Political Philosophy of Federalism

Robert Schütze*

Abstract

Federalism has come to refer to the legal arrangements between territorially distinct political communities: modern states. Yet it is not one but three traditions of territorial federalism emerge in the modern era. In a first stage, the dogma of state sovereignty relegates the federal principle to purely international relations between sovereign states. (Con)federal unions are conceived as international organizations. By the end of the eighteenth century, this international format of the federal principle would be overshadowed by the (pre-civil-war) American tradition. In this second tradition, federalism comes to represent the middle ground between international and national organizational principles. This mixed format would, in turn, be qualified in the course of the nineteenth century, when a third tradition insisted on a purely national meaning of the federal principle. Federation here came to mean federal state. The meaning of the federal principle thereby differs in each theory; and depending which political philosophy one chooses, certain constitutional questions will arise.

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A. Introduction

The federal principle has made a long 'journey through time in quest of meaning' (Davis). Its etymological origins lie in '*foedus*'—a word that signified 'contract'. Contractual bonds are variously made; and the federal principle was open to a variety of conceptual directions. Early on, the federal idea became associated with arrangements between *political* communities. Yet, there was hardly any political philosophy of federalism in antiquity; and in the medieval world, the federal principle found but little light to grow. Modern federalism emerges with the rise of the modern European state system. The normative heart of that system is the legal independence of each state. This legal pluralism indeed provides the conceptual background for all modern theories of federalism.

Since then, federalism came primarily to refer to the legal arrangements between territorially distinct political communities: modern states. (This territorial definition of federalism has nonetheless competed with a 'consociational' definition – see Section F below). Yet it is not one but three traditions of territorial federalism emerge in the modern era. In a first stage, the dogma of state sovereignty relegates the federal principle to purely *international* relations between sovereign states. (Con)federal unions are conceived as international organizations. By the end of the eighteenth century, this international format of the federal principle would be overshadowed by the (pre-civil-war) American tradition. In this second tradition, federalism comes to represent the middle ground between international and national organizational principles. This mixed format would, in turn, be qualified in the course of the nineteenth century, when a third tradition insisted on a purely national meaning of the federal principle. Federation here came to mean federal state. The meaning of the federal principle thereby differs in each theory; and depending which political philosophy one chooses, certain constitutional questions will arise.

B. The 'International' Philosophy of Federalism

The rise of the modern state system in the seventeenth and eighteenth century was a celebration of political pluralism. The apostles of state sovereignty thereby introduced a legal distinction that would structure our modern legal imagination: the distinction between national and international law. The former was the sphere of subordination and compulsory law; the latter is the sphere of coordination and voluntary contract. From the perspective of classic international law, a 'civil law' between sovereigns was a contradiction in terms for it required an authority above the states; and if sovereignty was the defining characteristic of the modern state, there could be no such higher authority. All relations between states must be voluntary and 'private' and, as such, 'beyond' any public legal force (Vattel).

1. Union of States in Early Modern International Law

How did seventeenth century international law explain 'unions of states', like the Swiss Confederacy, the United Provinces of the Netherlands and the German Empire? The international tradition of the federal principle emerged in the discourse that tries to come to terms with these theoretical "aberrations". In order to bring federal unions into line with the new idea of state sovereignty, they were thereby forced into a conceptual dichotomy: they were either an international (con)federation or a sovereign → *unitary state* (von Gierke (1939) 263) Thus, for Bodin the Swiss League was but a (con)federation in which the cantons had retained full sovereignty, while the German Empire was a unitary state governed by an aristocracy of princes (Bodin 165–6 and 207). The federal principle was thereby associated with *international* relationships between sovereign states. A (con)federation was an international 'union of states'.

The most influential seventeenth century treatise on the law of nations gave it the following definition (Pufendorf 1046):

> [A union of states] consists of several states bound to each other by a perpetual treaty, and which is usually occasioned by the fact that the individual states wished to preserve their [autonomy], and yet had not sufficient strength to repel their common enemies. *In this treaty there is commonly an agreement that one or other part of the supreme sovereignty should be exercised at the consent of all.*

This view recognized the difference between temporary and *permanent* treaties. In a federal union, sovereign states were bound together by a 'perpetual' treaty—the

'articles of confederation'. They would delegate powers that were of common interest to a council and retain their independence for those matters that were 'of little or no interest, at least directly, to the rest'. In a 'regular' federal union, all the member states would be equal and independent. This meant that they could 'voluntarily leave the league and administer their states to themselves' (ibid 1050–1). A regular union would thus fully respect the sovereignty of its members and thus operate by unanimity. Where the unanimity principle was replaced by majority (→ *plurality/majority*) rule, the federal union became 'an irregular system, and one that approaches more closely to the nature of a state'.

This view became the gold standard for modern international law. It resurfaces in *the* international law manual of the eighteenth century: Emer de Vattel's '*Law of Nations*'. 'Every nation that governs itself, under what form soever, without dependence on any foreign power, is a *Sovereign state*'; and a state that wishes to be part of international society must be a sovereign state (Vattel Book I Chapter 1 § 4). Hence, in all of its relations with other states, it is fundamental to retain its sovereignty. This meant the following for federal unions (ibid §10 'Of States Forming a Federal Republic'):

> Finally, several sovereign and independent states may unite themselves together by a perpetual confederacy, *without ceasing to be, each individually, a perfect state.* They will together constitute a federal republic: *their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it*, in virtue of voluntary engagements.

A federal treaty was consequently designed to be enduring and would involve the establishment of a permanent diplomatic congress. Yet, the 'joint deliberations' among the member states must not impair the sovereignty of each member. The obligations within the union would be 'voluntary engagements' that allowed each members to remain a 'perfect state'. The federal union under international law ended, where a state 'passed under the dominion' of another. Such a subordinated body was 'no longer a state' and could 'no longer avail itself directly of the law of nations'.

2. Political Reasons for Federalizing States

Why would states wish to federalize? Two famous answers were given in the eighteenth century. The first offered a particular, the second a universal rationale. In *The Spirit of the Laws*, Montesquieu (1748) had advanced a concrete reason for republics to federate. 'If a republic is small, it is destroyed by a foreign force; if it is large, it is destroyed by an internal vice.' To overcome the 'dual drawback', democracies would need to combine 'all the internal advantages of republican government and the external force of

monarchy'. The solution was the creation of a 'federal republic' (→ *republicanism*). 'This form of government is an *agreement* by which many political bodies consent to become citizens of the larger state that they want to form. It is a society of societies that make a new one, which can be enlarged by new associates that unite with it' (Montesquieu 131). Composed of small republics, the 'federal republic' thus 'enjoys the goodness of internal government of each one; and, with regard to the exterior, it has, by the force of the association, all the advantages of large monarchies' (ibid 132)..

A second – universalist – rationale came from Kant. In his *Perpetual Peace – A Philosophical Sketch* (1795), Kant argued that the very idea of an international *law* could only be achieved on the basis of a federal union of sovereign states. For Kant, international society had remained in a state of nature. And the only solution to this sorry state of affairs was that 'peace must be *formally instituted*' on the basis of a federal treaty (Kant 98). The federation of states was to be based on a constitutive treaty, the *foedus pacificum*. The treaty would be the basis of all international law as a *right* to peace. Yet, at the same time, the federal treaty would not provide the federation with 'any power like that of a state'. The states would not 'need to submit to public laws and a coercive power which enforces them'; and, in this way, their sovereignty was not restricted. A federation of peoples organized as states would thus not itself be an international state. (The latter would turn national peoples into one single people.) While the idea of a world republic could be desirable in the distant future, the social structure of international society was not ripe. In the light of the cultural diversity of mankind, the word republic would lead to international despotism. Temporarily, Kant thus preferred the 'negative substitute' in the form of a federation of states as a practical optimum as it better reflected the social structure of eighteenth-century society (Kant 61 – 130).

C.   The 'American' Philosophy of Federalism

The international format of the federal idea prevailed until the time of the American Revolution. The 1777 'Articles of Confederation and Perpetual Union' – the first American Constitution – still breathed the international tradition of the federal principle. The thirteen former colonies-turned-states (→ *colonization*) here promised to 'hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding

themselves to assist each other, against all force offered to, or attacks made upon them, or any of them' (cf. 1777 US Articles of Confederation, Art. III). Within the confederacy,

> [e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled (ibid Art. II).

While not in perfect accord with eighteenth-century doctrine—the Articles allowed for majority voting—they had remained loyal to the classic idea of federalism as an international union of sovereign states.

The semantic departure from the international tradition came with the second American Union. The meaning of the federal principle would here forever be changed by the most important 'speech act' in the history of constitutional federalism: the 1787 Constitution of the United States of America. The Philadelphia Convention had proposed a much more 'consolidated' union when compared to the 1777 Articles; and in response to the accusation that the drafters had abandoned the political philosophy of federalism, a new tradition of federalism was born. This new tradition would identify federalism with the 1787 constitutional compromise that placed the United States of America 'in between' an international and a national law. It is in the course of this debate that the old concept of federalism was rhetorically hijacked. For those advocating greater national consolidation styled themselves as 'Federalists'; and the papers that defended the new constitutional structure would become known as 'The Federalist' (Alexander Hamilton, James Madison, and John Jay). By contrast, those insisting on the old 'international' nature of the American Union became—ironically—known as 'Anti-Federalists'.

This new American tradition of the federal principle was immortalized by Madison. In the Federalist No 39, this grandmaster of constitutional analysis explored the 'federal' or 'national' character of the proposed new legal order. ('Federal' here still meant 'international', in the sense of respect for the sovereign equality of the states. 'National', by contrast, meant unitary, in the sense of one → *central government*.) Refusing to concentrate on the metaphysics of sovereignty, three analytical dimensions were here singled out, which—for convenience—may be called: the foundational, the institutional and the substantive dimension. The first relates to the origin and character of the new constitution; the second concerns the composition of its government; while the third deals with the scope and nature of the federal government's powers. And in the light of these three constitutional dimensions, the *Federalist* concluded that the overall constitutional arrangement under the proposed 1787 Constitution was 'in

strictness, neither a national nor a federal Constitution, *but a composition of both*' (ibid 187); and it was this *mixed* character of the reformed constitutional structure of the United States of America that would, in the future, be identified with the federal principle.

The new federal tradition came to Europe on board of a French ship. The analysis by de Tocqueville (1853) brought the new American ideas to a broader European audience. His influential account of the structure of American society also described the American federal union as a 'middle ground' between an international league and a national government. The mixed nature of the union was, according to Tocqueville, particularly reflected in the composition of the central legislator. The union was neither a pure international league, in which the states would have remained on a footing of perfect equality. Nor was it a national government; for if 'the inhabitants of the United States were to be considered as belonging to one and the same nation, it would be natural that the majority of the citizens of the Union should make the law'. The 1787 Constitution had chosen a 'middle course' '*which brought together by force two systems theoretically irreconcilable.*' The same strange middle ground had also been reached in relation to the powers of government: 'The sovereignty of the United States is shared between the Union and the States, while in France it is undivided and compact[.]' 'The Americans have a federal and the French a national Government.' In fact, the unique aim of the 1787 Constitution 'was to divide the sovereign authority into two parts': '[i]n the one they placed the control of all the general interests of the union, in the other the control of the special interests of its component states' (ibid 122–8 and 151).

Abandoning the international tradition of the federal idea, the 'novel theory' of federalism placed the federal idea on the middle ground between international and national law. Sovereignty—while ultimately resting somewhere—was seen as delegated and divided between two levels of government. Each state had given up part of its sovereignty, while the national government remained 'incomplete'. However, because either government enjoyed powers that were 'sovereign', the new federalism was based on the idea that '[t]wo sovereignties are necessarily in presence of each other' (ibid 172). Federalism implied *dual* government, *dual* sovereignty and also *dual* citizenship. Importantly, then, the American union was not identified with a federal state. The union was not referred to in the singular *United* States, but conceived as a plural—the United *States*. This has changed, especially after the Civil War. The Civil War Amendments indeed caused an unprecedented shift towards the nationalist end of the federal spectrum. Emblematic for this 'consolidation' of the union was the Fourteenth Amendment. It not only inverted the relationship between state and federal

citizenship. It subjected the states—for the first time—to the homogenizing forces of *national → fundamental rights*. And after the dramatic expansion of federal powers in the wake of the New Deal, the United States has been increasingly transformed into a more *United* State(s).

D.   The 'Germanic' Philosophy of Federalism

Nineteen-century European political philosophy was unwilling to accept the idea of divided or dual sovereignty. Victim of its obsession with sovereign states, European federal thought came to reject the idea of a divided or dual sovereignty. Sovereignty could lie either with the states, in which case the union was a voluntary international organization of states; or sovereignty would lie with the union, in which case the union was a 'state'. European thought developed this distinction by having recourse to the concepts of 'Confederation' and 'Federation'. Originally, the two concepts were synonyms, but in comparing the 1777 Articles of *Confederation* with the 1787 *Federation*, European thought distilled and juxtaposed two *different* constitutional principles. The two idealized principles came to be known as the *confederal* and the *federal* principle. The 'Confederation of states' was the 'old' international manifestation of the federal principle, whereas the 'Federal state' became the 'new' national manifestation of the federal principle. A federation was a federal state. This 'national' reduction of the federal principle censored the very idea of a 'Federations *of states*'. To understand this Germanic tradition of the federal idea—a tradition that influenced Austrian, German and Swiss federal thought—we must analyse the conceptual polarization that would occur in nineteenth century Europe before presenting two famous early critics of the new Germanic tradition.

1.   State Sovereignty and the 'Federal State'

Because European constitutionalism insisted on the indivisibility of sovereignty, the *absolute* idea of sovereignty would come to operate as a prism that would blind out all *relative* nuances and shades within a mixed or compound legal structure: *either* a union of states was a 'Confederation of *states*' *or* it was a 'Federal *state*'. While American federalism accepted gradations on the spectrum between a (Con)federation and a

unitary state, semantic fluidity was unacceptable to the *Begriffsjurisprudenz* of the time (Jellinek (1882)). The conceptual distortion effected by the sovereignty prism would thereby downgrade all existing *weak* (Con)federations to ordinary international organizations and upgrade all existing strong (Con)Federations to ordinary states.

a.   Conceptual Polarization: Confederation versus Federal State

How did Germanic federal thought define a 'confederation'? A (confederal) union of states was said to have been formed on the basis of an ordinary international treaty. Because it was an international treaty, the states had retained sovereignty and, therewith, the right to nullification and secession.

> Nullification and secession, absolutely prohibited within a unitary or federal state, follow logically from the nature of the Confederation as a treaty creature. A sovereign state cannot be bound unconditionally and permanently. … The Confederation is a creature of international law. However, international law knows no other legal subjects than states. The Confederation is not a state and can, consequently, not constitute a subject of international law (Jellinek (1882) 175-178).

Since the confederation was not a legal subject, it could not be the author of legal obligations; and it 'deductively' followed that the member states *themselves* were the authors of the union's commands (. The union was thus regarded as possessing no powers of its own. It only 'pooled' and exercised *state* power. From this international law perspective, the Confederation was not an autonomous 'entity', but a mere 'relation' between sovereign states.

How did Germanic federal though define the concept of the 'Federal state'? The federal state was regarded as a *state*; and, as such, it was sovereign—even if national unification had remained 'incomplete'. Because the federal state was as sovereign as a unitary state, constitutional differences between the two states needed to be downplayed to superficial 'marks of sovereignty'. It indeed became the task of nationalist scholarship to make the imperfect → *nation state* look like its unitary sisters. It was thus argued that when forming the union, the states had lost all their sovereignty. They had been 're-established' as '*member states*' *by the federal constitution*. These member states were non-sovereign states (Hänel 802–3). But if the criterion of sovereignty could no longer be employed as the emblem of statehood, what justified calling these federated units 'states'? The search for a criterion that distinguished 'member state*s*' from 'administrative units' led European federal thought to insist on the existence of exclusive legislative powers (→ *legislative powers*). In the succinct words of one of the most celebrated legal minds of that day: 'To the extent that the supremacy of the federal state reaches, the

member states lose their character as states'; and contrariwise: '[t]o the extent that the member states enjoy an exclusive sphere, but only to this extent, will they retain their character as states' (Jellinek (1900) 771–2).

b.   In Particular: The Idea of Kompetenz-Kompetenz

Let us look at one ingenious argument in particular that would be successfully developed to downplay the differences between a federal state and a unitary state. In a federal state powers are divided between the federal state and its member states. But if the characteristic element of a member state was the possession of exclusive legislative power, how could the federal state said to be sovereign? The German answer to this question was that all powers were ultimately derived from the federal state, since it enjoyed *Kompetenz-Kompetenz* (Hänel, 1892: 771–806). This idea translated the unitary principle of sovereignty into a federal context: 'Whatever the actual distribution of competences, the federal state retains its character as a sovereign state; and, as such, it potentially contains within itself all sovereign powers, even those whose autonomous exercise has been delegated to the member states.' If the federal state is sovereign, it must be empowered to *unilaterally* amend its constitution: 'the power to change its constitution follows from the very concept of the sovereign state'; and '[a] state, whose existence depends on the good will of its members, is not sovereign; for sovereignty means independence' (Jellinek (1882) 290–296).

The federal state was, consequently, deemed to be empowered to 'nationalize' competences that were exclusively reserved to the member states under the constitution—even against the will of the federated states. Through this process of 'unitarization', the federated states would gradually lose their 'statehood'; and since the power to unilaterally amend the constitution was seen as unlimited, the federal state was said to enjoy the magical power of *Kompetenz-Kompetenz* with which it could legally transform itself into a unitary state (ibid 304–306):

> The existence of the member states in the union is, as such, no absolute barrier to the federal will. Indeed, the option to transform the member states into mere administrative units reveals, in the purest way, the sovereign nature of the federal state. … The negation of this legal option to transform the federal state into a unitary state by means of constitutional amendment entails with it the negation of the sovereign and, therefore, state (*staatlich*) character of the federal state.

In the final analysis, the German tradition of the federal principle thus equated the federal state to a decentralized unitary state (Triepel 81; → *decentralization*).

2.   Early Criticism: Hans Kelsen and Carl Schmitt

The conceptual polarization of the federal principle into two specific manifestations – Confederation and Federation — has structured much of the twentieth-century European debate. And yet, there were two remarkable early critics of that tradition. They could not be more different as regards their legal outlook. Hans Kelsen would *legally* approach the federal principle with the tools of his 'pure theory of law', while Carl Schmitt would concentrated on the *political* nature of federal orders

In 1920, Kelsen torpedoed the tautologies inherent in European federal thought in a path-breaking analysis of the principle of sovereignty and the nature of international law (Kelsen (1920 and 1925)). While remaining loyal to the idea of indivisible sovereignty, Kelsen would attack the categorical distinction between Confederation and federal state. Legally, they had a similar structure. What distinguished the one from the other was only their degree of (de)centralization (Kelsen (1920) 194):

> Confederation and federal state, these two main types of state relations, differ in the degree of centralization and decentralization only. … The only way to justify that the difference between federal state and Confederation is not a relative but an absolute distinction is to elevate the concept of 'state' itself to an absolute idea. But this absolute notion excludes the idea of other states 'inside' a state as much as the idea of other states 'outside' it with whom the state is coordinated in a[n] [international] legal community, unless one posits the existence of a higher all-embracing whole that would turn these states into members and thereby depriving them of their sovereign quality. However, once we dissociate the concept of the 'state' from the idea of an absolute whole, once we relativize its meaning, then, the absolute distinction between federal state and Confederation, insisted upon by traditional [European] constitutionalism, must also disappear.

A federal state is simply a more 'consolidated' or 'centralized' union than a Confederation. One federal species thus blends continuously into the other. But what did this mean for the distinction between 'treaty' and 'constitution'? For Kelsen, 'treaty and constitution are not mutually exclusive concepts', since the content of a treaty may be a constitution. 'The federal state may thus have a constitution and yet be founded on an international treaty as much as the Confederation has its constitution that is also created through a contract.' There was no objective or inherent distinction between 'treaty' and 'constitution' as regards their origin; what differed was the *emotional* feeling brought towards them. Sovereignty lay in the eye of the beholder; and for social communities, this was a question of social psychology. The community of onlookers decided which legal order was to be posited at the normative origin — the '*Grund*norm'. Sovereignty and supremacy were 'emotional' questions; and, as such, beyond empirical and normative analysis (ibid 195).

This attack on the tautological nature of European federal thought was joined by a second—equally brilliant—critique: the federal theory of Carl Schmitt. Schmitt agreed with Kelsen that the European debate had unduly concentrated on idealized differences between two *species* of the federal principle. It had thereby forgotten to pay attention to the federal *genus* from which both species sprang. What had 'Con*federation*' and '*Federal* state' in common? A federal union was 'a permanent union based on a *voluntary* agreement whose object is the political preservation of its members'. The normative foundation for such a federal union was a 'federal treaty' (*Bundesvertrag)*. The 'federal treaty' was a 'constitutional treaty' (Schmitt 63 and 367–8): 'Its conclusion is an act of the → *pouvoir constituant*. Its content established the federal constitution and forms, at the same time, a *part of the constitution of every member state*.' The dual nature of each federation, standing on the middle ground between international and national order, was thus reflected the dual nature of its foundational document. The 'federal treaty' stood in between an international treaty and a national constitution. Each federation was thus a creature of international *and* national law (ibid 379).

Each federal union permanently lived in an 'existential equilibrium'. 'Such an existential limbo will lead to many conflicts calling for decision.' Yet, for the political equilibrium to remain alive, the conflict over the locus of sovereignty must remain 'suspended'. The question of sovereignty may be posed, but it must never be solved. Where the sovereignty question is—definitely—answered in favour of the union, only it has political existence. The 'union' is transformed into a sovereign state, whose legal structure may be federal but whose substance is not ('*ohne bündische Grundlage*'). Contrariwise, where the sovereignty question is—definitely—answered in favour of the member states, the political existence of the federation disappears and the union dissolves into an international league. The normative ambivalence surrounding the location of sovereignty lay at the core of all—real—federations.

E. 'Federal' Constitutionalism: Central Problems

The constitutional 'accomplishments' of the modern—democratic—nation state are said to be two things. First, all power is seen to derive from the people; and according to this idea of popular sovereignty, it is 'the' people that must create the constitution

and that governs itself through the medium of a national parliament. Second, all constitutional conflicts about the locus of sovereignty and supremacy are said to be resolved, because there is only one 'supreme' constitution. Both these normative 'accomplishments' can arguably be preserved—even if in a distorted way—when adopting an international or a national philosophy of federalism because they either declare the *member* state or the *federal* state legally sovereign; yet within the second federal tradition, both of these constitutional givens are questioned. In the absence of a single sovereign and a single 'demos' that validates a single constitution, these two core ideas of modern constitutionalism here receive a—special—'federal' solution.

1.   Popular Sovereignty: 'We, the People'

Democratic constitutionalism insists that since 'the people' are sovereign, they must create the constitution → *Popular sovereignty* may thereby express itself either directly or indirectly. The former demands that the people directly adopt their constitution through a referendum (Sieyes 92; → *direct democracy*). The softer version of popular sovereignty allows this task to be delegated to an elected constitutional or legislative 'assembly' (see only 1791 French Constitution as well as 1919 Weimar Constitution), which adopts the constitution 'on behalf' of the people.

But who is the popular sovereign and who embodies the 'constituent power' within a federal or pluralist legal order? What are the historical and theoretical alternatives to the unitary focus on popular sovereignty? We do find, again, historical alternatives to unitary popular sovereignty in the constitutional history of the United States. Believing that the framers of the 1787 U.S. Constitution had 'split the atom of sovereignty' (*US Term Limits* (Justice Kennedy), 838), American constitutionalism was here originally based on the idea that the constituent power underlying the (American) union was exercised by a plurality of peoples. The 1787 Constitution had thus been ratified 'by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong' with each state being 'considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act' (Hamilton et al, 2003: 184–5).

Yet the (American) union legal order had not been based on an ordinary international treaty. For instead of the ordinary state legislatures, the ratification of the 1787 U.S. constitution was achieved through state 'Conventions'. The famous phrase 'We, the people' must thus be read with two qualifications in mind. First, it did not refer to a

popular referendum; and, second, it also did not refer to the 'American people' but instead the peoples of the several states (Farrand, 1913: 190). The (in)direct authority from the state peoples was nonetheless seen to give the U.S. Constitution a normatively higher status than that of the (American) union and state *governments*. However, from a democratic perspective, the federal constitution enjoyed the same normative status as the various state constitutions.

The best theoretical generalization of the federal or pluralist conception or the constituent power has come from the pen of Carl Schmitt. Accordingly, the normative foundation of every union of states is a 'federal treaty'. This 'federal treaty' is an international treaty of a constitutional nature (Schmitt 368): 'Its conclusion is an act of the *pouvoir constituant*. Its content establishes the federal constitution and forms, at the same time, a part of the constitution of every member state.' Each union of states is seen as a creature of international and national law. Unlike unitary constitutionalism, a federal constitutional theory will thus not locate the constitution-making power in a unitary body: the people. A federal constitutional theory replaces the idea of a *single* sovereign subject with that of a pluralist constituent power. From the perspective of democratic constitutionalism, the constituent power behind a union of states will thus be the state *peoples* instead of a single people.

How should the democratic validation of a federal or pluralist constitution be expressed? The most direct expression would be a series of constitutional referenda in the member states. A less direct expression of popular sovereignty would be a ratification of the union constitution through state conventions. (This is what happened with regard to the 1787 US Constitution, which was consequently seen as a 'constitutional'—and not a mere 'legislative'—text.) The least direct expression of popular sovereignty is to leave the ratification decision to the 'ordinary' state legislatures. And it is this third—parliamentary—version that was used in the constitutional practice of post-war Germany (and the European Union).

What about the constitutional principles governing democratic representation? Within a unitary state with one unitary people, parliamentary democracy demands that all legislative power should be placed in a parliament that is elected on the principle of 'one person, one vote'. The British 'Westminster system' has come to be identified with this unitary standard. But is this—unitary—standard the appropriate yardstick for a compound polity that is composed by a plurality of peoples? In a union of states, there will always be two democratic constituencies: each state will have its own 'demos', while the union will also have a 'demos' that is constructed out of the various state

populations. Each of these democratic constituencies offers an independent source of democratic legitimacy; and a federal constitutionalism will have to take account of this dual democracy. Within a union of states, one *institutional* expression of this dual democracy is the compound nature of the union legislator. It is typically made up of two chambers: a state chamber representing the state peoples is joined to a parliamentary chamber representing the union citizens as a whole (→ *bicameralism*). Every union law is thus—ideally—legitimized by reference to two democratic sources: the consent of the state peoples and the consent of the union population as represented in the union parliament.

2. Constitutional Conflicts and the Question of Supremacy

Classic state constitutionalism defines a constitution as a set of those norms that stand at the apex of the legal hierarchy. Constitutional norms are the highest norms within a legal order and as such enjoy absolute—legal—'supremacy' over all other norms. But if *constitutional* law is the highest law within a legal order, will it not follow that there cannot be two levels of constitutional law? This 'unitary' or 'monistic' (→ *dualism / monism*) standard has never lived up to the constitutional practice of federal orders— like the United States, where both the union *and* the states were seen to have 'constitutional' claims. Unlike the unitary constitutionalism within unitary states, where only a single level of government is generally recognized to have a 'constitutional' claim, many federal unions have developed a federal or pluralist constitutionalism. Each of the two political bodies—the union and its member states—will have constitutional claims that may even sometimes come into conflict with each other (Schütze (2012)). Unlike unitary states in which the supremacy and sovereignty issue is settled, in federal unions the locus of sovereignty remains 'suspended' (Schmitt). Wherever the sovereignty question is—eventually—answered in favour of the union, only it continues to have a political existence, and the 'union' is here transformed into a sovereign (federal) state. Conversely, wherever the sovereignty question is— eventually—answered in favour of the member states, the political existence of the federation disappears and the union dissolves into an international organization. The normative ambivalence surrounding the location of sovereignty, and the consequent potential for constitutional conflicts, are indeed the core of all—real—federations (ibid 378).

This fundamental insight into the pluralist nature of unions of states as 'multilevel' or 'federal' legal orders has been 're-discovered' by an academic movement called

'constitutional pluralism' within the context of the European Union. One of the strongest proponents of this movement has claimed that '[c]onstitutional pluralism has been, perhaps, the most successful attempt at theorizing the nature of European constitutionalism' (Maduro 68). The idea of constitutional pluralism thus accepts—like constitutional federalism—the co-existence of multiple constitutional orders that are not hierarchically ordered but may or even ought to interact in a *heterarchical* way (ibid 75):

> While the empirical thesis of constitutional pluralism limits itself to state that the question of final authority remains open, the normative claim is that the question of final authority ought to be left open. Heterarchy is superior to hierarchy as a normative ideal in circumstances of competing constitutional claims of final authority.

The theory of constitutional pluralism here speaks much federal prose without being aware of it.

F.   Excursus: 'Consociational' Federalism

In the past, the federal idea has traditionally been reduced to forms of association between *territorially* diverse political communities; yet a second—minor—tradition has long co-existed with this state-centric definition. It views federalism in 'corporatist' or 'consociational' terms. An early proponent of this federal tradition is Althusius' *Politica*—a work that would be revived and significantly build upon in the late nineteenth century through von Gierke's *Genossenschaftsrecht*. According to a consociational conception, society is not an organic unit but a plurality of groups or corporations that—ranging from the family, the city, the region, and the state—agree to form ever-bigger 'consociations'. This version of federalism thus captures—unlike classic federalist thought—private legal relationships within a political community. This 'pluralist' idea of federalism has also emerged in France, where it is championed in the nineteenth century by Proudhon (67):

> Federation, from the Latin *foedus* means pact, contract, treaty, agreement, alliance etc. is an agreement by which one or more families, one of more towns, one or more groups of towns or states, create reciprocal and equal obligations to perform one of more specific aims[.]

The pluralist conception of the state/society as a (federal) union of diverse groups would also become a central part of Catholic social philosophy in the twentieth

century. The latter's great intellectual contribution here is the idea of 'subsidiarity'. The principle was first invoked in 1891 in the Church's attempt to find a middle ground between individualism (capitalism) and collectivism (→ *communism*); yet it received its celebrated form forty years later in the 1931 Encyclical *Quadragesimo Anno* (para. 79):

> Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help [*subsidium*] to the members of the body social, and never destroy and absorb them.

The principle of subsidiarity here tries to attempt a unity with diversity; and in the past, it has become a topos for decentralizing tendencies within the European Union (Constantinesco 35).

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