

Skadi Siiri Krause [ed.]

Theories of Modern Federalism

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Editorial

Throughout the course of history, our understanding of the state has fundamentally changed time and again. It appears as though we are witnessing a development which will culminate in the dissolution of the territorially defined nation state as we know it, for globalisation is not only leading to changes in the economy and technology, but also, and above all, affects statehood. It is doubtful, however, whether the erosion of borders worldwide will lead to a global state, but what is perhaps of greater interest are the ideas of state theorists, whose models, theories, and utopias offer us an insight into how different understandings of the state have emerged and changed, processes which neither began with globalisation, nor will end with it.

When researchers concentrate on reappropriating classical ideas about the state, it is inevitable that they will continuously return to those of Plato and Aristotle, upon which all reflections on the state are based. However, the works published in this series focus on more contemporary ideas about the state, whose spectrum ranges from those of the doyen *Niccolò Machiavelli*, who embodies the close connection between theory and practice of the state more than any other thinker, to those of *Thomas Hobbes*, the creator of *Leviathan*, to those of *Karl Marx*, who is without doubt the most influential modern state theorist, to those of the Weimar state theorists *Carl Schmitt*, *Hans Kelsen* and *Hermann Heller*, and finally to those of contemporary theorists.

Not only does the corruption of Marx's ideas into a Marxist ideology intended to justify a repressive state underline that state theory and practice cannot be permanently regarded as two separate entities, but so does Carl Schmitt's involvement in the manipulation conducted by the National Socialists, which today tarnishes his image as the leading state theorist of his era. Therefore, we cannot forego analysing modern state practice.

How does all this enable modern political science to develop a contemporary understanding of the state? This series of publications does not only address this question to (political) philosophers, but also, and above all, students of humanities and social sciences. The works it contains therefore acquaint the reader with the general debate, on the one hand, and present their research findings clearly and informatively, not to mention incisively and bluntly, on the other. In this way, the reader is ushered directly into the problem of understanding the state.

Prof. Dr. Rüdiger Voigt

Table of Contents

I. Introduction

Skadi Siiri Krause

On the Importance of Federal Theories: An Introduction 11

II. Theories of Federalism in the early modern Period. The Holy Roman Empire, the Swiss Confederation, and the Dutch Provinces

Lee Ward

Dutch and German Theories of Federalism in the Seventeenth Century 29

Thomas Maissen

The Swiss Confederacy: A Constitutional Model and Anti-Model for the Founding Fathers 49

Skadi Siiri Krause

Montesquieu's Theory of Federalism 71

III. Theories of federalism in the Constitutional Debates of the United States

Volker Depkat

The Holy Roman Empire in the Constitutional Debates of Revolutionary America 95

Dirk Jörke

The Democratic Federalism of the Anti-Federalists 119

James H. Read

The Best of Both Worlds? John C. Calhoun's Federalism, the United States, and the European Union 137

William Mathie

Slavery, Union, and Federalism in the Words and Deeds of Lincoln 167

IV. American Federalism and its reception in Europe in the 19th century

Skadi Siiri Krause

Tocqueville on American Federalism, Self-Government and the
Decentralization of Administration in France 187

Juri Auderset

Seizing The Madisonian Moment: Interpretations of American Federalism
in Switzerland, 1776–1848 215

Charlotte A. Lerg

A more perfect Union – The USA as an Example of Reform in the
German Bund 233

V. Federal Building Blocks of European Integration

Hartmut Marhold

Integral Federalism 253

Gabriele Abels

Federalism and Democracy in the European Union 283

Claudia Wiesner

Citizens of a polity without politics? The European Union, concepts of
Federalism and Citizenship 301

Authors 325

I.

Introduction

On the Importance of Federal Theories: An Introduction

In political science, interest in federal structures has increased significantly in recent years, not least because of the debates surrounding the European Union. In the majority of cases around the world, models of federalism closely follow the norms of modern Western state systems (King 2005, 97) – that is, a permanent statehood (Wachendorfer-Schmidt 2000) and the preservation and defence of fundamental values, rights and goals of a free parliamentary democracy (Möllers 1997, Möllers 2008). Beyond these fundamental similarities, however, clear differences to the Western democratic “unitary state” can be identified. These include the lack of absolute centralisation of political power by a single decisive body within the federal system, which combines political decision-making authority. The political will in the federal system thus takes place at several different levels of political representation and decision-making. Further, in federalism, less emphasis is placed on linguistic, cultural and religious similarities than in the unitary state. Instead, greater importance is being placed on the political processes of decision-making, compromise and approximation of living standards. This raises the recurring question of whether federalism, modern statehood and democracy are in fact compatible principles for state organisation (Bednar 2009, Watts 2008, Filippov et al., 2004).

Historically and also contemporarily, this thesis cannot be proven, as the anthology shows. Since today’s world consists of states and all fully developed federations are states, there is a general tendency to equate federalism with a (national) state form of government. But, as the contributions of this volume show, federalism preceded the nation state. Moreover, federalism has a broader normative potential that was later restricted by state sovereignty and nationalism, not to mention the core elements of modern democracy, which were not developed until the nineteenth century. In other words, the development of the concepts of federalism, nationalism, state sovereignty, and democracy must be traced back if federalism is to be reactivated as a viable concept. Only then does federalism not only stand for an administrative agreement with regards to the organisation of a system of government, but also for a political practice that Burgess (2012), following Johannes Althusius, called a “federal spirit”. This spirit describes a balance of local, regional and federal political self-determination, as well as the joint exercise of power within a shared system of laws and values.

A look into the political history of ideas makes this principle clear within the framework of modern federalism. As Lee Ward points out in his essay, there were initial reflections on modern federalism as early as the seventeenth century. The Old Kingdom and the United Provinces that emerged from it, as well as the Swiss Confederation, were described as federations committed to the principle of liberty and, in the United Provinces, equality of limbs. Constitutional lawyers such as Ludolph Hugo differentiated them from the classic confederations, because the independent cities and states, in contrast to the confederation of ancient and early modern times, combined to form a higher federal power whose legitimacy was based on treaties (Hugo 1689, Greszick 2012: 61). Hugo therefore also underlined the importance of constituent *lex fundamentalis*, which had created the regional divisions of the empire (cities and provinces) with the stated goal of forming one and the same community and to support and defend it with words and deeds, protection and help. Thus, this early theorist of federalism emphasised another essential side of federalism that Althusius had already worked out. He described the Old Reich as the result of dynamic processes of consensual and consocial institutionalisation (Hüglin 1990). Not only did he regard the *lex fundamentalis* (Althusius 2003, cap. XIX, no. 49) as the legal basis of the establishment of power, but he described them in their federal function as the basis of the political processes within the Union. They laid down political procedures and administrative structures that allowed both the unity and structural plurality of the empire to be preserved.

With these descriptions, the early state lawyers managed to capture both vertical and horizontal, as well as hierarchical and graduated community building. It is here, and not, as is commonly assumed, in the absolutist conceptions of sovereignty à la Jean Bodin and Thomas Hobbes, that lie the beginnings of a constitutional thinking (Stolleis 1996). This is also evidenced by the debates on the Seven United Provinces (Republiek of the Zeven Verenigde Provinciën), which achieved the status of an independent sovereign state at the end of the Eighty Years' War with Spain in the Peace of Westphalia (1648), subsequently making an impressive ascent in economic, cultural and political power. For contemporaries, the United Provinces became the model to be replicated not only for their economic strength, but also for their liberal principles, supported by their federal structures.

This did not change until the eighteenth century, as Skadi Krause points out in her contribution, when the economic and political decline of the United Provinces became obvious. French and British authors in particular described the political structures of the United Provinces, the Swiss Confederation and the German Empire as anachronistic, pointing to several flaws of such a system. First, in the age of emerging absolutism, the lengthy procedures of compromise and decision-making seemed too cumbersome and unproductive for many at the time to meet the challenges ahead, notably the creation of a single financial, internal market and a stable and

large army to safeguard hegemony outwards. Second, the linguistic, cultural and religious identity of the peoples was increasingly emphasised, which initially supported the power of the monarchs inwardly and later protected the national identity from the outside. Such arguments were used by Montesquieu when he judged the federations in the heart of Europe, which he had previously compared to the great monarchies, as now being politically and militarily obsolete, culturally and religiously divided and no longer competitive economically.

As the anthology shows, the debates surrounding federalism continued to change and evolve long after Montesquieu, even though the old federations which had initiated the debates were, by the late eighteenth century, now subjects of France. This is because, just as federations in Europe faded, a new and novel Union emerged: the United States of America. It was novel because it transferred the federal principle of horizontal and vertical separation of powers, as Dirk Jörke clarifies in his contribution, to the modern nation state. He points out that Montesquieu was an important reference author for the American founding fathers and the United Provinces was a recurring and central example during the constitutional debates. In the twentieth article of the Federalist Papers, in which he extensively referred to the United Provinces, James Madison highlighted the parallels between the shortcomings of the Union of Utrecht and the old Articles of Confederation (United States of America, 1781–1789). The United Netherlands was for him “a confederation of republics” and they affirmed “all the lessons we have learned from [our] previous discussions” (The Federalist 2005: 105), because they were, at his time of writing, threatened by anarchy and dissolution. Madison deplored the inability of the “public bodies” to come to “unanimous action” and thus “reform the well-known, universally confirmed and deadly deficiencies of the existing constitution” (The Federalist 2005: 109).

Although the Founding Fathers had little empirical knowledge of the actual Constitution of the United Provinces, the conclusions the Federalists drew from the Dutch example were far-reaching in justifying American federalism. The Constitution of 1787 created a federal state with a common legislative, executive and judiciary, but at the same time ensured extensive areas of autonomy for the individual states. In this way, a multi-level political order was created. Already during the negotiations, the anti-Federalists had strongly advocated such an arrangement. Samuel Adams, for example, pointed out that a purely national government could never legislate according to the habits and interests of all citizens (Cushing 1904–1908/IV: 324); only subnational units could adapt to local conditions and emergencies. This argument was finally interpreted in terms of strengthening popular sovereignty. Madison took it up when he emphasised that “within” a small sphere, the “voice of the people” was “most easily recognized” and “public affairs” could best be regulated (Madison 1962–1977/X: 207–215). In his defence of the federal system, he reminded his readers that “the public good,” the “real good of the great mass of the

people,” must be the “ultimate goal,” and that the “form of government” he advocated was committed to that value (The Federalist 2005: 250).

Nevertheless, nationalist federalism and its political implications have long been controversial, as the contributions of James Read and William Mathie make very clear. Not only was there a recurrent debate about the distribution of powers between the Union and the individual institutions, but the Union as a common legal area was itself called into question. Nevertheless, the founding of the first democratic federation, as Skadi Krause points out in her second contribution, stimulated discussions about the possibilities federalism offered for freedom and democracy, including in Europe. Alexis de Tocqueville, who travelled to the USA almost 50 years after the ratification debates, made a significant contribution to such debates (Krause 2017: 295–341). In *De la Démocratie en Amérique*, he argued that local self-government in America created areas of political experience and action that enabled people to become active as citizens and contribute to the formation of collective beliefs. Therefore, Tocqueville did not identify democracy as solely a system with general elections and a national system of representation. Quite the contrary: he was certain that the institutions of local and regional self-government would deprive the elected, representative central authority of as many spheres of influence as possible, and develop a political culture of freedom and self-determination. Following this same argument, he also defended fiscal decentralisation. This was because fiscal federalism would ensure that citizens of a democracy could preserve a great deal of civil liberty and participation rights within their small and subordinate communities, which would otherwise be largely lost when giving up rights to centralised political unity. This was a harsh criticism of the centralist structures in France that had been created in the *Ancien Régime* and then extended after the French Revolution under Napoleon Bonaparte.

The founding of the United States of America not only influenced the constitutional debate in France (where, despite all reform attempts in the nineteenth and twentieth centuries, a centralised state was preserved). As Thomas Maissen and Yuri Auderset show in their articles, the Swiss used the model that emanated from America far more effectively. After the Confederation, which had been replaced in 1798 by the strongly centralised Helvetic Republic in dependence on France and was converted to cantonal uprisings in 1803 in the Mediation Act back to the Federation, inflamed with the July Revolution of 1830, which the French King Charles X. de-throned, a liberal-democratic movement that was also inspired by the US. The major cantons, in particular, adopted new, liberal constitutions that provided legal equality for all citizens, introduced the separation of powers with representative elected parliaments, and protected the freedoms of the press, association, assembly, trade and industry. These developments finally allowed for Switzerland to create a form of political unity similar to that of the United States. The first attempt to revise the federal

contract and introduce a new federal constitution took place in 1832–33. It was only in the spring of 1848, however, that a new constitution was adopted. The cantons now had a federal government ruling over them. Following the example of the USA, a bicameral system was introduced: the National Council was elected proportional to the number of inhabitants in the cantons, while the Council of States, the actual successor to the Diet, had two representatives per canton.

Not all federations in the nineteenth century succeeded in transforming into free constitutional states with horizontal and vertical separation of powers, however. In the United Provinces William IV was appointed as governor of all provinces, and the governorship became hereditary, paving the way for a constitutional monarchy in the Netherlands.¹ The discussion about German federalism was decisively shaped in the nineteenth century by the Rhenish Confederation, the German Confederation and the founding of the German Reich.² In the 1840s, when liberal demands and conservative restoration efforts led to insurrections of civil war-like proportions, demands for an all-German Union emerged. In the debates of the Frankfurt Paulskirche, as the paper by Charlotte Lerg shows, the closeness between American constitutional thinking and the German state debate can be clearly demonstrated. Thus, according to Julius Froebel (1805–1893), the Reich was supposed to be structured as a federal state and organised as a republic, thus forming a so-called “Federal Republic” (Fröbel 1848: 7–9). America was not only used in arguments by leftists, radicals, democrats and liberals, but also conservatives such as Franz-Joseph Ritter von Buss (Buß 1844). These different political voices, however, used this same example for very different political ends. For the Republican Friedrich von Struve, the goal was to abolish the hereditary monarchy. He pleaded for freely elected parliaments, headed by freely elected presidents, united in the US Federal Constitution. Liberals such as Theodor von Welcker, Friedrich Christoph Dahmann and Georg Waitz called for a federal state to help Germany achieve a constitution, which would still be based on

1 According to Jonathan Israel, with the changes of 1747, the republic became “really more of a constitutional monarchy without a crowned monarch” (Israel 1995: 1078). This also had some small but noticeable effects on the temporary invasion of French troops in 1794–95. Although now the Batavian Republic was proclaimed, which broke as a French subsidiary republic and unitary state with the old system, it only existed until 1806, after which it was replaced by the Napoleonic Kingdom of Holland. In 1814–15, the United Kingdom of the Netherlands was created, a unitary state in which the provinces could not regain their former autonomous position.

2 The starting point here was Napoléon’s initiative of 1806 to form a Rhenish Confederation in the form of a confederation of states with a Federal Assembly of 16 German princes. They formed a Confederation and military alliance led by France. With the Wars of Liberation in 1813, however, the Confederation broke apart again. In 1815, the German Confederation emerged as part of the decisions of the Congress of Vienna to create a European economic and peace order. Some of the member states of this confederation then finally founded the German Customs Union in 1834 with the aim of establishing a common internal market and also of unifying the currency (Dreyer 1987: 62–244).

its historical background (Hartmann 2002: 23). At the same time they stated that the demand for a Federal Republic went too far for them (Gervinus 1848).

With the self-assertion of the monarchies in 1848–1849, the goal of a federal republic, as well as the idea of the state, were pushed into the distance. Nevertheless federalism now became interesting for conservatives because it promised a way of integrating the various monarchies without questioning their existence. This model was tested after the war between Prussia and Austria, after which the North German Confederation was founded under the leadership of Prussia. This union of 22 kingdoms, a Grand Duke, dukes and principalities as well as free and Hanseatic cities was given a federal constitution in 1867, which then became the model for the Constitution of the German Reich, founded in 1871 (Wahl 1987: 3–34). The federal founding compromise included basic institutional decisions, such as executive federalism, cultural federalism, and administrative and financial federalism, which showed that the empire could not legislate in all areas, and even in areas where it could, it remained subject to these legislations being implemented by the individual countries (Morsey 1957).

After the First World War and the downfall of the empire, the Weimar Republic became a unitarian state. From the point of view of the Reich elites, this had a democratic sense. However, Bavaria opposed not only the unitarian imperial power, but also the political-social and cultural project of Weimar. For Social Democrats and Liberals, this reinforced the impression that under the guise of federalism, anti-democratic attitudes were promoted. Indeed, democratic and republican sentiments were not strong throughout the Reich – rather, they were mostly only present in the largest single state, Prussia. This was particularly evident at the end of the Weimar Republic, when the National Socialists were on the rise and Prussia became the backbone of the Social Democratic Party of Germany (Sozialdemokratische Partei Deutschlands or SPD) in the fight against Adolf Hitler. Prime Minister Otto Braun and Interior Minister Carl Severing defended the “bulwark of democracy” against National Socialists and Communists (Ehni 1975). Federalism thus offered protection not only for the Bavarian anti-democrats at the Reich level, but also for the Prussian Social Democrats’ to fight against an imperial policy which, after 1930, seemed to set the path for a departure from parliamentary democracy.

In the nineteenth and twentieth centuries, federalism was anything but a guarantor of a democratic, liberal order that Madison and Tocqueville had hoped it would be. Instead, it offered protection against centrist tendencies that hindered any form of local and regional autonomy. Authoritarian regimes made every effort to suppress and eradicate these spaces of freedom, because in the system of vertical separation of powers, provinces, regions and municipalities played an important role in controlling the exercise of state power. The central purpose, therefore, of tracing the historical and current debates in this anthology, is not only to pursue the theoretical diversi-

ty of the discourse of federalism and depict path dependencies of certain traditions of thought, but also to determine primary elements – from a complex concept of sovereignty, through its constitutional design, to the maxims of subsidiarity and solidarity – as part of the federal political culture and administrative and procedural practice.

In short, the goal is to overcome the analytical and normative failures of early federalism studies. This is particularly evident in the debate about the EU today, as the contributions by Hartmut Marhold and Gabriele Abels make clear. Until the 1970s, federalism was a very common model (see Friedrich 1968, Monnet 1978, Spinelli and Rossi 1944). Federalism was used as an alternative analytical framework to international organisations for understanding EU policy. The federalism perspective stated that the European Union was an emerging federal system and that its development could be understood through the concepts and theories of state formation. A contrasting perspective was that the EU was built by states, and that its development had to be understood under the concepts and theories of international relations. The perspective of international relations eventually gained the upper hand and led to few researchers still viewing federalism as a useful analytical framework.

Of course, such developments have also ensured that this federal framework of analysis still contradicts the current state of the EU. There is, for example, no agreement on the political direction of the Union. Or rather, there are two goals: first, European integration; secondly, the maintenance of the sovereignty of nation-states. Does this mean that the EU is not fit for federalism, or are the specificities of the EU a challenge to the normative federal theory? What makes rapprochement within the EU so difficult, from the perspective of federalism, is the general propensity to equate federalism with a specific US version of national federalism. The fact that this is so is not least due to the history of interpretations of federalism shown in this volume. American federalism was a model to be imitated for many progressive forces across Europe in the nineteenth century. And yet, as the volume's contributions show, the concept of federalism has been adopted in largely varying ways throughout Europe, because of the differing contexts to which it has been applied. The contrast between US and Canadian federalism is very instructive here. In the US after the War of Independence, federalism was about creating a strong national government and a single economic and monetary area, without compromising the independence of the states (La Selva 1996: xii). In Canada, by contrast, the central aim was to use federalism to strengthen local autonomy without restricting central government. In the US, it was not necessary for federalism to reconcile several nationalities, while the main reason for federalism in Canada was to cope with this challenge. In other words, the strong confidence of Europeans in the American version of federalism is affecting the role of federalism in securing national identities.

In addition, the term federalism is still filled in quite formally, as it is currently defined as the coexistence of different bodies within the framework of an overall statehood, which does not apply to the European Union (Koopmans 1992: 1047). The coupling of the term ‘federalism’ to state associations is by no means as exclusive as it is often portrayed. Indeed, it can also be used to characterise the coexistence of federal members under one roof (Everling 2009: 961). The term ‘federalism’ is then actually the most appropriate to discuss the procedures and distribution of tasks between the Union and the Member States (Martenczuk 2000: 351, Zuleeg 2000: 2846). In federalist literature, however, this is mostly ignored in the comparison between the EU and the federal nation states. Nonetheless, the role of the Member States within the EU is crucial to this day, not only in budgetary matters, but also in all legislative processes and in the prioritisation of policies. It is the Member States that define the mutual solidarity obligations, as well as the European procedural and administrative law, which play a crucial role in the organisation and work of the Federation.

However, the federal perspective on the European Union does not only apply where the rights of expression and self-government of the members are safeguarded. The federation stands, as early theorists such as Hugo or Althusius make clear, for a common area of value and justice that secures the freedom of both members and citizens. Accordingly, Article 2 of the Treaty on the European Union, known as the Lisbon Treaty, states: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” In addition, Article 3 states: “The Union’s aim is to promote peace, its values and the well-being of its peoples. [...] It preserves the richness of its cultural and linguistic diversity and ensures the protection and development of the cultural heritage of Europe”. The values of the EU include, in particular, fundamental rights, such as equal treatment, anti-racism and tolerance, respect for human dignity, the rule of law and the independence of the judiciary, cultural diversity, a vibrant civil society, freedom of expression and the participation of citizens in democratic life.

Today, it can be observed that the civil liberties of European citizens are more far-reaching in many areas than the civil and political rights of their state constitutions.³

3 Instead of tying the European Union to the human rights standards of the Member States, they have even been further developed at European level. Thus, the guarantee of equal rights for all citizens implies a broader prohibition of discrimination going beyond the list of characteristics referred to in Article 19 TFEU (Article 21 of the Charter of Fundamental Rights), because it emphasises social equality and bans discrimination on the basis of sex, colour of skin, ethnic or social origin, language, religion or belief, political or other beliefs, affiliation with a national minority, property, birth, disability, age or sexual orientation.

European citizens, for example, enjoy guarantees of employment law and social security benefits as well as services of general interest, including public services. In addition, there are extensive environmental and consumer protection rights. The rights enshrined in the Charter of Fundamental Rights for access to social security and social and medical services are ensured regardless of people's social position or origin. Such rights have imposed significant checks on national social policies. Furthermore, to safeguard these fundamental rights, European citizens have several opportunities to sue and defend themselves, because they can turn to courts at local, regional, national and European levels. Even collective rights of freedom have been strengthened by the European Union, for example by the extension of information law. This goes beyond the right of individual access to a file by concerned citizens, insofar as it secures the broad and, if possible, unconditional access of the public to the written information at the disposal of the institutional bodies of the European Union. The focus here is not on the protection of fundamental rights, but on the legitimate public interest in information and the associated control of the actions of the EU institutions and national governments.⁴

The European Union continues to want to limit itself to a pure economic and monetary union, as shown by the contribution of Claudia Wiesner. However, it is no longer just companies and heads of state who are debating the future of the Union today. Indeed, citizens in municipalities, regions, national states and at European level now want to be involved in this discourse and participate in the decision-making process. Here too, it can be seen that although federalism, as a structural principle and procedural action, cannot be reconciled with democracy, it can certainly have a democratising effect if one uses its freedom-securing elements. A united Europe was the guiding idea of the post-World War II generations. Lasting peace was to be achieved through the ever-closer interlinking and integration of first the economy, and then state policy. Today, this idea is no longer sufficient to legitimise the European project, as the project itself has expanded far beyond it insofar as new areas of action have been created and new freedoms have been secured, which must be defended and expanded.

On May 12, 2000, when Joschka Fisher gave a speech at the Humboldt University in Berlin, calling for a "federal Europe," he opened a Europe-wide debate on the

4 The Lisbon Treaty revision upgraded the right to information and access to documents in several ways. The right enshrined in Art. 15 (3) AUEV is now one of the principles of the EU. As the right of access to documents is no longer dealt with in the chapter on the legislative procedure of the Union (as in the past with Article 255 of the EC Treaty), access to documents includes not only the legislative but also the administrative practice of the institutions. In contrast to the Treaty of Amsterdam, which only imposed such an obligation on the Parliament, the Council and the Commission, the Lisbon Treaty now explicitly provides that all Union institutions, bodies, offices and agencies must guarantee access to the documents. This makes it possible for citizens, associations and institutions not only to sue on the grounds of rights infringement, but also to become politically active in advance.

future of the Union, but also on the nature of governance in Europe. He did so at a time when it had become clear that Europe had changed since its creation, as increasing awareness of the “democratic deficit” at the EU level called into question the democratic legitimacy of the institutions. There were consequently increasing calls to democratise the political solution-finding and decision-making processes. Much has happened since then. Although the President and the Members of the Commission continue to be designated by the Council, that is to say by the national governments, Parliament must give its consent in a double procedure by an absolute majority.⁵ Legislation was also made more transparent and open.⁶ Prior to each legislative proposal, there is a consultation phase that includes not only national governments but also expert groups, non-governmental organisations and individuals as well as the regions of Europe. Each consultation phase concludes with a public report from the Commission. The ensuing debates on the legislative proposal in the plenary and the committees of the European Parliament are publicly available. The homepage on the Parliament’s website also provides information on the reports and voting results. At the national level too, parliaments are involved in the legislative process. For example, they can check whether drafts of EU legislation are in line with the subsidiarity principle, or put pressure on national governments on substantive issues. Governments, in turn, are required to inform national parliaments of Council meetings. When Parliament and the Council have finally determined their positions, the so-called trilogue occurs, in which Parliament, the Council and the Commission draw up a common compromise, which must then be reconfirmed by the plenary of the Parliament and by the Council. In all of these phases, it is possible to incorporate concerns, objections and criticisms into the legislative process.

Though democratic accountability has been strengthened, criticism on this subject has not abated. This is because, as Fritz Scharpf puts it, the “output-oriented” approach has not solved the fundamental problems of political representation and thus the deficit of democratic legitimacy (Scharpf 1999). In other words, the EU does not have a democratically elected government, a parliament whose competences are comparable to those of the nation states, European parties that are candidates for the European Parliament, or even a European public. Instead, the legislative processes

5 If the Parliament has approved the candidate, he or she is the President-designate but not yet in office. Following the nomination of the remaining Commissioners, the European Parliament must still give its assent to the Commission, which is then appointed by the European Council by a qualified majority. It is only with this appointment that the new President of the Commission, and the Commission itself, come into office.

6 It is true that the Commission still has the sole right of initiative for legislation, which means that legislative procedures are always initiated by it. However, the Parliament and the Council have a right of political initiative to call on the Commission to take new initiatives. European Citizens’ Initiatives also have the opportunity to ask the Commission to propose a legislative act. Once an initiative has collected one million signatures in a quarter of the Member States, the Commission must act.

have become accessible to a wider range of actors, including not just other governments, but also non-state actors, especially large industrial and agricultural associations. In addition, the EU has reduced the flexibility of national governments to implement policies by promoting regulatory enforcement patterns (Schmidt 1999).

In such a juxtaposition of national and European structures and democratic processes, it is vital not to lose sight of the complexity of the whole. For example, EU legislative processes limit national parliamentary powers of initiative, even though national parliaments' powers of scrutiny over national governments have grown overall (Norton 1996). The EU has deprived the powers of the nation states, while strengthening the subnational units in the legislative process and its implementation. This also applies to the growing independence of the regions from the national executive, which has been strengthened through the Committee of the Regions and Structural Funds, as well as through regional competition. Last but not least, the judiciary was strengthened vis-à-vis national governments. This is particularly evident in the so-called preliminary rulings, when the European Court of Justice (ECJ) is presented with a legal question on the interpretation and application of an EU law. The ECJ can be called on not only by Member States or EU institutions, but also by persons and associations.

What makes the debate about the democratic capacity of the European Union especially clear today is that supranational legislation and control has changed the national political notions of representation and interest sharing. The quasi-federal legislative processes and pluralistic political processes of the European Union have far greater effects on Member States with central-state structures than on those with federal structures (Schmidt 2006). In centralised states, where power has traditionally been concentrated in the executive branch, the EU has undermined the autonomy of the executive and questioned its monopoly on decision-making. Moreover, it has reduced the traditional control of the executive over other government units, in particular the national courts and subnational units that have become more independent, while the national legislature has lost even more power. In contrast, in federal states, where power has traditionally been more shared, the EU has undermined executive autonomy less. Such executive autonomy has traditionally been restricted by the judiciary and subnational units as well as a strong involvement of social partners in policy making. Additionally, supranational regulations have not reduced flexibility of implementation to the same extent in federal states, as the federal administrative structures and self-regulatory arrangements are not called into question.

The question is therefore not only how democratic the EU is, but to what extent the EU influences the understanding of democracy in Europe at national level. In a centralised state, it is believed that political projects are best initiated and implemented by a strong, centralised government, because only the central government is credited with the responsibility and ability to respond effectively to the wishes and

needs of its citizens. The EU's federal system of government undermines this understanding because of its federal structures and how they serve to reduce the concentration of power and authority in the executive in unitary states. In a federal system, however, it is believed that democracy is best served by a horizontal and vertical separation of powers. Citizens' rights are protected by state control mechanisms that are distributed among a large number of government agencies. The EU strengthens this understanding as the federal system is strengthened at national level. In addition, it promotes an understanding of political participation, according to which social interest groups must be involved in the decision-making process at an early stage, with their implementation being the responsibility of the subordinate authorities. This is an essential difference to centralist systems in which the access of social interest groups to policy formulation is limited (Schmidt 1996).

The discussion on a European Constitution initiated by Joschka Fischer's speech in 2000 was an important step. The failure of the Nice summit is a perfect example of the need to address the issue of the EU's further development in order to arrive at a new European self-understanding that does not just negotiate national interests. An important question will be how to re-think the notions of national democracy in the face of changes in national governance. This requires a Europe-wide debate that is no longer filtered by Member States' national communication discourse. Although the Commission has clearly tried to make this possible, it leads a lonely fight. While it has been extremely successful in coordinating discourses through the creation of networks, commissions and political forums around the legislative process, it has failed in terms of broad public discourse. Admittedly, the problem does not lie with the leaders spearheading such initiatives, but rather in the structure through which they must do this. Necessary reforms in the election of Parliament or the President of the Commission are therefore still essential.

The volume does not provide a conclusive picture of theoretical discourse on federalism, nor can it do so given the variety of on-going processes. Instead, it aims to stimulate debate, and explore notions of political representation and sovereignty that complement the various discourses on democracy and participation at the national level. I would like to thank all authors of this volume who have contributed to leading this debate, with their much-needed insights into the rich history of ideas of federalism as well as with regards to the current processes. Last but not least, I would like to thank Mira Krause for the editorial revision of the contributions of authors from Belgium, Germany, France, Great Britain, Canada, Switzerland and the USA.

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II.

**Theories of Federalism in the early modern
Period. The Holy Roman Empire, the Swiss
Confederation, and the Dutch Provinces**

Dutch and German Theories of Federalism in the Seventeenth Century

1. Introduction

The United Provinces of the Netherlands and the German Empire stood out in the seventeenth century as rare examples of federal forms of government in an age dominated by centralized monarchies and the doctrine of indivisible sovereignty created to legitimize the post-feudal state. In the United Provinces and the post-Westphalian German Empire there were important, but nowadays often neglected, theorists such as Ludolph Hugo, Pieter de la Court, Gottfried von Leibniz and Baruch Spinoza who articulated the outlines, or defended the fundamental principles, of federal systems that were both challenged by, and simultaneously a challenge to, the prevailing conception of sovereignty.

These seventeenth century Dutch and German thinkers tried to determine whether the United Provinces and the German Empire could be reconciled with the modern doctrine of sovereignty. In the process of addressing issues pertaining to the relationship of the central government to its constituent members, and the nature of the internal constitutional arrangements within their regimes, Spinoza, Hugo, de la Court and Leibniz asked crucial theoretical questions such as: Are the United Provinces and the German Empire recognizable states according to prevailing legal philosophy? If so, where is sovereignty located in these regimes? And does the predominant notion of supreme power adequately reflect heterogeneous, compound political structures such as the United Provinces and the German Empire?

These early federal thinkers were emphatically not engaged in a purely theoretical exercise, however. Their theorizing was often produced as a response to concrete political debates about the vertical division of power taking place in regimes in which the jurisdictional lines of authority were seldom clearly defined or uncontested. The Dutch Republic and the Holy Roman or German Empire were profoundly impacted by events that marked their origins such as the Dutch Revolt of the 1570's against Hapsburg Spanish rule, or by dramatic social and constitutional changes brought on by circumstances such as the Reformation or the introduction of colonialism that transformed the political milieu in which these quasi-federal forms developed. Our argument will proceed in four sections in the following manner.

In the first section we will provide important historical context for the emergence of early Dutch and German federal theory. This will include highlighting the role of

the Dutch Revolt in the creation of the United Provinces, a revolt which originated in large measure as a defense of a tradition of local self-government against the centralizing ambitions of the Spanish imperial authorities. We will also consider the evolution of the legal and political structures of the German Empire in the centuries prior to the 1648 Peace of Westphalia, paying particular attention to the complex role the Swiss conflict played in thinking about the possibilities and limitations on a vertical division of power in the empire. Section two will lay out several of the most important theories of sovereignty then regnant in Europe that were fundamentally antagonistic toward the idea of federalism and divided political authority. Thinkers such as Jean Bodin, Hugo Grotius and Samuel von Pufendorf presented arguments for supreme political power that, at most, precluded any notion of federalism or, at least, militated against any philosophical consensus on the merits of the federal constitutional system. In the third section we will examine late seventeenth century Dutch theorists of federalism especially Pieter de la Court and Benedict Spinoza, the latter a thinker not often associated with federalism. In the fourth section we will examine two important seventeenth century German federal thinkers Ludolph Hugo and Gottfried von Leibniz who theorized in the post-Westphalian era following 1648 about constitutional arrangements characterized by the vertical division of power and multilevel governance.

While it is doubtful whether these Dutch and German thinkers of the seventeenth century presented a fully developed federal theory, they and their homelands are a valuable study as a crucial stage in the development of modern federalism. In Spinoza, Hugo, de la Court, and Leibniz we see an articulation of the challenge to indivisible sovereignty posed by pluralistic political associations based, however vaguely, on a territorial division of power. In their efforts to find a new vocabulary and theoretical explanation for the United Provinces and the German Empire these early federalists made considerable conceptual strides that would inform later American and European views of the possibilities and limits of federalism. While the history and theory of seventeenth century Germany and the Netherlands seems alien to many in the English-speaking world today, it is perhaps useful to recall that later federal thinkers in Europe and America were intimately familiar with the complexities, including the vices, of the Dutch and German systems.¹ The theory and practice of seventeenth century Dutch and German federalism arguably highlighted the central problems that later federal theory would have to address.

1 For example, no less than 13 of the 85 *Federalist Papers* contained discussions of the United Provinces or the German Empire.

2. The Political Characteristics of the United Provinces and the German Empire

The German Empire and United Provinces were both political arrangements of remarkable complexity. The seventeenth century German or Holy Roman Empire had two main features. The empire was a heterogeneous political form composed of a dizzying array of over 300 estates including seven electors and hundreds of princes and independent cities all combined within the loose association of the Empire. It was also an elective monarchy that placed imperial authority in the conjoint power of the emperor and the Diet representing the various estates.

A number of formative events account for the gradual transformation of the empire from a fairly unitary state in its ninth century original to an emphatically decentralized arrangement of sovereign or semi-sovereign states. First, in the Golden Bull of 1356 Emperor Charles IV settled the composition of the Electoral College, and formally recognized the complex process of election involving the plethora of German princes, counts and independent cities such as Hamburg, Lubeck, and Frankfurt. In the aftermath of the Golden Bull, the emperor agreed to share many executive and judicial functions with the Imperial Diet or Reichstag, and all imperial legislation required the consent of the representatives of the estates. The effect of this agreement on the political cogency of the empire was dramatic. James Bryce went so far as to argue that with the Golden Bull, Charles V “legalized anarchy, and called it a constitution,” whereby the impact of the codified vertical division of power was particularly debilitating to the executive power insofar as the “power of the Crown was not moderated, but destroyed” (Bryce 1932: 250 150). Thus not only was the German Empire perhaps the most prominent example of elective monarchy in the modern world, it was also a form of political association in which the central government possessed a seriously diminished capacity to enforce and effectively administer imperial legislation throughout the empire. While Bryce was not alone in exaggerating the structural limits on imperial power, for our purposes the central point is to remind us how unique the German Empire was perceived to be in the era of centralized, monarchical superpowers.

The federal nature of the German Empire deeply impacted not only the executive power, but also the legislature. The Reichstag was not a parliament in the model of the English Parliament, which represented individual subjects. Rather the Imperial Diet was a mode of representation for the imperial Estates. These Estates were divided into three colleges: the college of seven Electors including three specific bishops and four secular princes, the college of imperial princes who ruled duchies and principalities of various sizes, and the college of imperial cities that were quasi-republican/oligarchical municipalities ruled directly by the Emperor in absence of a local aristocracy. The Imperial Diet met periodically in several locations throughout the history of the Empire until it settled into permanent session in Regensburg in

1633 (Wilson 2016: 443). The Imperial Diet was in certain respects profoundly federal insofar as it relied in part on the principle of territorial representation. However, it was far from being a democratic body as Peter Wilson explains: “There was no prospect of its evolving into a democratic institution without fundamentally altering the Empire’s character as a mixed monarchy and enfranchising inhabitants rather than territories” (Wilson 2016: 443). Nonetheless, the Reichstag proved useful as the medium through which the Emperor and the various imperial Estates could negotiate and strive for consensus.

Another formative event in the development of the federal idea within the German Empire, which clearly demonstrated the empire’s incapacity to enforce its legislative will, was the fractious relation between the Holy Roman Empire and the Swiss Confederation. As far back as the early thirteenth century the Emperor Friedrich II granted a handful of Swiss regions an Imperial Letter of freedom or *Reichsfreiheitsbrief*, which established that the inhabitants of these regions were free citizens of the empire charged with the duty of guarding new imperial roads through the Alps (Dame 2001: 213). The citizens of Uri, Schwyz, and Nidwalden – the three forest cantons – interpreted these imperial privileges to mean that they enjoyed a right of self-government that allowed them to enter into alliances with other free regions of the empire. It was upon this premise that these three cantons came together to provide for the first establishment of the Swiss Confederacy through the “Everlasting League” of August 1, 1291.

The Swiss illustrated both the salutary flexibility of the imperial structures, as well as the serious limitations on the empire’s capacity to impose a uniform body of law or economic policy across central Europe. Indeed, periodic imperial efforts to bring the Swiss to heel typically backfired. In the 1490’s Emperor Maximilian I tried to force imperial jurisdiction and taxation on his Swiss subjects as part of his effort to rationalize and modernize the empire, and only succeeded in expanding the scope of the Swiss Confederacy to include ever more cantons in a loose confederation of free cities and lands that refused to be subject to the Hapsburgs (Gillard 1955, 36). But it is important to recognize that as Dame observed about the Swiss cities and cantons: “They did not want freedom from the Empire, but imperial freedom” (Dame 2001: 245). What this meant is that the Swiss territories sought a direct relationship with the Imperial government freed from the intermediary role of detested feudal aristocracies and their endless petty tyrannies. In this respect the Swiss Confederacy’s relation to the Empire foreshadows at least *in potentia* key aspects of the modern conception of federalism pioneered in the United States centuries later, which rested upon the idea of a direct legal relationship between the central government and the individual citizens subject to the national government (Madison et. al. 2001: No. 39). While neither the Swiss Confederacy nor the Empire advanced a conception of individual rights in the modern sense, the tension we identify in their rela-

tionship between the competing jurisdictional claims of national and sub-national units, on one hand, and the legal rights and responsibilities of individual citizens, on the other, would provide modern theories of federalism with their major conceptual challenges. Centuries of experiencing the concrete reality of Swiss *de facto* independence from the Holy Roman Empire adumbrated these debates.

A third event that made a significant impact on the development of federalism in the German Empire was, of course, the Protestant Reformation. The Reformation of the sixteenth century shattered the formal unity of the empire as the Emperor came to be seen as the leader of the Catholic faction and the Protestant princes and cities rejected imperial authority not only over religious matters, but also on a wide range of issues previously held to be a function of the central administration of the empire. This was a process mirrored in the Swiss lands as well, in which by the mid-sixteenth century in reality “there were two Confederations – the Protestant towns and the Catholic cantons, each separate orbit following different policies, both internally and externally” (Gillard 1955:42). The Peace of Westphalia of 1648, which finally ended over a century of religious turmoil left the emperor badly diminished and recognized many of the princes and territories as more or less fully sovereign states.

Was the German Empire truly a recognizable state form defined by a modern idea of sovereignty? The German Empire certainly possessed some features of statehood such as a common head and a capacity for common action albeit tortuously consensus based. Moreover, it had a common legal framework, could provide somewhat for common defense, and the central government played a role settling disputes among the constituent members of the empire. However, the state personality of the empire was seriously limited by the constant evolution of territorial sovereignty (Wilson 2006: 573). The nature of the claims of territorial sovereignty was by no means uniform as the various princes and cities often enjoyed distinct privileges, but the ultimate effect was to diminish the power of the imperial authority and produce endless disputes about supremacy in the empire. Given the amorphous character of imperial authority and the steady growth of territorial power such debates were likely inevitable.

In its own way the United Provinces was as complex as the German or Holy Roman Empire of which it had once been a part.² In order to understand the political characteristics of the United provinces, it is necessary to appreciate the origins of Dutch ideas about self-government during and prior to the Dutch Revolt of the late 1560–70’s against Spanish Hapsburg rule. Strong elements of municipal and provincial autonomy greatly predated the period of Hapsburg rule over the Netherlands. As far back as the Joyous Entry of Brabant of 1356, the Burgundian rulers of the region recognized certain economic and franchise rights granted to self-governing towns

2 Although as Mout observes, the connection between the Empire and the Netherlands was widely considered to be fairly tenuous, even well before the 1548 Treaty of Augsburg (2012, 208–209).