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US Federalism and the North-South Conflict: From Bicommunalism to Centralization

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Abstract

This article seeks to explore to what extent and how the North-South conflict in the United States and attempts at its resolution have interacted with the evolution of American federalism. It starts with a brief overview of how this conflict came into being and a mapping of the most relevant actors involved. The chapter then goes on to analyze how Northern and Southern views on federalism clashed at three critical junctures in US history: 1787, the antebellum period and the postbellum era. This is followed by an assessment of federalism's effects on conflict resolution since the 20th century. After an analysis of the rise of centralized federalism during the "second reconstruction", the article explores how North-South conflicts were solved in the circumstances of this specific type of federalism in both the political and judicial arenas. It ends with conclusions and reflections on the implications of the North-South conflict for American federalism today.

Keywords

United States, North-South conflict, biculturalism, centralized federalism, intergovernmental relations



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1. Introduction

“[T]he very idea of an American People, as constituting a single community, is a mere chimera” (Calhoun 1831, cited in Tarr 2013: 33).

“Providence has been pleased to give this one connected country to one united people ... and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence” (Jay 1787).

These starkly contrasting views from the early years of US federalism highlight a deep-seated conflict about the subject of the Constitution of 1787. Similar to the reference to “one people” in the Declaration of Independence, this first modern federal constitution famously speaks in its preamble of “[w]e the people of the United States”, thus picturing a monolithic community. This differs fundamentally from Canada where Lord Durham’s report in 1839 famously found “two nations warring in the bosom of a single state” and these nations – the English and the French – would then constitute according to the traditional view the two founding nations in 1867.¹ The appeal of the US Constitution to “one people” was nothing to be taken for granted given the fact that the country was already at its founding much more diverse than one might assume. The first census in 1790 categorized merely 52% of the population as English and religious as well as linguistic diversity abounded too (Kincaid 2018: 282).

Despite the constitutional language referring to a single community, the United States have been characterized – at least for much of its history – by biculturalism revolving around the issue of slavery (Kincaid 2012: 160). The American South was famously characterized as “not quite a nation within a nation, but the next thing to it” (Cash 1941: viii) and its conflict with the North has decisively shaped the federal system. Over three decades ago, research has started to unearth the particularities of such dyadic constellations and identified five possible types of relationships between the two communities (Duchacek 1988: 12-15).¹¹ In the US case, the North has without doubt increasingly assumed a hegemonic position which propelled a centralization of the federal system. This process has been influenced by a long series of conflicts about distinct state, regional and US identities that are, of course, not passive attitudes but shape political action of politicians and citizens alike: “If citizens, when asked their citizen-identification, reply ‘I am an American’ ... the scene is



set for centralization. But if they reply first and foremost 'I am a Virginian' or 'I am a Buckeye,' then it is difficult to imagine much centralization occurring" (Riker 1964: 104).

With that in mind, this article seeks to explore to what extent and how the North-South conflict and attempts at its resolution have interacted with US federalism. It starts with a brief overview of how the conflict came into being (section 2) and a mapping of the most relevant actors involved (section 3). The article then goes on to analyze how Northern and Southern views on federalism clashed at three critical junctures in US history (section 4) before assessing federalism's effects on conflict resolution since the 20th century (section 5). Section 6 concludes.

2. Origins of the North-South Conflict

The deep cleavage running through the United States is something that already the framers of the 1787 Constitution were aware of. In fact, Alexander Hamilton opined in Federalist No. 13 that the alternative in case of a failure of the Union would be two separate confederacies with the New England states, New York and New Jersey, on the one hand, and all states south of New Jersey, on the other (Hamilton 1787). The boundary between those two areas was both socio-economic and cultural with slavery as a key distinction sparking among Southern whites the construction of a culture that was in contrast to the industrial and family-farm North "ambivalent about commerce and capitalism, dismissive of Lockean liberalism" and "also imagined a northern Yankee counterculture, which they believed was dedicated to destroying the South's way of life" (Kincaid 2010: 351). In this imaginary, "the North's 'Yankee race' of Puritan Roundheads" was on one side of the conflict line and on the other the white Southern elite regarding themselves as "Cavaliers – descendants of England's Norman conquerors" (Kincaid 2010: 360). As another observer emphasized, Southern distinctiveness has later been based on numerous elements such as the "Jim Crow laws and practices, debt peonage, convict-lease, various outbreaks of the Ku Klux Klan, 'massive resistance' and the White Citizens' Councils, black codes, legal mechanisms of disfranchisement, deep and profligate anti-union animus and pro-business boosterism, the pervasiveness of conservative religiosity, manners, climate, pace of life,



college football as religion, and kneejerk militarism as a widely accepted substitute for patriotism" (Feldman 2014: 2).

At first glance, this distinct regional identity of the South seems to distinguish the United States from many other countries where the frame of reference for identity formation is a specific subnational entity. Indeed, for example, in Quebec the Quiet Revolution of the 1960s brought forth not only a new identity based on secular values and the nascent welfare state but also changed its reference frame from "French Canadian" to "Québécois" (Resnick 1994: 72). While such a dramatic shift has not occurred in the United States, it must be recognized that promoters of the South's distinctiveness have of course acted through state institutions within that region so that regional and political identities "have overlapped and been mutually reinforcing" (Tarr 2013: 34).

The fact that biculturalism with its focus on only two (regional) communities has endured also results from decisions not to make the rest of the country a mosaic of states designed to empower one distinct community "owning" the territory (Kössler 2015: 249-52). First, even though the denominations of some states are linked to certain groups, they do not make them – in contrast to other federal countries – particularly empowered titular nations of these territories. Secondly, state demarcation policy ensured territorial neutrality according to which an area was "a blank slate to be filled in by whoever lives on the territory" (Kincaid 2013: 133-34). Indeed, Congress deliberately rejected demands from immigrant communities to allow the purchase of contiguous areas of land which contributed to a broad distribution of these groups throughout the country despite certain territorial concentrations. As one observer put it with a counterfactual, the United States could otherwise have looked very different: "Wisconsin a German state, Minnesota a Norwegian-Swedish state, Massachusetts an Irish state, Rhode Island an Italian state, New York a Jewish state, a block of black states in the South, of Mexican-American states in the South-west, and so on" (Glazer 1977: 77). Especially during the westward expansion, Congress rejected several demands for an "own" state from groups seeking to escape persecution or marginalization like in the case of an Indian state called Sequoyah and a Mormon state called Deseret comprising beyond what is today Utah parts of six other states. As for the South, the creation of a state "for" African Americans was promoted by the American Communist Party in the 1930s and again taken up without success in the 1960s. The reservations of Indian tribes therefore remain the only territories assigned to specific communities. A third factor



militating against states “owned” by particular communities was the force of the melting pot metaphor which focused on individualism by downplaying group affiliations and, in its later powerful interpretation also on assimilation into the Anglo-Protestant culture (Kincaid 2018: 284-86). This assimilative force led to increasing homogeneity not only regarding immigrant populations but also concerning French-speakers in Louisiana and Japanese Americans in Hawaii (Glazer 1977: 73-78).

3. Actors in the North and South: Parties and Governments

Unlike other disputes, the North-South conflict has not been shaped by regional parties but by the degree to which the two dominant national parties have acted as representatives of these regions. The fact that a two-party system has prevailed in the United States over much of its history is mainly due to the zero-sum nature of plurality elections which incentivizes both voters and party sponsors to seek influence in nomination contests of either the Democratic or Republican Party. With agendas of third parties being thus co-opted by the major parties, they have been short-lived experiments (Wekkin and Howard 2015: 283). When the American Independent Party nominated the former Democratic Governor George Wallace of Alabama, an ardent segregationist, for the 1968 presidential election, he won a remarkable 46 electoral votes in the South. Nonetheless, the Republicans’ “southern strategy” prevailed and the new party soon faded into irrelevance.

Despite the lack of regional parties, regional interests were long represented in the two major parties due to their confederal organization based on county and state branches. As the US Constitution assigned considerable governing functions to the states and also made them responsible for adopting election laws (Article I, section 4), parties were established at the state and local levels to then join forces in the pursuit of power at the national level. As a result of this confederal party organization, it could still be said in the mid-1960s that “Congressmen and Senators are essentially local politicians, and those of them who forget it soon cease to be politicians at all” (Banfield and Wilson 1963: 2). Only a few years later, however, party organization became nationalized due to, among other factors, the spread of primary elections in the wake of crucial Democratic Party reforms in 1968 and later also in the Republican Party. The key role regarding candidate nominations thus shifted from local



“political machines” to Washington-based campaign committees, forcing candidates to become political entrepreneurs with a national profile who could independently attract funding and voters (Kincaid 2012: 171).

The national arena thus became the venue for Southern political activism. This coincided with a process through which the Republicans took over the South. It has been argued that by abandoning African Americans to the restoration of white supremacy after the Reconstruction era (1865-1877)^{III} and by starting to champion anti-Catholic and anti-Jewish immigration laws in the 1920s, the Republican Party became the standard-bearer of a culture of “monocultural Puritan-esque Protestantism” (Kincaid 2003: 87). By contrast, Democrats ended their arrangement with White supremacy in the South, which Franklin D. Roosevelt’s coalition had still relied on, and lost much of the White Southern electorate in response to the 1965 Voting Rights Act. These voters were absorbed by the Republicans through its “Southern strategy” which appealed to White supremacy by vowing to protect in this region “traditional values” and the “the silent majority” (Feldman 2014: 6). While this strategy helped the Republicans in national elections from 1968 onwards, their takeover of state-level politics only occurred much later. Until 1980, they actually never had more than three governorships in the South (Wekkin and Howard 2015: 295-97). Ironically, the gradual political realignment of voters in the region towards the Republicans meant that the party once promoting centralization against interests of the South became, at least until the mid-1980s (Kincaid 2012: 172), the new champion of the Southern cause of states’ rights.

Quite evidently, the political parties are as actors in the North-South conflict closely related to the two political branches of government. As for the legislative branch, two critical changes have had a great impact. First, the admission after the Civil War of twelve western states into the Union reduced the comparative weight of the eleven southern states which had established the Confederacy. Southerners would now merely account for 23 per cent of all US senators which forced them to build coalitions with allies in the North and West (Kincaid 2012: 165-66). Secondly, the Seventeenth Amendment of 1913 required the direct election of US senators by voters in the states instead of their election by state legislatures. By depriving the latter of the ability to control the voting of “their” people in Washington, (Southern) senators became less accountable to local and state party organizations, even if the resulting centralization effect was to some extent mitigated until the 1960s by the above-mentioned confederal party organization. Still, the net effect of the Seventeenth Amendment



was that it facilitated in subsequent decades the enactment of progressive legislation which was unpopular with Southern states (Bybee 1997: 547-69). Today, given the nationalized character of parties and of interest groups lobbying them, members of Congress are even less inclined to prioritize the representation of state and local interests and the jurisdictional impact of legislation in question (Weissert 2013: 7).

As for the executive branch of government, this shift towards interest representation in the national arena has also had important consequences. To make their voices heard in this, arena states have established Washington-based offices which are typically “agents of the governor and the state executive branch” (Bowman 2017: 633). In addition to these bilateral efforts, state executives of course also promote their agenda through multilateral professional associations such as above all the National Governors’ Association (NGA). Yet, building a united front among Southern states, a precondition for gaining influence, is often absent. The partisan polarization that has gripped US politics since the Reagan presidency gave rise to separate Democratic and Republican Governor Associations which has not only weakened the NGA but also entailed the marginalization of the oldest regional organization, the Southern Governors Association (SGA). The latter’s eventual dissolution in 2016, when 12 out of 16 members were Republicans and the remaining ones Democrats, had a very clear rationale: “[A]lthough SGA’s mission of providing a bipartisan forum for regional collaboration served Southern states well for many decades, support for our work has diminished, rendering operations unsustainable” (SGA statement 2016, cited in Bowman 2017: 637).

4. Northern and Southern Views on Federalism: Three Critical Junctures

4.1. 1787: Constitutional Accommodation regarding Federalism and Slavery

Given the profound biculturalism already in 1787, it is striking that actors on both sides of the North-South conflict refrained at the Philadelphia Convention from translating this into the institutional framework of the federal system. This seems all the more surprising as Southerners played an outsized role during that time. In fact, Virginia was the single-most influential state at the Convention and in early US history with four out of the first five Presidents (Washington, Jefferson, Madison and Monroe) hailing from the so-called



“Virginia Dynasty” which ended only in 1825. The reason why the new Constitution does not reflect biculturalism in institutional terms is that the South was appeased with three other concessions (Kincaid 2012: 161): meeting its demands regarding slavery; parity with the North through the US Senate; influence through the electoral college on the President and, consequently, on the US Supreme Court. Influence on the latter is reflected in the notorious judgment in 1857 upholding slavery and denying citizenship to all Black people whether enslaved or free.^{IV}

While the option of institutionally entrenching biculturalism was discarded, the distinctiveness of the South in a way did militate against an overly centralized federal system. Indeed, “[t]he southern slavocracy was the monstrous territorial expression of multiculturalism at the time of the founding, and this expression – commonly known as the southern way of life – was politically powerful enough to compel constitutional accommodation as the price of union” (Kincaid 2003: 77). For Southerners, opposition to centralization was inherently linked to its aim of preserving slavery because they feared that a too powerful federal government would abolish it. Therefore, the above-mentioned “constitutional accommodation” is reflected in provisions of 1787 regarding both these issues.

As for anti-centralization, it is worth to mention the actually not too federal government-friendly original distribution of powers which was only a few decades later interpreted by the US Supreme Court in a more centralizing way.^V Equally relevant are in this regard the use throughout the 1787 Constitution of the plural form for the United States^{VI} and the fact that US citizenship was until the 1868 Fourteenth Amendment only awarded from state citizenship.^{VII} It is of course no coincidence that this change happened through a post-Civil War amendment which also in other respects epitomizes a shift of power towards the federal government (and the North).^{VIII}

Besides anti-centralization, the South was also able to compel constitutional accommodation regarding the institution of slavery itself. Interestingly, the 1787 Constitution nowhere mentioned slavery explicitly but instead used euphemistic terms such as “Person held to Service or Labour” (Article IV, section 2, clause 3). Several ambiguities and compromises were intended to gloss over the conflict at the Philadelphia Convention concerning this issue. The notorious Three-Fifths Clause clarified that slaves would be counted as three-fifths the value of free persons when it comes to state representation in the



US House of Representatives (Article I, section 2, clause 3) and fugitive slaves escaping to another state were to be returned to their owners (Article IV, section 2, clause 3). Moreover, the Importation Clause (Article I, section 9, clause 1) prohibited the US Congress from banning the slave trade until 1808. Even if this provision envisaged, at the insistence of Northern states, an end of the slave trade after this point in time, it implicitly still permitted the exploitation of domestically born slaves thereafter.

Among the framers of the constitution who opposed slavery there was a widespread belief in the eventual disappearance of this contested issue because they expected it to turn out to be economically unviable. Contrary to this view, however, the slavery-based economy soon started to boom, primarily as a result of Eli Whitney's consequential invention of a mechanical cotton gin in 1793 (Kincaid 2003: 78). A second reason for the continued importance of slavery was its link to the westward expansion of the United States. Southern states demanded equal representation in the US Senate by pairing the admission of free states with slave states (Kincaid 2012: 160). In 1820, Congress struck the Missouri Compromise which allowed the continuation of slavery in Southern states and disallowed its expansion into new states north of Texas. Yet, this failed to definitely end the conflict regarding slavery in the West. The 1854 Kansas-Nebraska Act abolished the compromise by enabling new states to practice slavery if approved by popular vote (Ryan 2017: 144). As slavery remained a bone of contention even after North-South constitutional accommodation in 1787, the antebellum period was marked by a fight for primacy within the federal system which occurred against the backdrop of increasing talk of disunion.

4.2. Antebellum: The South against Federal Supremacy

“The sovereignty of the United States is shared between the Union and the States, while in France it is undivided and compact” (Tocqueville 1954: 128). This famous observation of Tocqueville in 1835 demonstrates the fundamental difference between the Articles of Confederation and the new federal Constitution. While the latter did not explicitly mention the issue of sovereignty, most members of the Philadelphia Convention endorsed a conception of sovereignty as something relative and divisible. The states would relinquish parts of their sovereignty in order to give birth to a national government equally “incomplete”. The Supreme Court soon confirmed in 1793 that together with the national government the states were “the joint and equal sovereigns of this country”.^{ix} Yet, the entire



antebellum period was marked by a struggle about the concrete implications of co-sovereignty and it eventually took the Civil War to provide clarity.

Northerners adhered to a strictly individualist interpretation of the federal Constitution which inevitably conflicted with the views of Southerners. Echoing early federal ideas of Johannes Althusius, John Taylor of Caroline argued, for example, that “innate sovereignty” would lie with the states because only they were “self-constituted” (Taylor 1823: 43). In his view, the national government had been established with a reversible act of sovereignty by the states making it a merely derived and thus subordinated entity. Relying on a similar Althusian rationale, Calhoun claimed that 1787 had witnessed a “compact between the states” and not the imposition of a “constitution over them” (Calhoun 1854: 82).

With Calhoun being also a US Senator, his positions were eventually reflected in the 1830s in draft constitutional amendments. First, he derived from the states’ continued sovereignty a right to nullify federal legislation that they deemed unconstitutional. Southern states did indeed experiment during that time with acts of nullification regarding new tariffs (Ryan 2017: 144), thereby openly defying the Supremacy Clause characterizing the US Constitution, national legislation and international treaties as “the supreme Law of the Land” (Article VI, clause 2). Secondly, Calhoun proposed to make the federation formally bicomunal in institutional terms (Kincaid 2012: 161). He proposed a two-headed North-South US presidency and that national legislation be adopted by majorities of Northern and Southern members of Congress, something that would have militated against the decreasing relative weight of Southern senators following the admission of new states.^x From a comparative perspective, today’s collective three-member presidency of Bosnia and Herzegovina comes to mind (Article 5 of the Constitution), as well as the requirement in Belgium to have at least national special legislation adopted by concurrent majorities of parliament members from the Dutch and a French linguistic group (Article 4(3) of the Constitution). Moreover, Calhoun argued that the states had concluded a voluntary compact in 1787 so that they would have a right to unilateral secession. But as these views and those of the North remained diametrically opposed, no agreement on constitutional amendments was found before the Civil War which would ultimately solve all these issues militarily.



4.3. Postbellum: Paving the Way for Centralized Federalism

After the failed attempt of the Southern states to secede their relationship with the other states and the federal government was uncertain. Were they still states on an equal footing or reduced as (re)conquered territories to some kind of inferior status? It was for a landmark ruling^{XI} in 1869 to set the course for the post-war federal order. The judges held – with a quite legalistic argument – that Texas had never ceased to be a state of the Union simply because the US Constitution would not allow unilateral secession. As one observer put it succinctly, “whatever these states may have claimed, they hadn’t actually seceded – they had just very badly misbehaved. More accurately, the individuals involved had misbehaved – because the states themselves had nothing to do with it” (Ryan 2017: 148). The Court famously ruled that the “constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States”^{XII} and that secession could only occur in two exceptional cases, that is “through revolution or through consent of the States”.^{XIII} But the former would have required a successful overthrow and the latter an agreement with the North, none of which was given in the case of the Confederate States. With regard to Texas as a non-original state, the judges clarified that “[t]he act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final.”^{XIV} The strong emphasis on finality made crystal-clear that the above views of Calhoun were now definitively discarded.

The second pillar that cemented federal supremacy was the enactment of the Fourteenth Amendment of 1868. Slavery, the primary justification cited in the Southern declarations of secession, had already been abolished by the preceding amendment three years earlier so that another goal became to “complete the constitution” (Zuckert 1992: 69-91). After compromises were made in 1787 due to Southern resistance, the Fourteenth Amendment was perceived by its proponents “as ‘the new covenant’ which implicitly incorporated the Declaration [of Independence] into the federal Constitution” (Kincaid 2003: 79). Even if this amendment came about under conditions of procedural irregularities, with Congress refusing to seat the Southern delegation, it became a particularly consequential one until today. Scholars have subsequently argued that the flawed enactment was legitimized *ex post* by overwhelming legal, political and cultural validation (Ackerman 1998: 99-252).

As for federalism, the Fourteenth Amendment’s Citizenship Clause in combination with the Privileges or Immunities Clause secured protections of US citizens against (Southern)



state action, while the Due Process and Equal Protection Clauses would turn out to have enormous centralizing effects from the 1950s onwards.^{xv} Moreover, Congress was explicitly authorized to enforce the amendment. Interestingly, the federal government used its dominant post-war position not only for the Reconstruction of the South (1865-1877), but also for a broader campaign “to prevent any state or other legally recognized political jurisdiction from constructing a distinct cultural identity” (Kincaid 2012: 163). Such campaigns were successful against Creole cultures in Louisiana, Indian Nations and particularly the Mormons, as the Republican Party had vowed to abolish “those twin relics of barbarism – [Mormon] Polygamy and Slavery” (Kincaid 2010: 359).

Developments vis-à-vis the South were different. Ideologically, the 1870s witnessed the assertion of an American racial identity characterizing Anglo-Saxons as superior to Native Americans, African Americans and immigrants from other parts of Europe (Tarr 2018: 318). This entailed franchise restrictions in the North and in the South the restoration of white supremacy when the Reconstruction era ended in 1877. Indeed, while during this era ten southern states adopted new constitutions ensuring rights of African Americans, these would “last just as long as the bayonets which ushered them into being, shall keep them in existence”.^{xvi} Unsurprisingly, therefore, these changes were undone by constitutional conventions held in the decades following the withdrawal of federal armed forces. The reestablishment after Reconstruction of a new White supremacist identity, only this time based on disenfranchisement and Jim Crow laws enforcing racial segregation rather than slavery, was at least condoned by the national government despite its dominant position. Sometimes it was even actively facilitated like with an infamous 1896 Supreme Court judgment upholding state segregation laws under the “separate but equal” doctrine.^{xvii} Politically, this hands-off approach regarding the South was furthered by the need for electoral support from the region (Kincaid 2012: 164-65). The social reform movement of the Progressive Era (1896–1916) partnered with Southern white populists for some of its projects such as legislation regulating the economy and the Sixteenth Amendment of 1913, allowing Congress to levy an income tax without apportionment among the states. Similarly, Roosevelt’s New Deal coalition later relied on rural White Southerners and Southern Democratic organizations. As shown in this section, the Civil War and Reconstruction have put an end to conflicting views of federalism. But even if the two eras had laid the foundations for centralized federalism, the latter’s effect on North-South conflict only



became manifest belatedly during what has been called the “second reconstruction” (1945-1968) (Van Woodward 1955).

This period did not only see federal intervention to gradually abolish segregation, which had been in place in Southern states under the so-called Jim Crow laws (1865-1965), but also an anti-centralist backlash in this region. Politically speaking, this enabled the success of the above-mentioned “southern strategy” of the Republicans which re-positioned themselves on issues of race, feminism and religion and vowed to protect the distinctiveness of the region against, in their view, overly civil rights-focused Democrats (Maxwell and Shields 2019). While this backlash is typically identified as one of the reasons for the ascendance of modern conservatism in the late 20th century, there were of course others as well (e.g. economic factors such as stagflation in the 1970s. It is important to note, from a federalism perspective, that the realignment of parties in the South facilitated the success of the Republicans in federal elections so that conservatism became dominant at the center during the presidency of Ronald Reagan (1981-1989).

Legally speaking, the ideological tendency of Southern states towards conservatism has been reflected in recent decades in several high-profile victories before the US Supreme Court. Regarding the Southern core tenet of states’ rights, they achieved, for instance, an expansion of state sovereign immunity,^{XVIII} often finding a receptive audience in the Rehnquist Court during the peak of conservative “New Federalism” in the 1990s. But Southern conservatism also scored significant wins in more recent years. A case in point is when the court scrapped the obligation of several Southern states or counties under the Voting Rights Act to obtain federal preclearance for changes to their voting laws or practices which had served to forestall electoral discrimination.^{XIX}

Again, however, it is important to note that the link between Southern conservatism and US federalism should not be overemphasized. As to fiscal conservatism, for example, Western states appear to have played an at least equally significant role (Dinan 2012: 54-55). After all, the passage of California’s Proposition 13 in 1978 is often seen as a precursor of similar low-tax policies at the national level during the Reagan presidency. The fiscally conservative Tea Party movement of the early 2010s also had its strongholds not only in the South but also in Midwestern and Mountain West states (Skocpol and Williamson 2012). This is consistent with the overall decreasing influence of biculturalism in the context of



largely centralized US federalism which is merely occasionally challenged, but, if so, not only from Southern states.

5. Federalism's Effects on North-South Conflicts Resolution since the 20th Century

5.1. Unlocking Centralized Federalism during the “Second Reconstruction”

While after Reconstruction the Fourteenth Amendment was largely ignored by Congress and used by the Supreme Court to protect rights of corporations, not individuals against the states, this would change after World War II. The war had been a melting-pot experience involving Americans of all ancestries and yet African Americans then “came home to severe prejudice and discrimination” (Kincaid 2018: 287). It was in this historical context that the full potential of the post-Civil War amendments concerning the North-South conflict was unlocked. First, the above-mentioned implicit incorporation of the Declaration of Independence into the Constitution became visible, as it gained the status of a morally binding guideline for constitutional interpretation and provided with the phrase that “all men are created equal” the point of reference for every civil rights movement of the 20th century (Tarr 2005: 386). Secondly, the centralized federalism ushered in by the post-Civil War amendments facilitated the national government’s enforcement of individual rights against the (Southern) states. This reached a first culmination in 1954 with the US Supreme Court famously qualifying segregation in public schools as a violation of the Equal Protection Clause of the Fourteenth Amendment, as separate facilities are inherently unequal.^{xx} Resistance against the ruling in the South and the massive federal law enforcement intervention needed to break it only further delegitimized the Southern state governments.

These developments during the “second reconstruction” were thus based on centralized federalism and at the same time made it even more centralized. First, the social equality movements of the 1950s and 1960s invoked the above-mentioned equality pledge of the Declaration of Independence for “one people” throughout the country. In light of this unifying vision, change should not be blocked by state boundaries with individual rights only guaranteed in some states but not (or to a lesser degree) in others. Secondly, state governments, at least those in the South, had used their powers for oppression so that the



national government became for the social movements of the time a natural ally for change. This alliance further cemented, together with the above-mentioned nationalization of party organization around the same time,^{xxi} the focus shifted of politics to the national arena.

5.2. Conflict Resolution under Centralized Federalism: The Political and Judicial Arenas

When the North-South conflict came to a head in the 1960s, the national government could employ a wide range of political and judicial tools because cooperative federalism was slowly abandoned. During the Progressive and New Deal expansions of federal power that variety of federalism had still accommodated biculturalism. These “cooperative” relations are epitomized, for example, by the fact that federal grants were during the 1930s still largely unconditional so that “[t]he period was a fiscal nirvana for state and local officials” (Kincaid 2012: 167). In this light, it is understandable that an interpretation of the New Deal as a Trojan horse to change the South only really took hold after World War II when segregationists fused their antistatism with resistance against the civil rights movement (Ward 2014: 102-21). Indeed, it was only in the 1960s, coinciding with the “second reconstruction”, that coercive federalism replaced its cooperative predecessor. This new variety of federalism has been defined as “at its base, the outcome of a massive campaign to liberate persons from the tyranny of places, namely, state and local jurisdictions and the marketplace” (Kincaid 2012: 169). Key among these places was the South.

Enhanced centralization under coercive federalism had incisive consequences for the Southern states, as the national government could employ in conflicts with them a set of typical political tools (Kincaid 1990: 139-52): federal pre-emption of state laws under the Supremacy Clause (Article VI, clause 2 of the Constitution); underfunded or even unfunded mandates to shift responsibilities and their costs onto states without adequate financial coverage; grants with stricter conditions attached (in stark contrast to the New Deal era) to replace local preferences with federal objectives even outside the legislative powers of Congress. Sometimes, like in the above-mentioned case of ensuring desegregation after 1954, the national government even intervened with federal law enforcement officials.

Whether court orders needed federal enforcement or were complied with in the South, the judicial arena proved as important for conflict resolution as the political arena. The fact that judicial disputes were mostly decided in favor of the national government is certainly



anything but a coincidence. It is rather a natural corollary of the appointment of federal judges by the US President with confirmation by the Senate, a scenario in which judges “face fewer political risks when they strike down state legislation” (Somin 2017: 441). Specifically regarding the Southern states, their early influence on the US Supreme Court diminished immensely since the times when infamous judgments upheld slavery and segregation in 1857 and 1896, respectively.^{xxii} Since the early 20th century the traditional North-South balance on the Court became replaced by the aim to ensure the representation of (in this order) Roman Catholics, Jews, African Americans, women and Hispanics (Kincaid 2010: 367).

The centralizing penchant in judicial conflict resolution has rested on two pillars. First, the US Supreme Court refused to police limits of Congressional legislative power. In fact, while it recognized in one single judgment that the Tenth Amendment on reserved powers of the states provides such a limit,^{xxiii} the judges quickly overruled this view^{xxiv} and failed to resuscitate it later. Based on another key provision they even significantly augmented federal legislative power. According to a broad interpretation, the Commerce Clause (Article I, section 8, clause 3 of the Constitution) was seen as enabling comprehensive social regulation regarding any activities with potential effects on interstate commerce. Between 1937 and 1995, the Court failed to strike down a single federal law as beyond the Commerce Clause authority and those invalidated since then only affected legislation of rather minor importance.^{xxv} The enforcement of individual rights against Southern states using federalism arguments to uphold segregation is also reflected in the Commerce Clause jurisprudence. It was this provision which formed the basis for the Court to ban racial discrimination in public places such as hotels and restaurants.^{xxvi}

A second pillar of jurisprudence, that is the enforcement of individual rights in the federal Constitution against the states, was at least as effective in changing the South. This was done, first, by directly applying the Fourteenth Amendment in judicial conflicts for which with the above-mentioned 1954 *Brown* judgment on desegregation in public schools is an early example. Another key moment was the invalidation in 1967 of bans on interracial marriage, which were still in place in 16 (mostly Southern) states, as violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.^{xxvii} Importantly, the Due Process Clause was not only directly applied in judicial conflicts between the North and South but also formed the basis for the “selective incorporation” doctrine. Through this doctrine *certain* parts of the ten amendments constituting the US Bill of Rights (therefore “selective”) have



been made applicable to the states which further increased the protection of individual rights at the expense of state autonomy. It is telling that the 1960s, when the “rights revolution” was in full swing, witnessed 56% of all US Supreme Court rulings incorporating provisions of the Bill of Rights (Kincaid 2012: 170). This enabled the enforcement of the federal rights catalogue in matters under state jurisdiction regarding which Southern states held less liberal views than the North. For instance, the incorporation of the First Amendment’s ban on legislation regarding an “establishment of religion”^{XXVIII} resulted in the 1960s in the invalidation of state laws on officially mandated prayer and Bible reading in public schools. Another example is the incorporation of the Eighth Amendment’s prohibition of “cruel and unusual punishment”.^{XXIX} This formed the basis for numerous rulings restricting the death penalty. As executions have occurred overwhelmingly in ten Southern states (35% in Texas alone),^{XXX} this incorporation concerned almost exclusively the South. More generally, the centralizing effect of making federal rights applicable to the states evidently impacted disproportionately on this region which had an abysmal record of officially sanctioned rights violations. This also serves as a sharp reminder that federalism is something ideologically neutral that only facilitates greater congruence of policies with subnational preferences (Palermo and Kössler 2017: 319-20). It can be invoked by subnational entities against centralization to promote individual rights and liberalism or, as in the case of the US South, to oppose it.

6. Conclusions

How can two communities “inundated by hostility and mistrust in which one is simultaneously ally and enemy”^{XXXI} live together within one and the same country and how does such a peculiar conflict constellation interact with federalism? Early research on biculturalism regarded for such ambiguous dyadic situations “a confederal framework or federalism with confederal ingredients as appropriate” (Duchacek 1988: 9) because these decentralized arrangements would have greater chances for acceptance by both communities. This article demonstrated why the US path has been different. The acceptance of the arrangement for both the North and South had only been essential until the Civil War (and triggered compromises, albeit not an institutional entrenchment of biculturalism in the



federal system). Thereafter, the North (and the federal government) were strong enough to dominate. However, the enforcement against the South of individual rights and liberalism more broadly only occurred with the “second reconstruction” a century later. As the article has shown, conflict resolution has taken place during that time in both the political and judicial arenas in lopsided circumstances that reflected the North’s dominant status after the Civil War and Reconstruction periods. While what happened in the 1950s and 1960s can certainly be characterized as “ameliorative federal intervention” (Kincaid 2003: 76) in the South, this was linked, more generally, with a reinforcement of centralization in the form of coercive federalism. Put simply, it was bad luck for federalism in the United States that the only states defending decentralization based on a distinct identity, albeit of course much less distinct than Quebec’s or Catalonia’s, came from a reactionary region associated with “slavocracy” and Jim Crow laws. As a famous scholar of federalism put it in the 1960s, “if in the United States one disapproves of racism, one should disapprove of federalism” (Riker 1964: 155). This evolution of the North-South conflict and how it has interacted with federalism has three major implications: for the Southern states, for other states and for federalism itself.

As for the South’s relationship with the federal government today, it is important to note that the region is still distinctive in some ways. But internal differences, for example, between the Deep and the Border South, as well as peculiar state identities in places like Louisiana, South Carolina or Texas should caution against too easy generalizations (Bullock and Rozell 2007). It is perhaps doubtful whether one can still speak, as in the early 1960s, of a distinct and coherent Southern political culture of “traditionalism” (Elazar 1966: 85-141) which is aimed at preserving an idealized hierarchical agrarian society against the modern pluralism promoted by two rivalling cultures: “individualism” of the states stretching from the Great Lakes to the mid-Atlantic and “moralism” of the northernmost states. What can be said with certainty, however, is that Southern states clearly still form the politically and religiously most conservative region (Kincaid 2013: 139). In the contemporary culture wars about issues like abortion, homosexuality, the status of religion in public life and the role of the state in society it is evident to which camp they belong. Historians of the South remind us that this declared conservatism is not without paradoxes and that relations with the federal government are “complex, often hypocritical, and at times even perverse” (Feldman 2014: 2). While taking up the banner of individualism and anti-statism, no other region has benefitted more from



federal public spending and this even goes quite unacknowledged in the South (Feldman 2014: 1-2 and 13-14). A key point for federalism is that – with the upholding of segregation gone as specific territorial interest to defend against centralization – the common conservative ideological preferences are mostly expressed in a non-territorial way in the national arena (Kincaid 2013: 139-40). Thus, although Southerners are arguably more dissatisfied with today's nationalization of party organization, they are equally forced to play in this arena. They make at best instrumental use of federalism arguments when it suits conservative preferences. Demands of state-level regulation of abortion and same-sex marriage or of more state discretion regarding large national programs like Medicaid are cases in point.

A second major implication of the North-South conflict and its handling through federalism is its impact on identity-based territorial claims from other states. It is of course understandable that such claims had not been contemplated in the first place in 1787. After all, the idea of federalism as a tool, primarily, to manage diverse societies has only come to dominate political debates in the 1990s (Palermo and Kössler 2017: 97-101). But the perennial “problem with the South” ensured that willingness to recognize identity-based territorial demands would not emerge at later stages of history. First, the North used its predominance gained with the Civil War for campaigns against other communities, especially of the Mormons. Secondly, as identity-based demands became associated with Southern agitation for upholding white supremacy, the very idea of recognizing such claims became discredited and an anathema to liberal parts of the United States. The only exception is the particular case of Indian reservations, while the recently revived statehood movement in Spanish-majority Puerto Rico might sometimes lead to another one. But unlike in the case of the South, identity-based claims concern in these cases relatively marginal territories and not a number of states of an entire region.

A third implication of the North-South conflict is related to federalism itself. As the article has shown, this conflict has been inextricably linked with the US path towards centralization. In this light, some observers have cast the very rationale for federalism's existence into doubt. In their view, it has already been replaced by mere “managerial decentralization” (Feeley and Rubin 2008: 73) and is obsolete because US citizens demonstrate a lack of identification with their states. As the argument goes, the “vast nation displays less cultural diversity from one region to another than such small places as Belgium,



Rwanda, or Latvia" (Feeley and Rubin 2008: 120) and several states are even only "rectangular swatches of the prairie with nothing but their legal definitions to distinguish them from one another" (Rubin and Feeley 1994: 944). One may agree with the finding that state identities are weak compared to many other federations, but still refute the conclusion that this deprives federalism of its *raison d'être*. It is evident that the United States has travelled a long way from a time when Thomas Jefferson (like other founders) referred to his home state as "his country"^{XXXII} to today's prevalence of national US identity and it is equally obvious that the North-South conflict has contributed to that in various ways. It did so not only through its link with centralized federalism which evidently had a corrosive effect on state identities. Before that, the Civil War reinforced a sense of national identity, at least among Northerners. Moreover, the above-mentioned Privileges and Immunities Clause of the Fourteenth Amendment protects citizens against discrimination by states and has thus facilitated the extraordinary mobility of US citizens between states, another reason for weak identity formation among only temporary members of state political communities. As for African Americans, the fact that the South established after Reconstruction a system of racial apartheid led six million of them to leave the region during the Great Migration (1916-1970). Thus, Southern states missed an opportunity to create an inclusive identity and African Americans, both those staying and leaving, naturally identified with the national government as their potential ally against oppression (Tarr 2013: 32-33). Yet, the weakness of state identities for all these reasons does not necessarily lead to the obsolescence of federalism. First, with the entrenchment of checks and balances US federalism has had from the outset an alternative purpose that is still valid today. Secondly, there is a lack of public support for both rolling back coercive federalism and for abolishing federalism altogether (Kincaid 2012: 178-79) so that the status quo is bound to remain. The key question is then to what extent territorial differentiation following local preferences which is at the heart of federalism shall prevail, especially in the context of the ongoing "culture war". Remarkably, in one of the Supreme Court's most controversial rulings, *Obergefell* in 2015,^{XXXIII} the conservative minority argued for such differentiation which was conveniently in line with their ideological preferences. Their dissenting opinion blamed the majority stopping a vibrant debate across the country that had witnessed the electorates of 11 states voting for same-sex marriage and others, especially in the South, opposing it. The majority replied that in case of violations of (federal) fundamental rights individuals cannot be left at the mercy of state legislative action.



US federalism is thus bound to face the tension between decentralization in the name of diverse ideological preferences and centralization in the name of individual rights, the very theme that shaped the conflict between North and South.

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¹ It is only in the 20th century that aboriginal Canada started to be recognized as a third pillar (Russell 2017).

^{II} These relationships are frontal clash in various forms (e.g. civil war, genocide, mass expulsion), assimilation, hegemony of one of the two communities, a dyadic federation composed of only two subnational entities and a consociational association of the two communities.

^{III} See section 4.3 below.

^{IV} *Dred Scott v Sandford* 60 US 393 (1857).

^V See, especially, *McCulloch v Maryland* 17 US 316 (1819) regarding the Necessary and Proper Clause (Article I, section 8, clause 18) and *Gibbons v Odgen* 22 US 1 (1824) concerning the Commerce Clause (Article I, section 8, clause 3).

^{VI} See, for example, Article III, section 3: “Treason against the United States, shall consist only in levying War against them ...”.

^{VII} The Citizenship Clause introduced in 1868 reversed this relationship: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

^{VIII} See section 4.3 below.

^{IX} *Chisholm v Georgia* 2 US 419 (1793) 477.

^X See section 3 above.

^{XI} *Texas v White* 74 US 700 (1869).

^{XII} Idem 725.

^{XIII} Idem 726.

^{XIV} Idem 725-26.

^{XV} See section 5 below.

^{XVI} A Democratic newspaper cited in Tarr 2000, 131.

^{XVII} *Plessy v Ferguson* 163 US 537 (1896).

^{XVIII} *Seminole Tribe of Florida v Florida* 517 US 44 (1996).

^{XIX} *Shelby County v Holder* 570 US 529 (2013).

^{XX} *Brown v Board of Education of Topeka* 347 US 483 (1954).

^{XXI} See section 3 above.

^{XXII} See sections 4.1 and 4.3 above.

^{XXIII} *National League of Cities v Usery* 426 US 833 (1976).

^{XXIV} *Garcia v San Antonio Metropolitan Transit Authority* 469 US 528 (1985).

^{XXV} *United States v Lopez* 514 US 549 (1995); *United States v Morrison*, 529 US 598 (2000).

^{XXVI} *Katzenbach v McClung* 379 US 294 (1964); *Heart of Atlanta Motel, Inc. v United States* 379 US 241 (1964).

^{XXVII} *Loving v Virginia* 388 US 1 (1967).

^{XXVIII} *Everson v Board of Education* 330 US 1 (1947).

^{XXIX} *Robinson v California* 370 US 660 (1962).

^{XXX} <https://www.aclu.org/other/death-penalty-questions-and-answers>.

^{XXXI} Jean Beaufays quoted in Duchacek 1988, 9.

^{XXXII} See Jefferson's Notes on the State of Virginia of 1785 cited in Tarr 2013, 20.

^{XXXIII} *Obergefell v Hodges* 576 US (2015) ..

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