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# Federalism at the Crossroads: Old Meanings, New Significance

THOMAS HUEGLIN *Wilfrid Laurier University*

Our understanding of federalism as a concept of political organization is commonly derived from its practice in a handful of classical federal states. In particular, and with good historical reason, it is the United States that serves as the main point of reference. All other federal systems are, to a considerable extent, seen and judged as variations of the American model. Its central tenets are the sanctity of constitutional rule, the historical victory of federal supremacy over states rights, territorial jurisdiction and representation and a division of powers distinguishing between what is perceived as national and regional policy domains (the literature on comparative federalism remains thin; see Elazar, 1987; Watts, 1999).

On all counts, federalism has remained a contested concept. Constitutional rigidity is giving way to the greater flexibility of negotiated agreements or treaties. Accordingly, the relationship between federal and regional governments is taking on more balanced or even confederal characteristics. Territorial jurisdiction and representation are challenged by the rise of transborder and identity politics. The boundaries of national and regional policy domains are increasingly blurred by forces of economic globalization (Hueglin, 2000).

The theorists and practitioners of federalism are reluctant to endorse such changes to the classical model. They can rightly point to a powerful tradition and proven track record in modern federal states. Both are epitomized by the American model and its seemingly timeless constitutional commentary in the Federalist Papers (Hamilton and Jay et al.). Written as newspaper commentaries by Alexander Hamilton, John Jay and James Madison in 1787-1788 in order to bring about ratification of the American

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constitution in the state of New York, these essays doubtlessly comprise the very essence of the modern federal state in theory and practice.

As is well enough known, the Federalists drew from an older European tradition. Their most obvious source of inspiration was Montesquieu's idea of a "Confederate Republic" in *The Spirit of Laws* (1750).<sup>1</sup> Montesquieu had derived this idea from contemporaneous examples of federated governance in Switzerland, Germany, or what was then called the Holy Roman Empire of the German Nation and the Netherlands. Already a century earlier, and based on the same historical examples, Johannes Althusius had developed a grand theory of covenanted or consociational federalism (1614). There is no evidence that the Americans had read or known Althusius, although he published the second edition of his book in the Netherlands at a time when some of the English "pilgrim fathers" had stayed there in exile (Hueglin, 1999: 16; on possible connections between Althusius and Montesquieu, see *ibid*: 110). However, it is clear that the Protestant spirit of covenanted union played a central role in the political thought of the New England colonies.

Against the view that the dominant American model of the federal state gradually evolved from these older traditions (Elazar, 1994: 111-32), an argument can be made that the Federalists' interpretation constituted a deliberate and radical break with that tradition. This may already be evidenced by the fact that their account of the three very same historical examples, in the nineteenth and twentieth Federalist Papers, is entirely negative. The reason given is the same in each instance: the lack of supreme central authority in these confederacies leads to "imbecility" in government and social affairs.

A careful comparative re-reading of the Federalists against the older tradition embodied by Montesquieu and Althusius establishes the meaning of this turning point in the history of federalist thought more clearly. While the Federalists endorsed federal supremacy over the states, Montesquieu and Althusius insisted on a balance of power ultimately tilted in favour of the constituent members of a federation. While the Federalists sought to employ territorial divisions of power as a means of cutting across social community and class, Montesquieu and Althusius understood it as a means of reinforcing the stability of such communities. And while the Federalists based their arguments on a hierarchical differentiation of national and local policy needs, Montesquieu and Althusius emphasized that smaller communities would remain fully functioning polities in their own right.

This re-examination of a crucial turning point in the history of federalist thought also points out that the older understanding of federalism is remarkably in tune with critiques of the federal state as overly statist, top-heavy in the presumption of federal supremacy, territorially biased and insensitive to the self-governing claims of social communities, and inefficient in its anachronistic allocation of powers. The new significance of that

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**Abstract.** Federalism has remained a contested concept. The constitutional certainties of the modern federal state are under attack from confederal practices of negotiated agreement. Such practices have their traditional roots in the political theories of Althusius and Montesquieu. The central argument of this article is that the American Federalists broke with that older tradition and deliberately misinterpreted Montesquieu along the way. Consequently, the predominant reading of federalism emphasizes federal supremacy over the idea of a social compact among equal partners, territorial representation dominates over the recognition of social community, and the allocation of divided powers is guided by national prerogatives rather than regionally differentiated policy needs. Recent trends towards a more collaborative form of federalism indicate that the old model of constitutional federalism may be replaced by new practices of treaty federalism.

**Résumé.** Le concept de fédéralisme demeure contesté. Les certitudes constitutionnelles de l'État fédéral moderne sont remises en question par les pratiques confédérales de négociations d'ententes. De telles pratiques plongent leurs racines dans les théories politiques d'Althusius et de Montesquieu. L'argument central de cet article est que les fédéralistes américains ont rompu avec cette vieille tradition et ont ainsi mal interprété Montesquieu de façon délibérée. En conséquence, la lecture dominante du fédéralisme met l'accent sur la suprématie fédérale au détriment de l'idée du contrat social établi entre des partenaires égaux, de même que sur la représentation territoriale au détriment de la reconnaissance de la communauté sociale. La séparation des pouvoirs est faite en fonction d'impératifs nationaux au lieu de tenir compte des besoins politiques distinctifs des différentes régions. Les tendances récentes conduisant à une forme de fédéralisme plus axée sur la collaboration indiquent que l'ancien modèle du fédéralisme constitutionnel peut être remplacé par les nouvelles pratiques découlant du fédéralisme de traité.

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older tradition in a globalizing world of national fragmentation and international integration will be discussed briefly in the concluding section. However, the exercise begins with some methodological reminiscences on the bifurcation of statist and societal political thought at the beginning of the modern epoch.

## **1. Methodological Beginnings: The Statist versus Societal Perspective of Politics**

At the beginning of the modern epoch which brought forth the territorial nation state and, somewhat later, the federal state as its only significant variation, a French logician, Pierre de la Ramée (1515-1572), burst upon the scholarly scene with a masters thesis claiming that "whatever has been said by Aristotle, was wrong" ("quaecumque ab Aristotele dicta essent, commentitia esse"; see McRae, 1955: 306). It has been pointed out that this youthful and exuberant attack was really more directed against the scholasticizing distortions of Aristotelian thought at the time than against Aristotle himself. Ramée, who was first banned from teaching logic and philosophy altogether and then, reinstated, held a prestigious chair at the Collège Royal, perished in the St. Bartholomew Day massacre of 1572. He had an enormous influence upon two political theorists who would play a significant role in the debates shaping the modern world.

One of these theorists was Jean Bodin who gave that world the first definition of sovereignty as *puissance absolue & perpetuelle* (1576). The other was Johannes Althusius who held against Bodin that the right of sovereignty is “neither supreme and perpetual, nor above the law” (“non...est summa potestas, non perpetua neque lega soluta”; 1614: XI.21). In the Westphalian peace treaty negotiations of 1648 that ultimately sealed the fate of the Holy Roman Empire by bringing forth the modern state system, the imperial camp would routinely invoke Bodin in order to lay claim to the Emperor’s exclusive right of representation, while the anti-imperial camp took recourse to Althusius in its successful quest of having the estates included as territorial representatives in their own right (Hoke, 1998). While Althusius was soon forgotten, Bodin’s doctrine of sovereignty lived on as supreme law within the absolutist territorial states that emerged from the renunciation of imperial supremacy.

Both Bodin and Althusius based their claims on Ramist logic, a simple set of principles for the systematic discovery of knowledge (Hueglin, 1999: chapter 6). According to this logic, all scientific discourse has to be based on invention, the search for the right kind of arguments for each given subject matter, and disposition or judgment, the skilful ordering of these arguments in order to reach logical conclusions. The latter, disposition, means that all social phenomena have to be presented in a dichotomizing scheme of subdivisions ranging from the most general to the most particular. The former, invention, is itself subdivided into three further principles. The first, which is called the law of justice, determines the proper boundaries of a given discipline, and requires that all alien arguments be excluded. The second principle, or law of truth, requires a focus on universal and necessary precepts, and the elimination of all propositions that are only true in certain places and times. The third principle, or law of wisdom, commands that all propositions or arguments must be placed within a specific level of generality and should not be confused with matters on a higher or lower level of generality (Carney, 1995; McRae, 1955).

Bodin and Althusius both define as the subject matter of politics the rights of sovereignty in a commonwealth composed of households and other intermediate social organizations. They both follow the Ramist method of subdividing the plurality of social phenomena into various classes ranging from the general to the particular, although this is less evident in Bodin’s *République* than in Althusius’ *Politica* (McRae, 1955: 315). They both begin their discussion of politics with family and household as the natural and timeless beginning of social life. By declaring the establishment of sovereign rule as the ultimate end of social organization, however, Bodin subordinates these households and other intermediate social organizations to a status that is functionally dependent on that end. Here is where Althusius begs to differ.

Precisely because families constitute the natural beginning of social life, he insists, they are governed by special sets of rules specific to them, and not by a general rule of sovereignty. The same principle of specificity also applies to all communities or, as he calls them, consociations, villages, cities and provinces which all precede realms or states and are prior to them “just as the simple or primary precedes in order what has been composed or derived from it” (“eoque notior est & simplex, seu primum id quid compositum seu ortum a primo est, antecedit ordine”; Althusius, 1995). This then leads him to reject “Bodin’s clamours” (“non curo Bodini clamores”; Friedrich, 1932: Praefatio 1603) that the rights of sovereignty as the ultimate end must be exclusively located in the highest order of governance. Instead it follows logically that their ownership belongs to “none other than the entire people consociated from several smaller consociations in one symbiotic body” (“nullum alium, quam populum univsum, in corpus unum symbioticum ex pluribus minoribus consociationibus consociatum”; Althusius, 1614: Praefatio).

Althusius further explains why Bodin and others reach different conclusions. They try to determine the nature of sovereignty before examining social life in cities and provinces and thus deduce, erroneously, the nature of the latter with the help of principles that are not on the same level of generality. This “conflicts with the law of method” (“pugnat enim hoc cum lege methodi”; 1614: XXXIX.84). Put differently, the difference in method is that Bodin first determines the most general principle of politics, sovereignty, and then deduces from it the nature of organized social life, whereas Althusius first examines the nature of organized social life and *then* determines sovereignty as its most general principle—by means of induction rather than deduction. In the first case, the quality and organization of social life become dependent variables of sovereign rule. In the second case, sovereignty appears as a dependent variable of the nature and organization of social life.

The implications for political theory are considerable. Bodin falls into a tradition that defines politics predominantly, if not exclusively, as a hierarchical system of organized public power. All social rights and obligations stem from one universal source of legal authority. Althusius, by contrast, represents a tradition that defines politics in a much wider sense. For him it is primarily a horizontal process of communication among a plurality of groups or communities which all possess their own rights and obligations. Sovereignty as the communication of universal right is the end product of that process, not the starting point.

The implications for federalism are equally significant. From the Bodinian perspective of the sovereign state, federalism inevitably must take on the form of the modern federal state: the law of the federation ultimately breaks the laws of its member units. Primacy is given to the efficiency requirements of nation-state governance. From the Althusian perspective, on

the other hand, federalism is a balancing act among equals, confederal rather than federal because “every constituting body is prior and superior to what is constituted by it” (“*omnis constituens prior & superior est a se contituito*”; 1614: XVIII.8). Sovereignty, therefore, is not a constitutional certitude that determines who gets to do what in a federation. In fact, it only exists when the process of shared governance works and all agree. Federal sovereignty in the Althusian sense is a process of negotiated and shared sovereignty.

## 2. The Issue of Supremacy: Assemblage of Societies versus Perfect Subordination

It is in the ninth Federalist Paper that Alexander Hamilton most extensively refers to Montesquieu’s “Confederate Republic.” After quoting at length from the ninth book of *The Spirit of Laws*, calling it a “luminous abridgment of the principal argument in favour of the Union,” he goes on to tell his readers what his vision of a confederate republic is:

The definition of a *confederate republic* seems simply to be “an assemblage of societies,” or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members not be abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. (Emphasis in original.)

This is as subtle and brilliant an act of theoretical subterfuge as James Madison’s, much more well known and debated in the next and tenth Federalist Paper, where the frustration of majority rule is presented as republican virtue (Harrington, 1990: 5-6, 67). Hamilton’s move, a mere matter of “discretion” as it were, from “an assemblage of societies” to “perfect subordination” was a deliberate transformation of the federal principle that had been developed by Montesquieu, and by Althusius before him, as a prestatist concept of societal organization.

At the beginning of the modern age, the question of supreme authority had to be posed anew. Renaissance and humanism had begun to challenge the static medieval world of predestination and redemption. The Reformation had destroyed the old world of Christian universality in which the question of supremacy, at least in principle, had been left to the rivalries between Pope and Emperor, and to a plurality of overlapping spheres of rule in practice. As a result, a new world emerged that was ever more drawn into religious and civil war. Political theory responded with two solutions. One, represented by a line from Machiavelli to Bodin and Hobbes, aimed at the re-establishment of unity. The other can be discerned in what has been called the Calvinist rediscovery of political complexity (Wolin, 1957). Its main protagonist was Althusius.

Since he saw the social foundations of mixed republican rule destroyed by corruption in Italy, Machiavelli placed supremacy in the hand of “a new prince” (“uno nuovo principe”; Machiavelli, 1513: XXVI; Hueglin, 1990) who, ignoring all tradition, would be guided in his actions by “the factual truth of the matter” (“verità effettuale della cosa”; Machiavelli, 1513: XV) alone. A century and a half later in France, Bodin very much sought to retain tradition by basing his own explanation for the establishment of sovereignty on a historical theory of conquest (1576: II.2) by which, at least initially, “lordly” (*seigneuriales*) monarchies had been set up. These were eventually transformed into “royal” (*légitimes*) monarchies, foregoing some of their original lordly rights by bestowing them—as privileges—upon their subjects (Hinton, 1973: 310-12). Almost a century later again, in England, that tradition was dissipating rapidly in the Civil War. In order to re-establish stability, Hobbes called for the collective surrender of all individual wills which were to be conferred, in a fictitious social contract: “upon one Man, or upon one Assembly of men,” and, lastly, “unto one Will” (Hobbes, 1651: XVII).

For Althusius, politics is the art of consociation (“proposita igitur Politicae est consociatio”; 1614: I.2), a process of community-building, and of establishing and maintaining a stable and lawful relationship among many narrower and wider such consociations or communities, from families, guilds and professional colleges, to cities, provinces and the universal commonwealth (Hueglin, 1999: chapter 8). He has no problem in recognizing that, in a new age of social upheaval, sovereignty must be indivisible, that there must be, in other words, a supreme law of the land, covering all aspects of organized social life. But he denies vigorously that such a law can be beyond the control of those to whom it applies. Hence he holds against Bodin that the right of sovereignty is “neither supreme and perpetual, nor above the law” (Hueglin, 1999: chapter 8, footnote 10). Its sole source is “none other than the entirety of the people consociated in one symbiotic body from many smaller consociations” (“nullum alium, quam populum universum, in corpus unum symbioticum ex pluribus minoribus consociationibus consociatum”; 1614: Praefatio). In other words, politics for Althusius is the organization of social and territorial complexity, and sovereignty is shared sovereignty:

[Only] the people or consociated members of the realm have the power of establishing this right of the realm and of binding themselves to it. [It] does not belong to individual members, but to all members jointly. [By] common consent, they are able to establish and set in order matters pertaining to it. And what they have once set in order is to be maintained and followed, unless something else pleases the common will. For as the whole body is related to the individual citizen, and can rule, restrain and direct each member, so the people rules each citizen.<sup>2</sup>



The conceptual basis for this process of shared sovereignty is a social compact theory. There is no fictitious act of individual or collective surrender, nor the establishment of unquestioned supremacy. In fact, Althusius states unequivocally that at the universal councils of the realm “the opinion of the combined orders and estates prevails over the opinion of the presiding officer or the supreme magistrate” (“sentential igitur universorum statuum & ordinum praevallet paesidis seu summi magistrates sententiae”; 1614: XXXIII.20). This supreme magistrate holds “supreme” powers only insofar as he has a governing mandate. He is not part of the original social compact.

A compact theory of federalism does not preclude stable political union but is committed to the preservation of a plurality of particular identities. In fact, that preservation is the primary purpose of union. All through the Middle Ages, such plurality had existed. In principle, the Empire, its kingdoms, principalities, duchies, bishoprics and free cities all were to govern autonomously within their respective spheres of jurisdiction and privilege. In practice, overlapping spheres of authority and rule often had exposed citizens to near anarchical conditions (Bull, 1977). Althusius’ theory intended to provide a solution to this problem by establishing a unifying process of common governance without, however, destroying the plurality of communities itself. “[The rationale of universal governance is that] the highest concern must be had for the fundamental law of the realm... which is nothing other than those pacts [or covenants] by which many cities and provinces come together and agree to establish and defend one and the same commonwealth by common work, counsel, and aid.”<sup>3</sup> Rather than directing the commonwealth from a position of supremacy, therefore, the federal level of government assumes the role of a forum in which the constituent members of a federation agree on universal standards and norms. Its role is, in other words, to do what these members alone cannot do by providing internal cohesion and external security. The immediate question is, of course, why these constituent members would ever come to such an understanding and agreement of solidarity. It has always been the suspicion of radical democratic discourse that federalism balkanizes the general will and facilitates local tyrannies (Lowi, 1984). The Althusian perspective, however, points to three possible answers.

The first of these has to do with adequate structuration. Citizens will act reasonably and responsibly when they can see the consequences of their actions. This appears likely when the gap between the reach of individual responsibility and large political organizations can be bridged by intermediate structures, thus allowing for meaningful participation, linking particular concerns to particular structures of governance, and leaving to the large structures the general concerns that affect all in the same way. A second answer points to politics as deliberation. Without federal

supremacy, the constituent members of the commonwealth are held to engage in a process of “mutual communication of whatever is useful and necessary for the harmonious exercise of social life” (“ad communicationem mutuam eorum, quae ad vitae socialis usum & consortium sunt utilia & necessaria, se obligant”; 1614: I.2). Adequate structuration and representation<sup>4</sup> are the preconditions for this process.

Finally, the third answer points to faith in human nature; provided with appropriate institutions, humans will act responsibly. This is simply a more optimistic and Aristotelian view of human sociability than the Hobbesian assumption of man as man’s wolf.

Montesquieu’s argument a century and a half after Althusius is quite similar. In the famous sixth chapter of the eleventh book of *The Spirit of Laws*, he advances the thought that the value of proper representative government lies in its capability of “discussing affairs.” Proper representation requires that representatives are elected by the inhabitants of particular places rather than chosen from the “general body of the nation,” because “the inhabitants of a particular town are much better acquainted with its wants and interests.” This can only exist in a “free state” where, as Montesquieu has already established earlier, “by the very disposition of things power should be a check to power” (1750: XI.4). Such a free state can only be a small republic. A large one would have to be held together by the supreme force of a monarchical government, an “internal imperfection,” by which its freedom would be ruined. However, by the same token, a small republic would require protection from a strong monarchical government because otherwise it would be “destroyed by a foreign force” (1750: IX.1).

This is how Montesquieu arrives at the idea of a “confederate republic.” Such a republic, as an “assemblage of societies” constituting a new one, would combine “the internal advantages of a republican, together with the external force of a monarchical, government” (1750: IX.1). The locus of these passages, however, is the first chapter of the ninth book where Montesquieu discusses external defence and security,<sup>5</sup> not the sixth chapter of the eleventh book where he turns to the separation of powers in a free state. The federal union, therefore, is not meant to affect the full internal exercise of these powers by the members of such a union. There is simply no way of reading into these passages what Hamilton read into them, namely that the members of such a union will continue to exist for “local purposes” only—because local is not the same as internal, and that they “should be in perfect subordination to the general authority of the union”—because that authority is limited to external security.

Hamilton and his Federalist colleagues sought to convince their readers of the necessity of a strong union government for external as well as internal purposes because the preceding confederacy had proven unable to provide economic stability. That was as valid an argument then as it is

now. It could have been made, and can be made, by extending Montesquieu's limited understanding of security. Internal peace, order and good government, for instance, including the regulation of trade and commerce, may well be prerequisites for security in a more general sense. But it violates Montesquieu's spirit of laws to construct from it the assumption of supremacy.

### **3. The Issue of Representation: Territorial versus Social Community**

In the fifty-first Federalist Paper, the concern is with the representation of minority rights. As Madison had already made clear in the tenth Federalist, the purpose is protection of private property. The means to this end is now identified more precisely as "a judicious modification and mixture of the federal principle.... In the compound republic of America, the power surrendered by the people is first divided by two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments." Through this balkanization of the popular will, the Federalists argue, "the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."

The point here is not a critique of this early pre-formulation of the American doctrine of liberal pluralism and polyarchy. That critique has been made, pointing out the "circularity in polyarchy" (Lindblom, 1977: chapter 15; Manley, 1983) under conditions of social inequality which the Federalists took for granted and wanted to preserve. The point is that federalism as a form of power separation is employed as a constraining device cutting across social community, as the deliberate organization of bias (Schattschneider, 1960: 71) on the basis of territory, cutting across organized societal interests.

The merits or demerits of territorial federalism may well be debatable. But it cannot be claimed that the organization of territorial federalism thus established has its intellectual roots in Montesquieu. However, this is what Hamilton claims when he writes, in the ninth Federalist Paper again, that Montesquieu "explicitly treats of a Confederate Republic as the expedient for extending the sphere of popular government." As we already know, this is not at all what Montesquieu suggests. For him, the confederate option of territorial expansion is an external security device, and its purpose and design are precisely meant to preserve a republican form of mixed governance within the smaller constituent members of a confederation, balancing, as it were, the interests of different social communities through power separation as well as mutual checks and balances. The territorial principle of federalism, in other words, is treated as an expedient, reinforcing rather than cutting across social community.

The earlier federal theory of Althusius not only follows a similar logic but extends it to an elaborate scheme of political organization. A well-ordered polity, he argues, is politically structured as an ascending order, from smaller communities or consociations with more particular needs and interests, to a large commonwealth serving universal needs. In what might be called a system of consecutive federalization, each larger consociation is governed by a council of representatives from the smaller consociations it comprises, and by a presiding officer generally elected by that council. There is no direct parliamentary representation of individual citizens. In modern terms, the federal commonwealth resembles a multi-level system of governance by second chambers.

Thus the interests of families and clans are represented in guilds and professional colleges. Representatives of these organized interests sit in city councils. Cities and rural districts, in turn, are represented in provincial assemblies. Finally, the estates of the realm, nobility, clergy and cities, sit and deliberate in separate chambers or benches at the universal assembly or councils of the realm (Althusius, 1614). The entire commonwealth is thus constructed as an ascending chain of indirect or council representation.<sup>6</sup> Decisions at each level of federation or consociation are generally taken on the basis of mutual agreement. This consent requirement protects each consociation in its autonomous rights of self-determination. A majority, Althusius affirms, can only decide in matters “that concern all orders alike, but not what concerns them separately” (“*quae simul universos ordines concernunt, non quae seorsim singulos*”; 1614: VIII, 68-70).

The central issue is representative inclusion. For Althusius the representation of all societal interests is a matter of principle.<sup>7</sup> In modern terms, again, all politics is identity politics. Governance at the level of a province, for example, is based on agreement and compromise among the estates of the land. These include clergy, nobility, cities and rural areas. All are represented as distinct communities in provincial councils (1614: VIII). By comparison, the Federalists denounce the “actual representation” of all societal interests as “altogether visionary.” They concede that “all classes of citizens” should have some representation so that “their feelings and interests may be the better understood,” but in an almost pre-Althusian feudal sense, they insist that in general “landholders, merchants and men of the learned professions” will know what is best for all (35th Federalist [Hamilton]).

It needs to be emphasized that the point here is not to cast moral or political judgment on any of these authors. While they all defended the vested interests of the social classes they belonged to, they all went beyond the limitations of narrow partisanship and therefore deserve their places in the history of political thought.

The Federalists very much sought to constrain popular majority power by checks and balances which, nevertheless, were meant to safeguard the political process from the corruptions of vested interests in a

more general way. In this, they indeed learned from Montesquieu for whom federalism meant the provision of an external security shield behind which the traditional classes could engage in a stable game of republican politics. That constituted progress in political thinking because it advocated a form of “political liberty” by giving a representative voice to the “whole body of the people”—even though, as he wrote at the end of the chapter on the Constitution of England (1750: XI.6), he would rather not inquire whether this liberty was “actual” or merely formal. Althusius, in turn, stubbornly defended the interests of those to whom he owed his rise from humble peasant origin to respected law professor, Reformed church elder and influential city politician (Hueglin, 1999: 32-37). Yet with methodological thoroughness, he formulated general principles of representative inclusion that went far beyond such self-interest.

The point, then, is not to cast judgment but to contrast the substantive differences in these efforts at conceptualizing an inclusive theory of politics. The Federalists’ “judicious” territorialization of the popular will was already steeped in Lockean individual liberalism. At least in the postbellum American republic, when common diction replaced “the United States are” with “the United States is,” federalism increasingly came to be seen as a safeguard of individual rights, not social communities. For Montesquieu and Althusius, on the other hand, territory and social community still formed an inseparable unit. Representation of the general will therefore meant representation of these communities. Federalism was conceptualized as a safeguard of these communities in a community of communities.

#### **4. The Issue of Power Allocation: Policy Fields versus Policy Needs**

The modern federal state was in most instances based on elite compromise among economic modernizers and cultural traditionalists,<sup>8</sup> without, however, losing sight of the fact that this cultural traditionalism also went hand in hand with the preservation of economic interests. At the Philadelphia Convention of 1787, the essential compromise was the one between northern interests in trade and commerce and southern interests in retaining that “peculiar institution,” slavery, upon which the privileges of the plantation owners rested (Hofstadter and Miller et al., 1973: 68-69). The compromise was not a durable one, and it was only settled, in favour of federal supremacy, a century later in the Civil War. In Switzerland, on the other hand, the constitution of 1848 was preceded by a secessionist war. The outcome was a compromise between the modernizing liberal and the catholic-conservative cantons (im Hof, 1968: 61). At Versailles, in 1871, Bismarck’s federal state was forged upon a compromise between the dynastic interests aligned with Prussian industrial nationalism and the alliance of southern fairy tale princes led by Bavaria’s Ludwig II (Mann, 1958: 377). And in Canada, the constitutional outcome of 1867, even though based on one of

the “most curious alliances ever forged in Canadian politics” (Vipond, 1991: 16), nevertheless came down to a basic compromise between John A. Macdonald’s transcontinental economic railway union and the retention of “property and civil rights” in Quebec (Morton, 1983: 71-79).

A general pattern of power distribution by policy fields evolved, centralizing trade and commerce at the national level while leaving culture, education and social policy at the subnational level. Soon this became a problem for modernizing and democratizing societies. Federal trade and commerce policies created or reinforced patterns of uneven regional development. Overburdened with social policy problems, regional governments became dependent on federal transfers. Fiscal revenue was increasingly spent by governments which did not have the capacity to raise it. Fiscal distribution and transfer schemes became the main preoccupation of federal systems. The original separation of powers became blurred, by political interlocking—as in the German system—by the wild growth of a mostly conditional federal grants system—as in the United States—or by a quasi-diplomatic regime of intergovernmental relations behind closed doors—as in Canada (Watts, 1999).

The question to be raised here is not whether modern federalism has become inefficient due to a decision-making process trapped in overlapping lines of authority (the classical locus of this argument is Scharpf, 1988). Once more, it is about a disjuncture in the history and tradition of federalism as a system of divided governance, and once again we return to the ninth Federalist Paper, in which Hamilton had told his readers that the purpose of such a division of powers was to separate the “general authority of the union” from governance for “local purposes.” Such governance would be sustained, he extended further, by leaving to the states “certain exclusive and very important portions of sovereign power.” In light of the actual constitutional document and its judicial interpretation over time, this passage indicates that the Federalists intended to bring about a radical departure from the older and traditional understanding of allocating powers among a plurality of political communities.

For the Americans, the federalist compromise meant the distinction of different classes of political community with different sets of powers required to maintain them. This exclusive allocation of powers was to be laid down with constitutional certitude and to be changed only exceptionally and with extreme procedural caution. Moreover, once established, the allocation of powers among the two levels no longer was to be negotiable. Changing policy needs would lead American federalism to a rights-based battleground of competing judicial interpretation.

For an appreciation of the older tradition of power allocation among plural political communities, we return once more to the federal theory of Althusius. Althusius was as much concerned with compromise as were the American framers. While he sought to preserve the local

autonomies of cities and other subnational units against the rising tide of territorial absolutism, he was very much aware of the fact that these now had to operate in a new context of Europeanized socio-economic relations. He recognized, in other words, a development that had begun to transform the “merchandising politics of cities” into the “monetary politics of states” (Sombart, 1928: 366). Guilds and professional colleges could no longer rely on insulated protection in local market places. The traditional nexus of social and regional identity had begun to weaken. The question, very much, was who should get to do and decide what in a new era of territorialized complexity.

Althusius thought of all political communities or consociations as generically alike. The purpose of each is the “mutual communication of goods, services and rights” (“communicatio mutual...rebus, operis, juribus”; 1614: I.7). Each is to be organized as a common social enterprise, including all essential cultural, economic and political activities necessary for the organization of a prosperous and just social life. The question, then, is not which functions, economic, social, and so on, should be allocated at what level, but which economic, social, and other functions should be allocated at what level.

From the perspective of the modern federal state, Althusius’ scheme of power allocation looks like a concurrent intergovernmental nightmare. For provinces and the universal commonwealth, for instance, he provided very similar lists of enumerated public policy powers. Both include, in varying formulations, similar matters of public order and security, levying of duties and public spending, the promotion of commerce, use of language and money and a general clause pertaining to the public good (1614: VII.12, XI.4). But then he does provide a normative or conceptual yardstick for how to cut through the maze. Borrowing from an old and venerable formula of Roman Law, he established as the most general rule for the process of decision making that “what touches upon all, must be agreed by all.”<sup>9</sup> This is not just expression of a general consent requirement. It means that a particular community should retain veto power (operationalized by a consent requirement) and self-regulatory autonomy in matters affecting it in a particular or unequal way, whereas common decisions (allowing majority voting) are possible in matters pertaining to all communities equally or in the same way.

In sharp contrast to the rights-based construction of modern constitutional federalism, the Althusian commonwealth was meant to rely on negotiated compromise over the extent to which each political community would be autonomous in governing its own affairs. The rationale of constitutionality in the Althusian sense is not to settle the question about who *has* the right to do what. It is to provide procedural principles that are meant to answer questions about who *should* best do what, and to what extent, in order to ensure the fairest outcome for all.

## 5. Speculative Endings: Constitutional versus Treaty Federalism

The American Federalists wanted to invent a new form of government. They wanted to break away from the British unitary form of state that had failed to give adequate recognition to their particular colonial interests. They also wanted to overcome the institutional defects of the preceding Confederation that had been plagued with political and economic instability. Madison in particular was convinced that the historical precedents he had studied, such as the United Netherlands in particular, only offered “warning of the course to be shunned, without pointing out that which ought to be pursued” (37th Federalist). The constitutional outcome that he and his colleagues defended so vigorously, while retaining the idea of divided government as a safeguard against tyranny, was to do away with what he saw as the “notorious vices” of factious “councils and consultations.” For that reason exactly the new constitution had been designed so that political organization would cut across social community, and so that it would be understood as a “final act” no longer permitting “new experiments” (ibid).

In historical terms, the American model shut the door to the older tradition exemplified by Montesquieu and Althusius. The constitutional model of territorialized rights protection replaced the idea of federalism as a form of ongoing deliberation and negotiated compromise. The original covenant or compact that is still celebrated as the heart and soul of American federalism (Elazar, 1994) eventually became as fictitious in constitutional practice as the Hobbesian social contract had been in theory. Within the confines of constitutional rights litigation,<sup>10</sup> only a sense of political pragmatism and the necessity of co-operative intergovernmental relations has kept it alive.

Elsewhere, older notions of a compact or treaty theory of federalism did not disappear so easily and thoroughly. In Bismarck’s federal Empire, for instance, the Bavarian constitutional lawyer Max von Seydel, taking recourse to the secessionist theories of John Calhoun, gave expression to the confederalist view that the Empire had been created by a treaty among sovereign states, and that this state of affairs was evidenced by the diplomatic relationship between Empire and states (Lehmbruch, 2000: 62). As a constitutional convention, the principle of “amicable federal-state behaviour” (Lehmbruch, 2000: 63) lived on in the new German federalism after 1949. Moreover, and as in the Bismarck constitution, the *Basic Law* of the Federal Republic also gave to the Länder governments an important and direct voice in federal legislation.<sup>11</sup>

In Canada, provincial “autonomists” had also insisted soon after Confederation that the new constitution “should be understood as a ‘contract’ among the several provinces.” The issue here was the removal of the federal government’s power of “disallowance,” the right to void provincial legislation. The autonomists argued that the provinces, as the contractees of the constitution, had a right to bring about a constitutional amendment to this effect without the federal government’s consent (Vipond, 1991: 137).



As in the German case, the compact theory of federalism did not gain legal ground in Canada. Yet the federal power of disallowance has not been used since 1943 and, as in Germany, considerable ambiguity about the constitutional nature of federalism has remained. In his refutation of Seydel's position, Rudolf Smend, one of Germany's leading constitutional scholars, wrote in 1916: "In terms of constitutional law [his] description of the relationship between Empire and *Länder* could not be more mistaken. In terms of political convention, it could not be more accurate" (Lehmbruch, 2000: 62). It is almost breathtaking how this view was echoed, in another country and 65 years later, when the Supreme Court of Canada ruled, in its decision concerning provincial approval to constitutional amendments, that "a substantial degree of provincial consent" was a political convention required by the constitution but, at the same time, that adherence to this convention was not "legally required" (Russell, 1982: 501-74).

It is this admission of ambiguity, between federalism as a legal construction and a political system of negotiated agreement, that warrants speculation on how the balance between the constitutional and the treaty dimension of federalism might shift in the twenty-first century. Indeed, this essay started with the assertion that constitutional federalism fashioned upon the American model may have outlived its usefulness in an age of flexible territorial relations, identity politics and economic globalization. Evidence supporting this assertion appears on the rise. Even in the United States where "tepid" signs of a "devolution revolution" remain firmly tied to judicial interpretation, a growing number of legislators appear to endorse the view that federalism "can move in a more state-friendly direction without constitutional change" (Kincaid, 1999a: 141, 150).

In some other federations, the signs of a return to an older and more confederal tradition and understanding of federalism are in evidence much more clearly. Canadian federalism in particular saw a dramatic turnabout in the last two decades of the twentieth century. One of the most successful textbooks on Canadian federalism could denounce the very idea of the provinces as equal partners to the federal government as an "unprecedented betrayal of the national interest" (Stevenson, 1982: preface). Twenty years later, such equality is celebrated as the wisdom of a new collaborative federalism. Intergovernmental treaties or accords are meant to replace the haggling over constitutional rights. They would identify national policy objectives and establish procedural rules of collaboration, including mechanisms of mediation and dispute settlement (the subject matter here is the Social Union Framework Agreement of 1999; see Simeon and Cameron, 2002). Clearly, and despite the fact that most of this is still at the stage of intentions, the age of disallowance and supremacy is over in Canadian federalism.

In Belgium, formally a federal state since 1993, a constitutional attempt has been made to distinguish between territorial and cultural communities. The constitution recognizes three territorial regions: Wallonia, Flanders and Brussels-Capital, as well as three cultural communities: French, Flemish and German, each with elected self-governing bodies and distinct sets of powers. More importantly, perhaps, the constitution does not attempt to allocate powers with juridical finality. Instead it provides for extensive mechanisms of co-operation, concertation and arbitration (Senelle, 1996).

And, finally, there is the European Union. It has already been described as a novel form of "confederal federalism" (Kincaid, 1999b) or "confederal consociation" (Chrysochoou, 1994). Such characterizations are called for because the EU has established impressive levels of supranational law and regulation while remaining committed to ongoing treaty negotiations and a general search for consensus. In particular, however, it is the often-belittled principle of subsidiarity that stands out as the most innovative feature of European governance (Follesdal, 1998). More than a mere admonition to make decisions at the lowest level possible, it obliges all participants to reach negotiated agreements about what that entails "by reason of the scale or the effects of the proposed action." As in the Althusian scheme of power allocation, this stipulation provides an open-ended approach to the organization of divided governance (there is evidence that Althusius played a role in finding the subsidiarity formula of the 1993 Maastricht Treaty; see Endo, 1994). In principle, the Community<sup>12</sup> can become active in any policy field deemed necessary, providing general standards and framework regulations, but it has to leave most of the material regulation and programme implementation to the member states.

It remains to be seen whether these (and other) elements of treaty federalism can become the building blocs for a new model of federalism. Thus far, the collaborative federalism in Canada has failed to include Quebec, the Belgian recognition of cultural communities has done little to ease tensions and, given its ever expanding membership, the European Union may still opt for firmer constitutional grounds. However, it seems unlikely that any of these three polities will ever return to the constitutional certainties of the American model. A globalizing world will likewise have to find flexible forms of multilevel governance that are both efficient and accountable. Therefore, as long as the history of political thought is still recognized as a heuristic tool of guidance, for the intellectual explorer as well as for the political engineer, it remains important to advance awareness of historical crossroads and alternatives.

## Notes

- 1 Since this is the edition the American Federalists used, I am not using the original French text of 1748.
- 2 “Juris hujus regnis statuendi & se obligandi ad id, potestatem populus, seu membra regni consociata habent...non singulis, sed conjunctim universis membris...competit...communi consensu de illo disponere & constituere possunt, & quod semel disposerunt, id servare & praestare tenentur, nisi communi voluntate aliud placeat. Nam ut se habet totum totum corpus ad singulos cives, atque ut totum corpus cuilibet membro imperare idque cohibere & regere potest, ita populus cuilibet civi imperat” (Althusius, 1614: IX, 16-18).
- 3 “Summa cura legis fundamentalis regni, habenda est...nihil aliud, quam pacta quaedam, sub quibus plures civitates & provinciae coierunt & consenserunt in unam eandemque Rempubl. habendam & defendam communi opera, consilio & auxilio.” (XIX.49).
- 4 Althusius suggests a kind of council system of representation whereby the legislative body at each level of consociation is composed of the representatives of the next lower level. See the next section.
- 5 Already John Locke had defined the federative power as pertaining to external affairs, and he had explained the difference by referring to the political organization of America’s native peoples where the chiefs assume supremacy only in times of war (see *Second Treatise* [1690], 146 and 108).
- 6 Still today, this is what distinguishes the German Bundesrat from the American Senate. While the representatives in the latter receive their mandate from popular election in the states, the members of the former are representatives of the Länder governments.
- 7 Of course he had a somewhat selective view of such interests. Women as a gender-specific community and non-Christian minorities had little chance of being included. But in his principled approach he did go beyond the practice of his time by asserting that there was no reason to exclude individual women from public office, for instance, or by including agrarian interests in his representative scheme.
- 8 This simplification may be allowed for comparative purposes; a more differentiated analysis of the Canadian case can be found in Simeon and Robinson, 1990: 19-30.
- 9 Althusius refers to this formula twice, verbatim, in his discussion of decision making in guilds and colleges, *Politica* IV.20 (“quod omnes tangit, ab omnibus...approbari debet”), and, modified in a reference to the representative purpose of universal councils, *Politica* XVII.60, where he says that what touches all, should also, and in fairness, be acted upon by all (“quod omnis tangit, ab omnibus etiam peragi aequum est”).
- 10 Based on the record of notoriously partisan 5-4 Supreme Court decisions, some now speak of “judicial federalism” in the United States; see Kincaid, 1999a: 150-53.
- 11 As exactly the kind of “council” that Madison was opposed to so vehemently, the upper legislative chamber, the Bundesrat, is composed of ex officio members of the Länder governments who have equal powers over most important legislative acts.
- 12 The Maastricht Treaty established three so-called pillars for the EU, the supranational European Community (EC), mostly governed by qualified majority voting, as well a pillar for common foreign and security policy (CFSP) and one for justice and home affairs (JHA), both intergovernmental in nature.

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