Sovereignty and Federalism: Inventing and Reinventing Public Law

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The history of Great Britain is the one with which we are in general the best acquainted, and it gives us many useful lessons. We may profit by their experience without having to pay the price which it cost them.

John Jay, The Federalist Papers, V.

The critique of sovereignty is a standard feature of federalism theory which, more often than not, gets itself off the ground by engaging with sovereignty’s claim that all power flows from a single source, the perfect antithesis to its own claim that power is always distributed and shared between different agents in whom it inheres originally. For the most part, the critique of sovereignty consists in pointing out that power never actually inheres in a single locus, from which the untruth of sovereignty as a theory about how to organize political life is taken to follow. The argument is nothing if not persuasive. It does, however, leave us to wonder how the idea of sovereignty, in spite of its being so obviously flawed, nevertheless managed to hold sway within public law theory for so long. More importantly, by focusing exclusively on whether sovereignty’s claim to be the source of all power is true, the critique evacuates the question of whether sovereignty might condition federalism theory in other ways.

Understanding the implication of federalism and sovereignty requires us to look beyond the logical incompatibility of sovereignty and federalism, which posits their implication as something static. Instead, we shall consider how this implication works itself out in certain canonical texts of political jurisprudence as a function of how theory reflects and enacts basic intuitions of political reality. We remain within the realm of theory. However, theory is no longer seen as inert propositions but as a form of action that responds to and in turn determines a context of social action. Seen in this perspective, federalism appears as a trajectory, growing out of a specific intersection of theory and history. We shall compare two such trajectories: federalism as it is articulated in European political jurisprudence and the political theory of the nascent American federation. We shall first consider how sovereignty laid out the domain of public law (I) into which federalism had to fit. We shall then analyse the strategies of federalization to which this ordering of public law theory gave rise (II). Moving across the Atlantic, we consider the work that notions of sovereignty and federalism did in the articulation of a public law theory for the republic that was being founded (III). As we shall see, this not only involved adapting elements of political jurisprudence to a
new context of political action; it also involved coming to terms with the meanings with which they had been overlaid in other contexts (IV).

I. SOVEREIGN POWER AND PUBLIC LAW THEORY

The federalist critique of sovereignty almost invariably focuses on the work of Thomas Hobbes. He is taken to task for having buried the diversity of constitutional life under the uniform cloak of sovereign power. The reproach is undoubtedly justified but only rarely do his critics inquire why he did so. Rather than shut himself within a closed polity Hobbes could have chosen to focus on the supra-statal system of governance that was still in place in continental Europe at his time¹. If he did not, it is because he was also, and perhaps primarily, concerned to establish the locus of droit politique, by which we mean a format of law that is immanent to the body politic and public in nature. Within the architectonic of Hobbes’ theory of commonwealth, the aspect of immanence, which engages the relationship of man to God, is the most important one. For our purposes, however, attention revolves around the public nature of law; the role popular sovereignty played in the creation of a public format of law. In taking all law back to a single source, sovereignty created a uniform domain of law in which distinctions between public and private had no place. In earlier political jurisprudence, including the work of Bodin and Grotius, it is not entirely clear whether law was public or private, as reflected in the still-current idea of a patrimonial kingdom. In 1625, as Grotius publishes his inquiry into the rights of war and peace, the public laws or, failing that, the consent of the people, is identified as the source of constitutional authority. But Grotius acknowledges that, in some cases, the distribution of constitutional authority is made according to norms of a non-public nature: « For in Kingdoms not patrimonial, the Regency belongs to those, to whom the publick Laws, or upon their Deficiency, the Consent of the People shall consign it. But in Kingdoms Patrimonial, it belongs to those whom the Father, or nearest Kindred shall chuse² ».

In Hobbes’ political philosophy, the indeterminacy has been lifted. The distinction between the office and the person of the sovereign no longer needs to be proved; it is simply a fact. As the student of the common laws tells the philosopher in Hobbes’ dialogue on the common laws, the king is, in a sense, more than one: « all Sovereigns are said to have a double Capacity; viz. a natural Capacity, as he is Man, and a politick Capacity, as a

King\(^3\) ». This is, in outline, the idea of public law, the notion that all forms of title and all forms of property derive from the same source: the laws of the commonwealth in which the will of the sovereign is expressed. On the strength of this idea, Hobbes can dismiss other, traditional titles to authority. Titles of nobility, for example, « in old time titles of office and command », have « by occasion of trouble and for reasons of good and peaceable government » been turned into « mere titles, serving for the most part to distinguish the precedence, place, and order of subjects in the commonwealth\(^4\) ». For some time now, we are told, men have been made « counts, marquises, and barons of places wherein they had neither possession nor command ».

Hobbes’ reduction of authority to a public format of law involves a dual operation: he redefines the origin of authority so as to bring it back to a single source, at the same time as he introduces a state of radical uncertainty, the state of nature. The re-definition of the origin of authority brings together all constitutional actors by dissolving the differences that medieval lawyers had established between them, leaving only a mass of identical individuals with no principle to order their sociality. This is the backdrop to Hobbes’ laconic commitment to the principle of popular sovereignty, posited as a condition of political life. Sovereignty is popular sovereignty because civil order arises out of the coming together of the individuals that make up the people: « When men have met to erect a commonwealth, they are, almost by the very fact that they have met, a Democracy\(^5\) ».

The prominence of the *demos* is unprecedented in the history of political theory. Where the people was formerly seen simply as a constitutional actor amongst others, it is now the element out of which civil order is fashioned. Most likely, the reservation expressed in the « almost » that Hobbes adds reflects a sense of unease about designating the people as the sole source of power. It might also, however, reflect an awareness on his part that in applying the well-established legal concept of the *demos* to what would still have been seen as a ragtag assembly of constitutional actors, he was committing a category mistake.

To this operation, which has the effect of bringing all parts of the medieval constitution together, is joined another which has received far more attention: the introduction of a state of nature. The radical uncertainty of life in the state of nature acts as a solvent of all pre-existing ties between indi-

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\(^3\) T. Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, Chicago/London, University of Chicago Press, 1971, p. 160 (hereinafter *Dialogue of Common Laws*). The dimension of the private is not fully expunged from constitutional order. It remains in the form of the duality of the king’s two bodies: « Whatsoever a Monarch does Command, or do by consent of the People of his Kingdom, may properly be said to be done in his politick Capacity; and whatsoever he Commands by Word of Mouth only, or by Letters Signed with his hand, or Sealed with any of his private Seals done in his natural Capacity: Nevertheless, his publick Commands, have their original from his natural Capacity. For in the making of Laws (which necessarily requires his assent) his assent is natural[.] » (p. 162).


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Individuals and is thus an enabling condition of the creation of a single source of authority. For this creation to succeed, it cannot rely on already-constituted constitutional categories as they refer back to earlier, traditional distributions of power. It must be a *creatio ex nihilo* in that it must be wholly contained within the moment (even if it is not wholly immanent as political subjection leaves intact man’s relationship to God).

The mechanism that allows Hobbes to contain the alienation of liberty within the moment of genesis is authorization. Each man covenants with every other man to subject his will to the will of the sovereign and make himself the author of his every act, provided that all others do the same. The novelty of Hobbes’ conception is that he ties the subject’s alienation of liberty to his integration into the people, in contrast to the medieval forms of authorization which revolved around the notion of a transfer between self-standing equals. Authorization, to Hobbes, marks the «generation of the great Leviathan, or rather (to speak more reverently) of that Mortal God to which we owe, under the Immortal God, our peace and defence». As the act of creation is wholly contained within the moment, its elements – the subjects, the sovereign, and the people – are kept in a state of continuous implication. Paradoxically, this is what allows Hobbes to detach the exercise of sovereign power from the will of its constituent parts. In this triadic structure where every part makes reference to every other, only the sovereign is manifestly present. As the body politic is constituted in and through its authorization by the subjects, its capacity for action, indeed its very existence as a discrete entity, is tied to the person of the sovereign. Absent subjection, which is the only thing keeping the subjects together, they are nothing but a multitude: «A multitude of men are made one person, when they are by one man, or one person, represented so that it be done with the consent of every one of that multitude in particular. For it is the unity of the representer, not the unity of the represented, that maketh the person one».

The inaugural gesture of modern public law theory, the end towards which the invention of sovereignty tends, relies on stripping the people of its political agency so as to maintain the purity of the will of the popular sovereign. In other words, the public nature of law is predicated on the self-effacing of the very subject whose (collective) will is the source of law. The volition of the people exhausts itself in the act whereby it wills itself into being. Its genesis coincides with its eclipse as a political agent which means

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6 *Id., Dialogue of the Common Laws, op. cit.*, p. 96: «Now as to the Authority you ascribe to Custome, I deny that any Custome of its own Nature, can amount to the Authority of Law: For if the Custom be unreasonable, you must with all other Lawyers confess that it is no Law, but ought to be abolished; and if the Custom be reasonable, it is not the Custom, but the Equity [and hence the implicit jurisdiction of the King] that makes it Law». The problem resurfaces in the inconclusive attempt by Hegel to offer a speculative justification of the centrality of the prince in the constitution (see G.W.F. HEggEL, *Principles of the Philosophy of Right*, Cambridge, Cambridge University Press, 1991, § 280, p. 321. On this point, see the analysis in A. LEV, *Sovereignty and Liberty: A Study of the Foundations of Power*, Abingdon, Routledge, 2014, p. 137-140.

that the people is never properly present within constitutional order but only intersects with it.

On this conception of the role of the popular sovereign, there is no room to consider how power is to be distributed, which is to say that there is no room for a theory of federalism. In enjoining the people to will itself as more-than-one, federalism renders inoperative a will that depends for its operation on having no content other than its own unity. Even prior to the encounter with sovereign power, the imperative of constructing a sphere of public law banishes from view all federal phenomena, not by opposition to federalism but more fundamentally, because this format of public law theory gets in the way of understanding what federalism is about. Given the work sovereignty, and with it public law theory, is called to do, federalism appears as a performative self-contradiction.

A thorough survey of the literature would be required to show how this incomprehension conditions the attempts by public law theorists to articulate the federation. The following section will point to elements of a response but for our purposes, one reference will have to suffice to demonstrate the persistence of this incomprehension into the twentieth century: Carl Schmitt’s *Constitutional Theory*. The interest of Schmitt’s work is that he realizes the inadequacy of the conceptual framework within which the federation had been analysed and, in an attempt to capture its specificity, tries to carve out a middle ground between the confederation and federal state. But in taking the being of the federation back to an act of the popular sovereign, he ends up taking on the schemata of modern public law theory. Thus, he tells us that to constitute itself as a federal commonwealth, a people must will itself as a federal people and this presupposes that the duality of a federation is capable of being assumed by the people. Duality must be real which is to say that the sense of non-unity must be real. At the same time, the sense of non-unity cannot introduce real tension into the federal polity as this would cause the polity to break apart. This indeterminacy of tension – real, yet never so real as to put into question the unity of the polity – has the effect of suspending the decision about the existence of an existential community which, to Schmitt, is the defining characteristic of the political. Within the *Bund*, the question of sovereignty must «always remain open,» which, on the terms of his theory, means that a federation can never be the locus of political life. Crucially, it also means something else that Schmitt does not acknowledge but which follows from the terms of his theory. The supposition that the question of sovereignty must always remain open in a federation, in other words, that it does not admit of a decision, means that, whatever its prominence in Schmitt’s theory, the federation cannot be the locus of ultimate meanings and is therefore not a real object of public law theory⁸.

⁸ C. SCHMITT, *Constitutional Theory*, 7, III, 1, c, Durham, Duke University Press, 2008, § 29, p. 390. Schmitt predicates the existence of the union on the homogeneity of its members (see § 2, c), p. 395) which, on the terms of his theory, is tantamount to saying that the Empire is a federation in name only. For a different view, see Ch. SCHÖNBERGER, «Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-
II. Strategies of Federalism: Confederation and Federal State

To understand the implication of federalism and sovereignty in European public law theory, we must keep in mind the paramount importance, for public law theory, of establishing a locus from which social life could be ordered by reference to norms of a public nature. As we have seen, this imperative precluded even raising the question of how power should be distributed between constitutional actors. As a result, the federal idea always arrived too late to have an impact on the constitution of the polity. Finding the polity to be already constituted on a unitary format, publicist either relegated federalism to the interstate sphere, a reflection of, and subservient to, the will of the states, or they sought to integrate it wholly into the polity in the form of a federal state. The first of these strategies we see exemplified in the work of Montesquieu; the second in German public law theory at a time when publicists tried to come to terms with the new reality of the empire.

Federalism, as articulated by Montesquieu, is a means whereby small republics can remedy the military weakness that attends on their size, without falling prey to the internal vice that, in a large state, will invariably cause republican rule to degenerate into despotism. If federalism is a compromise, the accommodation of a reality that one would have wanted otherwise, it is a felicitous compromise. It lets a small republic have the best of both worlds: « Composed of small republics, [the confederation] enjoys the goodness of the internal government of each one; and, with regard to the exterior, it has, by the force of the association, all the advantages of large monarchies. »

The finality of confederalism is perhaps best put in evidence if we consider the ill-effects of its absence. If republics are left to fend for themselves, Montesquieu is concerned that military power will contaminate the political nature of their internal government. Having been unshackled from the chains of law for the purpose of preserving the commonwealth against external threats, power tends to liberate itself from law altogether. It is a concern that Montesquieu shares with Rousseau. Rousseau’s comments to Abbé de Saint-Pierre’s federalist project clearly express an appreciation of the danger that the power a society has concentrated at its borders to keep it safe will, in time, extend its dominion inwards. It is « easy to see that war

\*Bundesstaat-Schemas *», *Archiv des öffentlichen Rechts*, 129, 2004, p. 99-100. Schönberger notes, however, that Schmitt’s consideration of sovereignty in the Bund may not accord with his general theory of sovereignty (p. 105, n. 91) which is precisely the source of the tension we have pointed to.

9 The belief that federations would need to be federal states survived well into the twentieth century. See, for example, R. Carré de Malberg, *Contribution à la Théorie Générale de l’État*, Paris, Librairie de la Société du Recueil Siery, 1920, 1, p. 92 where the distinction confederation-federal state is presented as self-evident.


and conquest, on the one hand, and the advance of despotism, on the other hand, strengthen one another."

On this view, federalism is not a political or even a constitutional principle. At most, it is a sort of safeguard against the spread of domination but really it is a tool of governance (which is precisely the view of federalism Hamilton pushes back against in Federalist No. 9). Another, theoretically more interesting, option is that of superimposing a unitary format of state on the federation, as practised by German publicists of the nineteenth century. Taking Georg Jellinek, the most brilliant among them, as our example, we find that what moves him to consider federalism is the implication of sovereignty and public law methodology we have pointed to. His primary concern is to place the new German Federation within a topology of legal forms of interstate relations. The federation attracts his attention because it destabilizes the framework that keeps in place public law theory. The inherent instability of the federation, due to the implication of its inner and outer dimensions, undercuts the attempt to maintain a distinction between the legal regimes that governs them: the law of the land and the law of nations. This prompts Jellinek to warn that if we cannot assign lines of demarcation to the concepts of state law and international law as clear as those found between the concepts of private law, we cannot consider either discipline as a science.

As Jellinek looks to find a place for the federation in public law theory, he falls back on the notion of sovereignty. Unconditional power is the only criterion that will qualify the federation as a full-fledged public law form. Only at the point where power becomes unconditional – sovereign – does it detach itself from those that brought it into being. Sovereignty can therefore serve as a warrant of the federation’s public law credentials. Jellinek’s reliance on sovereignty is noteworthy as it conspicuously absent both from his general theory of state and his work on international law, the two spheres that the federation straddles. In fact, it is all the more noteworthy as Jellinek’s reliance on sovereignty is noteworthy as it conspicuously absent both from his general theory of state and his work on international law, the two spheres that the federation straddles.

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15 The significance that the format of sovereignty, and the relationship of domination around which it revolves, comes to have in Jellinek’s theory of federation contrasts with his analyses of the spheres of law that lie on either side of it. In his earlier construction of the interstate sphere and in his later theory of state, state power is formalized as a relationship of the state, or the state apparatus, to itself, stripping it off any existential-political dimension (see Id., Die rechtliche Natur der Staatenverträge, Wien, Alfred Hölder, 1880, p. 15-18, 43-45 where the binding nature of treaty law is deduced from the formal presuppositions of an act of volition; see Id., Allgemeine Staatslehre, Berlin, Verlag von O. Häring, 1900, p. 420, 445 where he denies that sovereignty constitutes an essential characteristic of state authority; see A. BÖHNER, Die Europäische Union im Lichte der Reichsverfassung von 1871. Vom dualistischen zum transnationalen Föderalismus, Berlin, Duncker & Humblot, 1999, p. 109-110; J. KERSTEN, Georg Jellinek und die klassische Staatslehre, Tübingen, J.B. Mohr, Paul Siebeck, 2000, p. 297-298.
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ek, even as he introduces the idea of sovereign power, dismisses the mechanism by which Hobbes first brought it into being. A federation cannot have its foundation in contract any more than any other form of polity because power to command cannot rest on assent:

One cannot, by means of a contract, bring forth a higher will to sit above or an independent will to sit next to one. […] A public authority that had come about in this way would not have the most prominent characteristic of a state power: it could not rule or command unconditionally, but would at all times depend on the good will of the members of society.¹⁶

The repudiation of social contract theory, and with it the idea of representation through authorization, leaves Jellinek without the conventional means of showing how federal power connects to its subjects, which in turn leaves unexplained how a federation could ever compel by command. It is to address this question that Jellinek turns to American federalism. The point of his very selective appropriation of it is to show that a people can be a federal people without having made itself so. Federalism need not, in other words, involve agency on the part of the popular sovereign.

What acts in the constitution of a federation, Jellinek tells us, is history, not the people. In the first instance, the pre-eminence of history is epistemological. Only by consulting history can we find out if a sense of belonging to a destinal community has built up so as to elevate the federal entity to the status of a federal state, the fulfillment of the national aspirations of a people.¹⁷ It might seem curious that Jellinek should choose the political history of the United States of America, not that of Germany, as the medium of his demonstration. Notwithstanding the paradigmatic status that American federalism had already come to enjoy, we would not expect him to look to it for lessons about how to understand the new constitutional reality of federal Germany. As he notes, deep-seated differences in the social and historical underpinnings of constitutional order militate against transposing theories of American federalism onto the German empire. Such theories are appropriate for a federal state founded on the sovereignty of the people and the autonomy of its member states, each of which were given sovereignty as « a gift at birth »; they are not appropriate for an empire of predominantly monarchic states whose princes have for centuries been the subjects of a common master.¹⁸

But what Jellinek wants to show is exactly that even in the United States of America where federalism is supposedly just another expression for popular sovereignty, what called the federation into being are in fact forces that transcend the actions of the popular sovereign. The demonstration, if one

¹⁷ Ibid., p. 257.
¹⁸ Ibid., p. 188. This sense of the inadequacy of what we might call traditional federalism for Germany is already articulated in Johann Caspar Bluntschli’s comments to the Paulskirche Constitution, see J.C. BLUNTSCHLI, Bemerkungen über die neuesten Vorschläge zur deutschen Verfassung, München, Christian Kaiser, 1848, p. 11, where Bluntschli predicts that the union of states proposed by the Frankfurt Assembly will prove to be a transitional form on the way to a monarchic empire.
can call it that, moves between constitutional law and political history, using the latter to determine the truth of the former. On grounds that are never made clear, Jellinek uses John C. Calhoun’s dilemma, the point of which is to tie federalism to popular sovereignty, as a stand-in for contractualism\textsuperscript{19}. Jellinek is not concerned to refute this dilemma that shows the impossibility, in theory, of a federal state; his point is that the dilemma does not even arise. When he tells us that « [one] thing we can take from Calhoun’s work, a result by now firmly established, is that a federal state cannot be founded on contract, » he is not telling us anything about Calhoun’s work but about the fate it suffered as the constitutional policy of the Southern Confederacy. The defeat of the South established the value we should put on Calhoun’s theorem: « History decided that it did not apply to the Union\textsuperscript{20} ».

The implication is that the constitutional nature of a state, whether it is federal or unitary, is not the result of a determination through political agency simply because there is no political agency at the level of the constitution. The popular sovereign was not the actual agent of the determination that took place on the battlefield, and the moment the popular sovereign did act – the moment of the conclusion of the (federal) social contract – is not the moment in which the federation was made: « Where a contract has been concluded by the future members of a federal state, it should not be considered as the rightful foundation of the new construct\textsuperscript{21} ». The absence of political agency is mirrored by the non-political nature of the sentiments that the new federal constructs elicits from its subjects. These are sentiments of an intensely personal nature that cannot easily be recovered politically. A need to join with others to survive combined with a « heightened religious sentiment » impelled « a handful of people » to leave behind the « frightful solitude » in which they found themselves in order to found a polity\textsuperscript{22}. Working from the idea of a pre-political foundation of the polity, Jellinek forces a convergence between the trajectories of the American and the German federation. So powerful is the determination of constitutional order through history that it obliterates the differences between states constituted in and through acts of the people and states that have come about through constitutional change imposed from above. In both instances, an old order is


\textsuperscript{20} G. JELLINEK, Die Lehre von den Staatenverbindungen, op. cit., p. 194.

\textsuperscript{21} Ibid., p. 189.

Collapsing the distinction between states whose political history revolves around popular agency and states where the people is only ever the object of action, never the agent, is not quite a demonstration that a federal state is a national enterprise. What it does is to cancel out a set of intuitions that would make us disinclined to posit the federal state as a national enterprise. Given, on the one hand, that a state cannot come into being by means of a contract and, on the other hand, that its self-affirmation as a nation-state can take place in and through executive action, there is no a priori reason why we should suppose that a federal constitution would lack an existential foundation. On the contrary, the implication of the argument Jellinek makes is that for a federal state to have any historical reality, it cannot be found wanting in that regard; it must be an object of strong existential commitment. To exist at all, it must exist in full.

On both outcomes of the strategies of federalism we have considered – confederation and federal state –, the question of political life is evacuated. The system of confederal governance outlined by Montesquieu involves the reduction of social life to survival and prosperity, the goods of the state of nature and of market society, leaving no space to articulate a political community. The federal state, for its part, is led to bracket the question of political life so as to appropriate the mysterious fact of federalism of which it cannot make sense because the being of a state consists in the act of willing itself and it cannot will itself to be anything but one. To negotiate this aportia, Jellinek had to, on the one hand, sever the link that tied public law theory to the idea of sovereign will, which meant leaving the determination of the federation to history, and, on the other hand, engage an intense spiritualization of the new federal construct so as to show that despite not being a creation of its subject, it could still elicit a sense of existential commitment from them. Integrating the federation completely, doing away with its indeterminacy, thus comes at the price of abandoning the project of political jurisprudence; the ambition of showing the state to be a political community. In the federal state, the indeterminacy that attaches to federalism is neutralized.

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24 This operation in which the federation is aligned on the people and, in turn, on the form of the state recurs in the work of Heinrich Triepel for whom the basis of a federation is to be found in its « federative foundations » which perpetuate the « spirit » of its founding treaty (see H. TRIEPEL, Unitarismus und Föderalismus im Deutschen Reiche. Eine staatsrechtliche und politische Studie, Tübingen, Verlag von J.C.B., 1907, p. 29). The federal determination of the polity remains past in the sense that it does not require a renewed commitment in order to be valid. Consequently, Triepel cannot show how a federation can elicit the commitment of individuals who were not directly implicated in the decision to federate. In the end, he concludes from the presumed fact of federation to the existence of its enabling condition: « There must be some element of popular will in this if the people is to develop, from the outset, this sense of commitment towards the legal will without which no legal order has the power to compel. Thus, the constitution [of a federation] does not rest exclusively on a “federative” but also, if I may say so, on a “constitutional” foundation [...] In other words, the statal “foundation” is in every respect a match for the federative » (p. 31).
However, as a state, the federal state can no longer generate commitment by holding out the promise of political liberty. To sustain itself, it must tap into non-political sources of commitment.

The oscillation between the two prongs of this alternative results from the pre-eminent role of sovereignty in European political jurisprudence. Seen in this perspective, it is understandable that many believe that the obstacles to the emergence of a truly federal Europe could be cleared if only we could lay to rest the ghost of sovereignty. On the analysis of Jellinek’s theory of federalism we propose, we have cause to doubt this belief. The emergence, or re-emergence, of sovereignty is not reflective of an excessive attachment to it. The attempt to elevate the federal entity to a federal state is driven by other considerations, chief among them a fear that predates and has outlived sovereignty, the fear that the people might return to claim the power it had relinquished. This would bring about the implosion of the world of public law, in theory and in fact.

III. THE SECOND SAILING: FEDERALISM, POPULAR WILL, AND TERRITORY

If the notion of sovereignty is used only sparingly in the federalist papers, the source and subject of sovereign power – the people – makes its presence felt throughout. Its consent is the «pure, original fountain of all legitimate authority,» and the «precious blood» that was spilt in making the American Revolution is that of the «people of America». We are a far cry from the world of Hobbes’ Leviathan which, if it also reflects dramatic political events – the English Civil War that forced him into a decade-long exile in Paris – does so only at a distance. It is natural to suppose that the sense of the immediate presence of the people that pervades the federalist papers reflects the liberty that a people had claimed and won. This would commit us to seeing history as the dominant element in the intersection of theory and history that is federalism. We should, however, be wary of supposing that the differences between European and American political jurisprudence can be accounted for solely in terms of the proximity of theory to historico-


26 See also the remarks concerning social contract theory in Jellinek’s theory of state where he tells us that from being foundational of the state, social contract theory acts as a solvent of it (G. JELLINEK, Allgemeine Staatslehre, op. cit., p. 192).

political action. Theory also has a history which, while it does not unfold in isolation from political history, cannot be reduced to it either. In order to understand the differences between federalisms, we also have to assess how, and how far, theory has moved between their points of inception.

It is not the capacity for political action, or lack of same, that explains why the people’s presence in the primordial assembly leaves such an imprint on Hobbes’ work that its absence from government cannot be anything but a source of embarrassment. So much so in fact that Hobbes feels called to add that it is the people itself that assembles again, having grown tired of attending the public courts, «dwelling far off» as they do, to institute a restricted form of government so that the burden of exercising the power of which they are the source may be taken from them.\(^{28}\) Equally, it is not political action but a process of sedimentation/acculturation that explains the ease with which Madison and Hamilton move between committing to popular sovereignty and excluding the people from government\(^{29}\). If Madison can proclaim it as the novelty of the American form of government that the people «in their collective capacity» be excluded from it\(^{30}\), it is paradoxically because the semantic nexus that ties civil authority to the body politic is now so firmly entrenched that its presence within constitutional order need not be invoked at every turn.

The strong presence of the popular sovereign within constitutional order has several important consequences. It means, for one, that the people need not be assigned a specific constitutional locus, in contrast to European public law theory where parliament was the conduit through which the people would establish a presence within constitutional order\(^ {31}\). In America, each branch of government is seen as an emanation of the people and can claim

\(^{28}\) T. Hobbes, *Elements of Law Natural & Politic*, II, 2, 6, London, Frank Cass & Co. Ltd., 1969, p. 121. Hobbes’ reference to public courts that are situated far away from the dwellings of the common people is, to my knowledge, without equivalent in his work. The reference is likely to Aristotle’s *Politics* where the same reason is given to explain the transition from an initial, unlimited state of government to a more restricted form of government (see Aristotle, *Politics*, VI, 4, 1318b11-20).

\(^{29}\) Akhil Reed Amar argues persuasively that the system of government that would come out of the American Revolution was prefigured in the charters of the corporations as which several of the states had originally been designed (see A. Reed Amar, «Of Sovereignty and Federalism», *Yale Law Journal*, 96, 7, 1987, p. 1432-1437). This reading has the merit of situating the idea of an intersection of theory and history in a specific practice. However, analogizing between a corporate charter and a constitution and, more fundamentally, between a corporation and a commonwealth, not only engages but also presupposes a re-definition of sovereignty. It presupposes that the presence of the people be so firmly entrenched in history that the difference between the nature of its acts (private/public) seem irrelevant when held up against the identity of the actor.

\(^{30}\) *The Federalist Papers*, LXIII, p. 373 (Madison).

\(^{31}\) For a brilliant analysis of the lack of a parliamentary tradition in German theory of state, see Ch. Schönenberger, *Das Parlament im Anstaltsstaat. Zur Theorie parlamentarischer Repräsentation in der Staatsrechtslehre des Kaiserreichs (1871-1918)* Frankfurt am Main, Vittorio Klostermann, 1997, passim, especially p. 282-300.
to speak in its name. So firmly entrenched is the constitutional presence of the popular sovereign that its reach extends beyond the branches of federal government to all the parts of the Union. Depending on context, Madison can thus invoke the people to show the common origin of state and federal government and to disqualify the claims of the former to be sovereign in their own right.

A further, essential consequence follows from the strong presence of the popular sovereign within constitutional order. In Hobbes’ format of sovereignty, theory is tied to territory but indistinctly so. It is essential that theory be situated in space. This is what allows Hobbes to dismiss the claim that political power has a transcendent foundation. However, the position that theory occupies is underdetermined. Sovereignty is always articulated from somewhere, but that somewhere could be anywhere. The authors of *The Federalist Papers*, for their part, articulate their theory of government from a determinate position in space. To this end, they rely on the existence of a given exterior. Their papers abound in references to Europe, seen either as a threat to the Union, directly through intervention or indirectly through instigation, or held up as an exemplar of what the Union would develop into, should it ever become disunited. A disunited America would soon, Hamilton warns, find itself in the situation of the continental powers of Europe whose liberties have fallen prey to the means of protecting themselves against each other’s jealousy and ambition:

This is an idea not superficial nor futile, but solid and weighty. It deserves the most serious and mature consideration of every prudent and honest man of whatever party. If such men will make a firm and solemn pause, and meditate dispassionately on the importance of this interesting idea; if they will contemplate it in all its attitudes, and trace it to all its consequences, they will not hesitate to part with trivial objections to a Constitution, the rejection of which would in all probability put a final period to the Union. The airy phantoms that flit before the distempered imaginations of some of its adversaries would quickly give place to the more substantial prospects of dangers, real, certain, and formidable.

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34 Considering the papal claim that all Christian men make up one commonwealth under spiritual rule, Hobbes notes that it contains a «gross error [...] [inasmuch as] it is evident that France is a commonwealth, Spain another, and Venice a third &c. And these consist of Christians » (T. Hobbes, *Leviathan*, III, XLII, 124, *op. cit.*, p. 393).

35 *The Federalist Papers*, VIII, p. 117-118 (Hamilton). On this point, see also XLIX, p. 314: «We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord ... The future
The existence of an immediate threat to the survival of the polity has the effect of suspending the question of the political identity of the people(s) that make it up. Hamilton and Madison need not require that the states abandon their separate identities. On the contrary, they constantly reaffirm that the natural inclination of the American people is to favour their local government over that of the Union, affection being a function of proximity\textsuperscript{36}. What comes to if not take over from then at least supplement the identity of the federal people is the identity of the territory it inhabits. It is tempting to dismiss John Jay’s effusive description of America in *The Federalist Papers* No. 2 as gloss, but as an indication of how territory conditions political jurisprudence, its significance can hardly be overestimated. Jay’s contribution is predicated on a nexus of theory and territory where the emphasis is not on the dimension of the particular, as in European political jurisprudence, but on the particulars that make up a territory. The sense that the country of America and its people were made for each other means that the « variety » of its « soils and productions » and the « succession » of its « navigable waters » and « noble rivers » can serve as placeholders of the unity of civil order, unlike European political jurisprudence where the unity of civil order rest exclusively on the unity of the people, perfect only in the moment of its constitution. This is why the constitutional principle of American government can be cast as a spatial modification and why it can be left undetermined whether the « ENLARGEMENT of the ORBIT » of which Hamilton speaks concerns the dimensions of a single state or the consolidation of several states into one great confederacy.

Consolidating the states into a confederacy would, of course, engage the question of the nature of the body politic and, with it, the question of the political identity of the popular sovereign. But what is at stake in the text is not the constitution of a body politic; it is the appropriation of territories that are not « detached and distant, but […] one connected, fertile, widespread country ». The introduction of territory as a supplement to the body politic enables the transformation of the either/or of sovereignty into an inclusive ordering of divergent distributions of power, a compound regime. The unity of the territory of the American republic is proof positive that different levels of government can co-exist within the same polity.

Scholars have noted the tension between the system of federalism developed in Madison’s contributions and the emphasis on the need for a uni-

\textsuperscript{36} *The Federalist Papers*, XVII, p. 157 (Hamilton), see XXV, p. 193 (Hamilton). This nexus is taken up by Tocqueville: « The sovereignty of the Union is an abstract being that is attached to only a few external objects. The sovereignty of the states comes before all the senses; one comprehends it without difficulty; one sees it act at each instant. One is new; the other was born with the people itself. The sovereignty of the Union is the work of art. The sovereignty of the states is natural; it exists by itself without effort, like the authority of the father of a family. […] The sovereignty of the states depends on memories, on habit, on local prejudices, on the selfishness of province and family; in a word, on all the things that render the instinct for one’s native country so powerful in the heart of man. How could one doubt its advantages? » (A. TOCQUEVILLE, *Democracy in America*, I, I, 8, Chicago, Chicago University Press, 2002, p. 157-158).
tary government to conduct the foreign policy of the Union we find in those of Hamilton, one of the grounds on which the commitment of both to federalism has been called into question. This might be to take too narrow a view of federalism. Instead, we should consider, first, how the federalism of Madison’s and the imperialism of Hamilton, to use a terminology that has become standard, are implicated and, second, how internal power-sharing and external consolidation condition each other:

1) Seen in the context of America’s history, the consolidation of government in matters of foreign policy involves more than a concession to the pragmatic requirements of international life. At the semantic level, federalism and foreign policy are implicated. What constitutes the appropriation, in fact and in law, of territory as a collective enterprise is an implicit reference to the act by which the « people » of America cast off colonial rule, tying its fate as a nation to a particular territory. Whatever the tension that exists between the theory of federalism expounded by Madison and the theory of international relations of Hamilton, the theory of government appropriate for the new nation must rely on both. Its articulation can only take place at the point at which they intersect.

2) A distrust of the organic runs through the work of both men. Hamilton argues that « politicians have ever with great reason considered the ties of blood as feeble and precarious links of political connection ». If Madison, for his part, is loath to involve the people in government, it is because he expects they will be moved by passions that have their seat in such natural ties or, more precisely, in the relationship of proximity they create. To Madison, it is the pre-eminence of proximity that condemns democracy – « a society consisting of a small number of citizens, who assemble and administer the government in person » – to fail as a system of government. The pre-eminence of the personal entails the near-impossibility of curbing the passions that animate the people. This explains why Madison is so dis-


38 The demonstration that the American form of government is of a compound nature is thus prefaced with the observation that it, alone, is reconcilable with the « genius of the American people; with the fundamental principles of the Revolution » (The Federalist Papers, XXIX, p. 254 (Madison)). The force with which this association conditions thinking about the nature of American government is reflected in Patrick Henry’s observation that the transition from a confederacy to a consolidated government would be « a revolution as radical as that which separated us from Great Britain » (P. HENRY, Speech to the Virginia Ratifying Convention (June 5, 1788), in R. KETCHAM (dir.), The Anti-Federalist Papers and the Constitutional Convention Debates, London/New York, Penguin Books, 2003, p. 200. In order to pre-empt the move towards consolidation that the reference to revolution invites, Henry goes on to add that « [happily] for us, there is no real danger from Europe » (p. 204).

39 The Federalist Papers, XXIV, p. 191 (Hamilton).

trustful of the legislative branch. Unlike the other two branches whose members are few in number and little-known, its members « are distributed and dwell among the people at large, » with whom they have « connections of blood, of friendship, and of acquaintance » which enable them to exercise « a personal influence among the people.41 ».

Hamilton’s imperialism and Madison’s federalism both involve a movement away from the natural, organic foundations of social life. It is not clear what purpose it serves in imperialism but then we may be wrong to look for one. To Hamilton, denaturalization is simply a feature of international relations. Evoking the possibility that Britain and Spain, the major maritime powers of Europe, might in the future become allied against the Union, he explains that this eventuality, which he considers to be all but inevitable, would be brought about by « the increasing remoteness of consanguinity [that] is every day diminishing the force of the family compact between France and Spain.42 ». To which he adds that politicians have « ever with great reason considered the ties of blood as feeble and precarious links of political connection. »

Within the American polity, on the contrary, denaturalization serves a definite politico-constitutional purpose. Channeled through a federal system of government, it lays the foundations for the republic by containing the effects of public passion and the faction it gives rise to. It does so, primarily, by posing constitutional barriers to the circulation of sentiment:

The influence of factious leader may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular country or district than an entire State. In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government.43

On Madison’s theory of government, the introduction of distance is quite literally a condition of republican rule. Given the impossibility of removing the causes of faction, Madison looks to untie factious interests from local government, thereby creating the conditions of a higher form of faction more likely to serve the common good than local interests. Federalism is implicated in this operation in two ways: first, it diffuses constitutional authority between levels of governments, which has the effect of denaturalizing personal ties of political association, and, secondly, it facilitates the extension of the republic. If we consider the work federalism does in this format of government, we find that it performs a function that, in European

41 The Federalist Papers, XLIX, p. 315 (Madison).
42 The Federalist Papers, XXIV, p. 191 (Hamilton).
43 The Federalist Papers, X, p. 128 (Madison).
political jurisprudence, is tied to sovereignty: by elevating government above the realm of human passions and interests, federalism renders a plurality of self-interested individuals capable of being governed as a republic. Sovereignty and federalism both operate by introducing an artificial element into the body politic on which its unity is to rest, whether in the form of the person of the sovereign or the purely «ideal» nation of the Union of which Tocqueville speaks. And as it was in European political jurisprudence, denaturalization of the polity is an enabling condition of the refinement and enlargement of public views through representation that Madison expects his system of government to deliver.

The partial reprise of sovereignty’s mode of operation refers back to the difference in the modality of denaturalization (automatic/engineered) within and outside the polity. Between nations, in the international state of nature, denaturalization happens automatically as there are no constraints on power. As it was in Hobbes’ theory of commonwealth, denaturalization is a function of power. Within the polity, denaturalization must be engineered by means of a federal system of government so as to preserve the precarious equilibrium between the parts of the Union. Given the threat of division among its «rival nations,» the question of the identity of the body politic – always also the question of sovereignty – must be kept suspended. The intuition that informs the federalist papers is that the Union would not survive the determination of this question that would drive the people of America to take refuge «in the arms of monarchy, or [to split] ourselves into an infinity of little, jealous, clashing, tumultuous commonwealths».

On both scenarios – consolidation and fragmentation –, the Union would effectively become realigned on the Old World, the world of European power politics. In settling the question of political identity, the people(s) of America would call into being a sovereign power, whether it would cover the entire territory of the young polity or only determinate parts of it. Seen in this perspective, the federalism we find in the federalist papers appears as a means to dissociate essential functions of the operation of a public law system, chief among them representation of the unity of the polity, from the format of sovereignty. One might say that the federalism of The Federalist Papers is a means of processing the political legacy of Europe. Its ultima ratio is to prevent the forces of disaggregation that originate in Europe from coming into direct contact with America’s virgin territory. The Union, Hamilton and Madison believed, desperately lacked the means to defend itself

44 A. Tocqueville, Democracy in America, I, 1, 8, op. cit, p. 155-157: «The government of the Union rests almost wholly on legal fictions (fictions légales). The Union is an ideal nation that exists so to speak only in [the] minds [of its subjects], and whose extent and bounds intelligence alone discovers. The general theory being well understood, the difficulties of application remain; they are innumerable, for the sovereignty of the Union is so enmeshed in that of the states that it is impossible at first glance to perceive their limits. Everything is conventional and artificial in such a government, and it can be suitable only for a people long habituated to directing its affairs by itself, and in which political science has descended to the last ranks of society ».

45 The Federalist Papers, IX, p. 120, (Hamilton); cf. V, p. 101-102 (Jay).
against these forces; in part, because the powers of the Old World continued to meddle in its affairs, hoping to render its rival nations «the instruments of foreign ambition, jealousy, and revenge.» but also, and more importantly, because the Union was ill-prepared to take on history. It found itself in the position of having to negotiate the present without having lived the history leading up to it, and thus without having at its disposal the tools to fend for itself. The sense of an almost ontological vulnerability that comes from being a late-comer in history is a key to understanding the political theory of The Federalist Papers. Nowhere is this sense more clearly expressed than in Hamilton’s reflections on the war that would be sure to follow, should the Union dissolve. In Europe, the history of war «is no longer a history of nations subdued and empires overturned, but of towns taken and retaken, of battles that decide nothing, of retreats more beneficial than victories, of much effort and little acquisition.» In America, on the other hand, «the scene would be altogether reversed». Here, the want of standing armies and fortifications that in Europe act as obstacles to invasion would both facilitate conquests and render more difficult the keeping of them. As a result, wars would be «desultory and predatory, » «accompanied with much greater distresses » than in Europe.

IV. COMPARING TRAJECTORIES

As we hope to have shown, comparing the trajectories of European and American federalism allows us to move beyond the sterile opposition of federalism and sovereignty we find in so much federalism theory. It allows us to bring out the way configurations of authority grow out of, and in turn inflect, the working itself out of a polity. What a specific form of federalism looks like depends on how elements of political jurisprudence are taken up as public law theory works to realize an ideal of what it is meant to do, taking into consideration what it can do, given the circumstances. Federalism, on this view, is essentially unfinished. Contrary to a view that the American Revolution, unlike the French, actually succeeded in founding the republic, we have seen that the question of foundation is never laid to rest in the system of government proposed by Hamilton and Madison, which is precisely why they articulated it as a federal system. What set the political jurisprudence of the United States of America apart from the European original may simply be that where the latter enacted its foundation on the threshold of human life, the former was, for reasons of theory and history, in a position to clear that threshold.

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