation that was proposed by Saint-Pierre is very different from the modern EU but, on the other hand, there are many similarities and this is why it is so interesting to compare the two projects from such different periods of history. In the 18th century, European international relations did approximate a Hobbesian state of nature and, as Rousseau put it, perpetual peace seemed like an 'absurd dream' (Rousseau 1991: 129). Kant suggested that the only reason Saint-Pierre had been ridiculed by subsequent philosophers was because he had 'thought that its realisation was so imminent' (Kant 1991: 47); for Saint-Pierre had thought it could be achieved within six months. However, Kant did acknowledge that such a project was something to pursue in the future, when the time was right.

It was perhaps Voltaire who had an idea as to when this right time might be. He said 'the sole means of rendering peace perpetual among men is then to destroy all the dogmas

that divide them, and to re-establish the truth which unites them; that is what perpetual peace really is' (Riley 1974: 192). However, he believed that when the citizens of European nations had reached such a level of enlightenment, no European federation would be required to maintain peace because there would be no one with an interest in war anyway. Nonetheless, he did acknowledge that some form of European Assembly ('diète européane' (Voltaire 1785: 1)) could be useful for 'extraditing criminals, in settling commercial questions, in resolving conflicts between different national laws in international dealings' (Riley 1974: 192).

Arguably European international relations remained Hobbesian for 180 years after Voltaire wrote these words and only began to change in character in the 1950s when the first EU treaties were signed. What was critical to this, however, was that the signatories of these treatises were only from states that had institutions that enshrined the beliefs that Voltaire claimed were necessary for true peace to be achieved. Of course, the EU has subsequently developed way beyond Voltaire's proposed European Assembly, for EU member states are far more integrated than he thought would be required to maintain peace, and perhaps this is where Voltaire was naïve. Maybe closer political union is required in order to prevent a return to a Hobbesian international order even amongst so called enlightened states.

It is too early to say what long-term affect the Brexit referendum will have on the EU and on the UK itself but the success of the Leave campaign has raised many issues that go right to the heart of the Union. The Brexit debates focussed heavily on issues such as immigration, economics, state sovereignty and nationalism and what we have seen in this article is that many of the arguments used by the Eurosceptics against the EU have been around, in some form or other, for centuries. Originally proposed by such philosophers as Rousseau, Kant and Voltaire they were formulated in order to show why an abstract political proposal, made by an obscure French Abbot, would never work in practice. Present day Eurosceptics are, on the other hand, using similar arguments against an actual existent institution. But what we have also seen is that there was a significant issue, the maintenance of peace in Europe, which was rarely touched upon in the Brexit debates, even though it was one of the main driving forces behind closer political unity from the outset of the European project. And it is because of this that it is worth revisiting the

writings of Saint-Pierre, and these other early writers on European integration, because for them peace in Europe is its ultimate aim.

One of the most vocal Eurosceptics, Nigel Farage, addressed the EU Parliament before the Brexit vote saying 'I hope it brings an end to this entire…[EU]…project and in a few years' time, we can be sovereign, democratic nation-states that work and trade together' (Farage 2016). Perhaps he would have done well to remember the other reason why the EU was established in the first place – to bring peace to Europe. As Saint-Pierre said, as far back as 1713 'Neither the balance of power nor Treaties are sufficient to maintain peace; the only way is by European Union' (Brown et al 2002: 398). The EU differs significantly from his proposed European Union but I suspect that had he been alive today he would have thought an institution such as the EU has certainly gone a long way to fulfil his ultimate aim of maintaining peace in Europe. Only time will tell whether a potential UK withdrawal from the EU will upset this aim.

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I Saint-Pierre had been a member of the French delegation which, in 1713, had successfully negotiated the Treaty of Utrecht that effectively brought to an end the War of the Spanish Succession (de Bruin & Brinkman 2013).

II It is unclear how seriously Rousseau took Saint-Pierre's proposal. Many subsequent philosophers assumed he was sympathetic, including Kant (Kant 1991: 47 and 92) and Voltaire, who called him an 'odd fool' for agreeing with Saint-Pierre (Perkins 1965: 93). More recently, both Wight (1996) and Waltz (2001) interpret Rousseau as a proponent of international federation. On the other hand Friedrich (1948) claims that Rousseau thought Saint-Pierre's project was ridiculous. Likewise, Hoffmann & Fidler (1991), Lafrance (1998) and Hinsley (2004) present the view that Rousseau was far from being an advocate of international federation.

III For more information on the treaty see Linda and Marsha Frey (2012).

IV See also Warrender (2000:18-22) & Gauthier (1969: 30-31).

V Hobbes likewise summarises his laws this way (1949: 55).

VI See also Lot (1989: 95).

VII Charles Beitz (1999) examines the conditions that lead Hobbes to conclude that the inter-personal state of nature will be a state of war and argues persuasively that the international domain is sufficiently different that the analogy of the individual and the state is inadequate (Beitz 1999: 27-50).

VIII See also Hinsley (2004: 35).

IX See also Petrovic (2013: 123) and Verdun (2007: 14).

X Although he acknowledges that, once peace is established, it will spread to enable peace between non-Christian states as well. (Frey 2012: 457). See also Goyard-Fabre (1998: 38).

XI A MORI poll in May 2016 showed that 88% of the UK's most prominent economists believed that a UK exit would be financially damaging (Ipsos MORI 2016).

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