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Introduction

A political cartoon. When in 1754 French colonists in North America attempted to establish a line of fortifications from the shores of Lake Erie and along the Ohio river up until their southern settlement in Louisiana British colonists feared they might become confined to the territories east of this imaginary line from north to south so that any further territorial expansion towards the west would become practically unfeasible for the British. The chief bone of contention was Fort Duquesne situated at the confluence of the Monongahela and Allegheny rivers in Pittsburgh, Pennsylvania, the source of the Ohio river. On April 17, 1754, Fort Duquesne fell to the French. This setback for the British colonies prompted Benjamin Franklin, then a delegate to the colonial assembly of Pennsylvania, to write a commentary for his¹ local newspaper, the *Pennsylvania Gazette*, which was straightaway reprinted in other colonies' newspapers.²

In this article of May 9, 1754, Franklin articulates the demand for a genuine political union of the British colonies. His aim is to establish a unified high command to be able to counter acts of aggression as those by the French. The point of his claims is to join forces and implement a common defense and security strategy both at the policy and at the operative level. He describes the British colonies' problem as follows:

The Confidence of the French in this Undertaking seems well-grounded on the present dis-united State of the British Colonies, and the extreme Difficulty of bringing so many different Governments and Assemblies to agree in any speedy and effectual Measures for our common Defence and Security [...]

The underlying motivation is to safeguard economic activity since the French “kill, seize and imprison our Traders, and confiscate their Effects at Pleasure [...] murder and scalp our Farmers [...]”. If they are not hindered, according to Franklin's warning, this “must end in the Destruction of the British Interest, Trade and Plantations in America”.³ As an eye catcher, he adds what has

1 Franklin became a co-publisher on October 2, 1729, see <http://www.loc.gov/rr/news/circulars/pagazette.txt> (retrieved 2016/01/19).

2 See Overhoff (2006, 184). The *Pennsylvania Gazette* can be accessed here <https://lccn.loc.gov/sn84026371> and online upon subscription <http://www.accessible-archives.com/collections/the-pennsylvania-gazette/> (both retrieved 2016/01/19).

3 All quotations are taken from Franklin's aforementioned article.

since been labelled “America’s first political cartoon”.⁴ On this sketch a number of British North American colonies, namely (from left to right) South and North Carolina, Virginia, Maryland, Pennsylvania, New Jersey, New York and the New England colonies Massachusetts, New Hampshire, Connecticut and Rhode Island, are represented as pieces of a fragmented snake. It is implied that the snake will not survive if the pieces are not bound together to form a ‘whole’. The corresponding slogan (or rather: exhortation) is “Join, or Die”.



Fig. 1

Franklin thus acts as a self-proclaimed spokesman of the British colonies in North America. At first it seems his proposal is followed and put into practice: In the weeks after Franklin’s article the need for intercolonial cooperation is urgently felt and what comes to be known as the Albany Congress is convened on June 19, 1754. Seven colonies send their commissioners. Among these Franklin is appointed to represent Pennsylvania, and he further writes some “short hints to-

⁴ See Overhoff (2006, 185): “eine von ihm selbst entworfene politische Karikatur [...]” and (ibid.) “Amerikas erster politischer Cartoon”.

wards a Scheme for uniting the Northern Colonies”⁵. However, he proposes to implement a union by way of a top-down directive, an act of the British Parliament. Accordingly, in the plan adopted by the Albany Congress, the “Albany Plan of Union”, a so-called “Grand Council” is envisaged to be constituted by representatives of the colonial governments (apart from those of Georgia and Delaware) while a “Governour General” is designed to be appointed by the British Government and to preside over the unified intercolonial government thus to be installed.

The Albany Plan is ambivalent. While the overall authority of the British government over the North American colonies is not called into question, the Grand Council is to have ‘relative’ authority over intercolonial and Indian-colonial affairs and even to levy colonial taxes. In spite or rather because of this mixed tendency between colonial autonomy and independence on the one hand, reinforcement of British colonial power on the other, the Albany Plan fails.

Albeit dismissed in 1754, Franklin’s idea to establish a union of the British colonies in North America so as to allow for a common government to handle what then would be ‘external’ relations of the union is out in the world; its renewal lies ahead. In 1777, after the Declaration of Independence in the previous year, the first former colony and new-born independent *state* ratifies⁶ the Articles of Confederation and Perpetual Union. Like a showcase the years to come highlight the advantages and disadvantages of a confederation as opposed to a federal state. Entering into force in 1789, the United States Constitution finally replaces the ‘general government’ of the Articles and introduces a strong(er) federal government.

Montesquieu is the first author to discuss the advantages of a ‘federal state’ under the rubric of a “république fédérative”⁷. The expression ‘federalism’

5 See Franklin’s letter and enclosure “[T]o James Alexander and Cadwallader Colden with Short Hints towards a Scheme for Uniting the Northern Colonies” written from “N York June 8. 1754”; <http://franklinpapers.org/franklin/framedVolumes.jsp?vol=5&page=353a> (retrieved 2016/01/19).

6 Virginia, December 16, 1777.

7 Montesquieu, *De l’Esprit des Loix*, Book 9, Chapter 1 (1951, 369 [1758]): “une manière de constitution qui a tous les avantages intérieurs du gouvernement républicain, et la force extérieure du monarchique [...] la république fédérative. Cette forme de gouvernement est une convention par laquelle plusieurs Corps politiques consentent à devenir citoyens d’un État plus grand qu’ils veulent former. C’est une société de sociétés, qui en font une nouvelle, qui peut s’agrandir par de nouveaux associés qui se sont unis”. He continues that “[C]et État [...] [C]omposé de petites républiques, [...] jouit de la bonté du gouvernement intérieur de chacune; et, à l’égard du dehors, il a, par la force de l’association, tous les avantages des grandes monarchies.” Ibid. (1951, 370).

(French: *fédéralisme*⁸) has come into existence as a neologism⁹ in the French revolution and has spread in its aftermath¹⁰. In his *Philosophical Sketch* of 1795 Kant develops a teleological political philosophy towards *Perpetual Peace*. Adapting the contemporary form of a peace treaty Kant proposes in the second of his three “Definitive Articles” that “[T]he law of nations shall be founded on a federation of free states”¹¹.

However, it is easy to detect and describe pre-federal phenomena *avant la lettre*. Of course political units have been able to cooperate and to unite through

8 According to Koselleck (1972, 637 fn. 285) the term ‘fédéralisme’ was in “1772 von Robespierre zuerst verwendet”. The year is obviously erroneous and should read ‘1792’ when Robespierre (1758 – 1794) started to polemicize against ‘federalism’ as a threat to the unity and indivisibility of the Republic in his speeches. See, e.g., Robespierre (1957, 578f. [1793]) in a speech of 18 June 1793 on the “Conventions nationales” in the constitution: “Un peuple qui a deux espèces de représentans cesse d’être un peuple [unique]. Une double représentation est le germe du fédéralisme et de la guerre civile.”

9 Koselleck (1972, 638).

10 See Koselleck (1972, 637 fn. 285) and (2006, 486 [1994]) for an abbreviated version of the Chateaubriand quote from the French writer’s questionable *Voyage en Amérique* (1838, 170 [1826]), “Les Indiens de l’Amérique septentrionale connoissent les monarchies et les républiques représentatives; le fédéralisme étoit une des formes politiques les plus communes employées par eux”. With this quote Koselleck alludes to the dual territorial and ‘ethnic’ or ‘communitarian’ aspects of federalism and points to the fact that in the French revolution with the defeat of the ‘federalist’ Girondins faction and its aftermath, ‘fédéralisme’ is predominantly used pejoratively in France. Cf. French constitutional law scholar Beaud who starts off with the observation “qu’il n’existe pas en France de tradition fédérale” (2009, 2) in order to develop a theory of the federation understood as “union ‘librement consentie’ entre États” (ibid., 116f.). “Là où une telle liberté de formation n’existe pas, il n’y a pas de véritable Fédération” (ibid., 118).

11 “Das Völkerrecht soll auf einen Föderalismus freier Staaten gegründet sein” (*Zum Ewigen Frieden. Ein philosophischer Entwurf* AA 8:354; English translation by the editors). Kant discusses forerunner ideas by French thinkers such as Charles-Irénéé [“l’abbé”] Castel de Saint-Pierre (1658 – 1743) with his *Projet pour rendre la paix perpétuelle en Europe* (1712; see <http://catalogue.bnf.fr/ark:/12148/cb30204145x>, retrieved 2016/03/03) and Jean-Jacques Rousseau (1712 – 1778) and calls for states “[...] aus dem gesetzlosen Zustande der Wilden hinaus zu gehen und in einen Völkerbund zu treten; wo jeder, auch der kleinste Staat seine Sicherheit und Rechte nicht von eigener Macht, oder eigener rechtlichen Beurtheilung, sondern allein von diesem großen Völkerbunde (*Foedus Amphictyonum*), von einer vereinigten Macht und von der Entscheidung nach Gesetzen des vereinigten Willens erwarten könnte. So schwärmerisch diese Idee auch zu sein scheint und als eine solche an einem Abbé von St. Pierre oder Rousseau verlacht worden (vielleicht, weil sie solche in der Ausführung zu nahe glaubten) [...]” (*Idee einer Geschichte in weltbürgerlicher Absicht* AA 8:24). Kant is cited by the corresponding volume in the standard “Akademie” edition of Kant’s works: Kants gesammelte Schriften, edited by the Königlich Preußischen Akademie der Wissenschaften (Berlin 1902–[here 1912/23]).

all of recorded human history. The ancient Greek alliances and leagues of *poleis*¹² are but one example—even though the Swiss *Eidgenossenschaft* and the North American federation with their origins in medieval and modern times respectively may be the first historically more ‘tangible’ political co-operations of the type of a federation. The Roman *foedus*, the etymological origin of all composites and variants of ‘federal’, was instrumentalised as an imperial subjugation treaty on pain of religious penalties.¹³ Historically and empirically, a *foedus* was taken to be regulated by ‘international law’; there was the *foedus* among equals (*foedus aequum*) and the *foedus iniquum* characterized by a subjugation clause.¹⁴

Judging from the mere depiction of the dissected snake, Franklin’s cartoon may at first sight be read as signifying an ‘organicist’ or ‘holistic’ understanding of a federal entity: the sub-units would accordingly be taken to be organs or subordinated parts of a body which itself would only be able to function as a whole.

By this picture we are reminded of the pre-federal political-theological conception proposed by Johannes Althusius (1563[?]-1638) who, as a leading Calvinist thinker, emphasized the ‘corporative’ nature of *consociationes*.¹⁵ In his “consocial federalism” (Hueglin/Fenna in their comparative work) or “consocialism” (Friedrich¹⁶) the ambivalent politically secular and teleologically religious nature of his commonwealth is founded upon both free consent by all to join a consociation (starting from the level of the family) *and* the idea of a special obligation of the faithful towards God.¹⁷ The *telos* of a consociation is to enable its members to lead a life pleasing to God. The *consociationes* form a whole, their members are conceived of as parts of a body.¹⁸

However, this corporative, organicist picture is misguided with respect to the North American federative process since an essential feature of this modern federalist conception is the sustainable, long-term autonomy of the sub-units which in themselves have the quality of ‘sovereign states’ and merely ‘join forces’ on a contractual basis and transfer well-defined powers to a central governmental unit with a limited attribution of powers. According to this contractarian concep-

12 See, e.g., Beck (1997); Ward and MacDonald (2009) offer interpretations of Herodotus and Thucydides to explore what they consider “Nascent Federalism”—which then collapses into imperialism.

13 Baldus (2002; 2004).

14 Baldus (2002; 2004). Ziegler (1994, 49) points out that the *foedus iniquum* is not a Roman term but a scholarly concept not used in the historical sources.

15 See, e.g., Hüglin [Hueglin] (1991; 1999).

16 In his edition of Althusius’s *Politica Methodice Digesta* (1932, lxxxviii).

17 Elazar (1997) points to the biblical features of Althusius’s conception which therefore is a paradigm example for the covenant tradition of federalism argued for by Elazar.

18 Koch (2009, 78).

tion of a federal structure the sub-units coming together each have the characteristics of a state, and the central unit will also acquire state-making properties itself (*E pluribus unum*) while the sub-units retain their ‘state quality’¹⁹. Even if the actual genesis of a federal state may not be mistaken for its claim for legitimacy, it is hard to see how the legitimacy of a *federation* (used here as an umbrella term to include confederations, federal states and related institutional arrangements) can be derived from the idea of a pre-existing, ‘naturally united’ body existing *in potentia* awaiting its actualization by a process of federation.

Both on conceptual and ontological grounds, a question pertaining to the idea of state continuity remains: How is state continuity to be conceived of with respect to federal and to federated states? Legal theories on the continuance or succession of a state through constitutional renewal rely on different ontological presuppositions relevant for the question of whether or not constitutional change means continuity rather than foundation of a ‘new’ state. Even if *arguendo* we take transtemporal identity of states through radical constitutional change to be possible, this assumed continuity would not *necessarily* include the federation-making properties.

If we go back to Franklin’s drawing, the snake is in so far an inadequate visualization as the claim to a pre-existing snake torn apart and to be re-united does not account for the situation of the colonies—which at the time of Franklin’s article still form part of the British Crown. From the moment in which the colonies do not directly accept legislation adopted by the British Parliament anymore it could be claimed that the structure uniting Britain and the colonies is a federal structure in which the colonies have each acquired state-making properties (legislative, administrative, judicial powers) but in some domains accept the authority of a central unit (Britain) which itself now has the character of a federal state. Now Franklin’s call for action can be interpreted as a revolutionary appeal to ‘exchange’ the ‘old’ central unit (Britain) for a new central unit still to be created. The structural problem (what to do with the ‘old’ central unit in Europe?) highlighted by this certainly daring and historically inappropriate reading of Franklin’s 1754 article in the *Pennsylvania Gazette* may point to the reason why the Albany Plan of Union was doomed to failure. The role of the British colonial power remained unclear, the colonies feared to lose their relative autonomy. The situation could only be resolved by a clear-cut move towards independence from Britain and the creation of a ‘new’ federation by the Articles of Confederation and Perpetual Union in 1777. The subsequent period was then marked by quarrels over the *kind* of federation to be implemented, federalists

¹⁹ In German federal constitutional lingo: *Eigenstaatlichkeit der Länder*. Cf. Herbst (2014, 74).

and so-called anti-federalists (who, inappropriately denominated, did not argue against *any* federation but strove for a kind of *con*-federation) disputed about the nature of what then would be the Constitution of the *United States* [our emphasis; the eds.] of America.

Some conceptual clarification and desiderata for research. Leaving aside Franklin and the intricate ontological underpinnings of the protracted unification process of the former British colonies in North America, we have to turn to the task of conceptual clarification and introduce at least some provisional taxonomic categories.²⁰ Roughly, today's world can be divided into two groups of states: *federal states* and *unitary states*. Although theoretically and empirically the picture is much more colorful, with quite a few options in between, these two forms of the organization of states can be taken to be ideal-types allowing for classification in the sense that states can either be said to be closer to one or the other type or to combine elements of the two.

Another theoretical dividing line which historically and practically is of great relevance is the one between *federal states* and *confederations* which on a certain understanding can both be subsumed under the concept of a federation understood as an umbrella term. Thus, a unitary state may become a member unit of a federation in the sense of a confederation. Present-day European Union (EU) is neither considered a confederation (in German: *Staatenbund*) nor a federal state (*Bundesstaat*) but a federation *sui generis* with many features of an ideal type federal state; in its case law²¹ the German constitutional court (*Bundesverfassungsgericht*; BVerfG) has used the term *Staatenverbund* to capture the particular characteristics of the European Union and its special nature of 'an association of sovereign states'.

In the history of ideas and in political science the definition and genesis of federalism, the advantages and problems of each organizational form of a state, confederation, federal or unitary state have been investigated in many ways. However, 'federalism' is an elusive concept in so far as there is a plethora of different phenomena to be subsumed under this umbrella. This makes it a fertile ground for manifold analytic and empirical approaches in the historical, political and social sciences as well as in law. However, in these prolific multidisciplinary

²⁰ Cf. for a taxonomy Føllesdal (2014).

²¹ Most recently see the judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 on the "Act Approving the Treaty of Lisbon" which is found compatible with the German Basic Law while the accompanying law is judged unconstitutional "to the extent that legislative bodies have not been accorded sufficient rights of participation"; http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html (2016/02/22).

nary studies the philosophical foundations of federalism often go unnoticed and unappreciated.²² Philosophical analysis sheds light on the reasons for and against federalism, especially the legitimacy conditions of ‘shared’ political authority and the vertical division of powers. The justification of dual or multiple political authority in a multilevel federal order, the nature of demands for allegiance and loyalty and the related concerns of legitimacy, democratic participation and distribution of powers as well as, e.g., more technical issues of distributive justice including levying of taxes and fiscal redistribution in a federal order all refer back to underlying theories of political philosophy and can most adequately be addressed if the philosophical perspective is not ignored. Modern federalist thought cannot—*pace* Rousseau—be detached from philosophical social contract theory. On this reading, federative and confederative agreements can in a ‘bottom up’ approach be regarded as freely negotiated associations of states the legitimacy of which is based on individual self-determination. Although often the focus is primarily put on the tensions between decision-making in a multi-level political order, protection of individual rights and democratic sovereignty, federalism and democratic theory are closely interwoven; an eventual ‘democratic deficit’²³ has important repercussions on the legitimacy of a federal arrangement.

Departing from this diagnosis the aim of this book is to counterbalance this focus and, first, to present original research into historical reasoning in political philosophy which may be regarded as a justification or—at least—a precursor of federalist thought. Secondly, this is complemented with philosophical research into present-day organizational and justificatory issues of federal or federative orders, notably the principle of subsidiarity, its interpretive dimensions and its suitability to remove or lower tensions between the principle of democratic sovereignty of sub-units or member states and binding higher-order decision-making by central governments or international human rights jurisdictions.

We wish to help fill the lacunae in philosophical research on federalism and respond to a renewed interest in questions of federalism both from a theoretic point of view as well as from a political concern for a possible *finalité* of the European Union by shedding light on philosophical foundations from both a his-

²² See, e.g., Deuerlein (1972) who in his title claims to offer a work covering “[D]ie historischen und philosophischen Grundlagen des föderativen Prinzips” and then presents a predominantly historical outline of federal structures in the history of Germany. More recently the four volume compendium edited by Härtel contains more than one hundred contributions from a variety of disciplines while as few as three are from philosophers: see Höffe, Lübke and Nida-Rümelin (2012).

²³ See, e.g., Føllesdal/Hix (2006) for an examination of contemporary EU institutions.

torical and a systematic perspective. Instead of proposing an attempt at some overarching conceptual analysis—which, depending on the methodological background theory one may hold, will at any rate be doomed to failure—the approach pursued here is, admittedly, marked by its fragmentary character and piecemeal fashion. The idea is to explore principal philosophical tributaries flowing into the large delta of federalism, mainly Kant and *The Federalist*. Far from any claim to comprehensiveness, some upstream pre- and proto-federal conceptions are added, as well as selected examples of ‘downstream’ criticism and reception.

In what follows we introduce to the structure of the book and present a short summary of each of the contributions. The book commences with a survey of early modern roots of federalist thought. Two central building blocks of the book are dedicated to Kant and federalism and to the *Federalist Papers*, each with three contributions. A further historical section examines nineteenth century reception and criticism of federalist ideas with a special focus on Hegel and John Stuart Mill. Finally, in a systematic approach contemporary applications of and challenges to the concept of federalism—especially its operationalization in the political and legal sphere—are illuminated and fathomed out.

Early modern roots of federalist thought. Early modern forerunners of federalist thought are explored in the two contributions by Bernd Ludwig (Göttingen, Germany) on Thomas Hobbes (1588–1679) and Lukas K. Sosoe (Luxembourg) on Gottfried Wilhelm Leibniz (1646–1716).

Ludwig examines the spiritual presuppositions of secular politics in Hobbes’s conception of the “Common-Wealth Ecclesiasticall and Civill”. He does so in light of the frontispiece of Hobbes’ major work where it reads “Leviathan. Or: the *Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill*”. The Hobbesian *Common-Wealth* is a model case of the early modern idea of federation, a political structure, though, that stands under the strong impression of the religious wars of the seventeenth century. Ludwig shows that the unity of politics and religion is, for Hobbes, the unity of state and church. In view of this insight he intertwines central aspects of Hobbes’s theory, i. e., political anthropology, state of nature, natural right, religion and politics. According to Ludwig’s diagnosis, Hobbes neither aimed at a theological foundation of the state nor did he want to undermine Christianity. In the end Ludwig is more than sceptical whether the idea of the “Common-Wealth Ecclesiasticall and Civill” was, and maybe even still is, a promising one, and whether it offers a solid foundation of the modern (federal) state.

The aim of Sosoe’s article is to demonstrate that Leibniz is one of the forerunners of a European cosmopolitan idea. In a first step he delineates Leibniz’s idea of a universal republic, which is a political ideal, also called by him *Optima*

Respublica or *Respublica Christiana* or *Civitas Dei*. He then pays special attention to the theological and metaphysical foundations of Leibniz's cosmopolitanism, to his *Civitas Dei* based on natural right embracing the whole world and to the place of the Christian republic within this cosmopolitan structure. In this context, Leibniz's *Mars Christianissimus*, which contains a very severe criticism of France's imperialism in Europe and a defense of the German princes based on the Westphalian Treaty, plays a significant role. Sosoe dedicates the last part of his contribution to Leibniz's position on European federalism and to his debate with Abbé de Saint-Pierre. This debate has the advantage to reveal clearly Leibniz's idea of European federalism. It will become clear that these three parts are all based on Leibniz's metaphysical and theological premises. This explains why many commentators of Leibniz's political ideas contend that his whole metaphysics was at the service of his unified global international political order and, specifically, at the service of his *Civitas Dei*.

Thus, the Hobbesian *Common-Wealth* may be characterised as *pre-federal*, not yet of a federal nature, whereas Leibniz's proposal for a European federation could be termed *proto-federal*, a first instantiation of modern-day federalism.

Kant and federalism. Robert Hanna (Boulder/Colorado, US, now Curitiba, Brazil), Dietmar H. Heidemann (Luxembourg) and Heiner Klemme (Halle/Saale, Germany) offer analyses of federalist thought in Immanuel Kant (1724–1804) or rather, as in the case of Hanna, an innovative interpretation of what might be termed 'Kantian federalism'.

Starting from general considerations on coercion, political authority, defensive or preventive moral force and state Hanna explores Kant's philosophy as a source of what he calls *existential cosmopolitan anarchism*. According to Hanna, the thesis of philosophical anarchism says that there is no adequate rational justification for political authority, the State, or any other State-like institution. Thus the thesis of political anarchism says that we should construct a world in which there are no States or other State-like institutions. He argues that Kant's political theory, as formulated in the *Metaphysics of Morals*, is sharply out of step with the central ideas of his own moral philosophy. The doctrine of right of the *Metaphysics of Morals*, in Hanna's opinion, presents a fairly run-of-the-mill and explicitly anti-revolutionary, hence politically mainstream and safe, version of classical individualist liberalism, plus constitutional monarchy and/or parliamentarianism, plus a peace-securing internationalism, in the social-contract tradition of Hobbes, Locke, Grotius, and Rousseau. On Hanna's account, the cosmopolitan, existentialist version of anarchism, i. e., *existential Kantian cosmopolitan anarchism*, very naturally flows from Kant's moral philosophy, his philosophy of religion, and his political anthropology.

In his contribution Heidemann shows that Kant's foundation of federalism is teleological. Kant conceives of federalism as a natural consequence of the finite cognitive make-up of the human being that can, in the end, secure its freedom solely under cosmopolitan conditions, that is to say, within a federalist political framework as the purposeful outcome of human political history. Kant sketches this teleological conception in the *Idea of a Universal History with a Cosmopolitan Aim* (1784). It is only in the *Critique of teleological Judgment* that he elaborates in detail what might be called 'political teleology', the view that the antagonism between individuals and furthermore states is the means by which nature evokes individual states and eventually an international political federation of states.

In his article Klemme discusses the problem of the so-called unjust confederate (*ungerechter Bundesgenosse*). The problem springs from Kant's consideration of the *Metaphysics of Morals* (§§ 59–60) on the right a state has against the "unjust enemy" and concerns the associated question of what right a confederation has against an *unjust confederate*, i.e., a confederate state that is unjust not with respect to other confederate states but to states that are not confederates. Klemme debates this important problem of any federalist political structure from the point of view of international right in Kant and focuses on the more specific questions concerning the juridical relation between just and unjust confederate, and furthermore what exactly the injustice of the unjust confederate consists in.

The "Federalist Papers". Legal scholar and philosopher of law Beatrice Brunhöber (Berlin, Germany) then turns to the *Federalist Papers* the authors of which, Alexander Hamilton (1757[?]-1804), James Madison (1751-1836) and John Jay (1745-1829), might—against the usual ascriptions—be termed the intellectual 'founding fathers' of the US Constitution. Brunhöber demonstrates that *The Federalist* (as the *Federalist Papers* are usually being referred to) is at the origin of an innovative interpretation of political representation. The composite of "representative democracy" is a term introduced by Alexander Hamilton. Representation and democracy, in the tradition of Aristotle and Rousseau hitherto deemed incompatible, are shown to be compatible. Thus, democracy understood as and implemented by representative government is suited even for a large territory and a large number of people. Brunhöber carefully carves out how according to *The Federalist* for a democratic representative government to avoid despotism is to implement a thorough separation of powers. This does not only account for the different powers horizontally but also vertically, and favors a multilevel federal state. A federal structure thus helps prevent an undue accumulation of power and—indirectly, by means of vertical separation of powers—serves to guarantee citizens' individual freedom.

Analysis and discussion of *The Federalist* and its context is continued with two contributions on the role of political emotions and political virtues by philosophers Norbert Campagna (Luxembourg) and Heinz-Gerd Schmitz (Köln/Cologne, Germany).

Campagna starts off with an observation by French anarchist Pierre-Joseph Proudhon (1809–1865) who claims that in a federal order the central unit is not a government but an agent of the sub-units. For Campagna such an instrumental analysis of federalism originates in an analysis of fear as the decisive political emotion. He sets off to examine the function of fear as a motivating factor for arguments on cooperation and federal unification in the making of the US Constitution. Fear asks for controls and checks to be implemented, however, it is a Janus-faced emotion. The controls may be put into place both *from* fear but also *because of* fear. In the latter case it is fear which needs to be checked. In his convincing four-partite analysis Campagna shows how fear was a multi-dimensional phenomenon and catalyst of US institutional arrangements. From the perspective of a federated state there was fear of fellow citizens, of potential foreign invaders, of the other federated entities and even of political ideas including a fear of republicanism in its more demanding interpretations—putatively put forward by the central unit the progressive stance of which then needed to be curbed. The underlying assumption is that the role of emotions in the political sphere can hardly be overestimated. Campagna claims that the US founding fathers had a pessimistic view of human nature and therefore preferred a federal state with its multi-level checks and balances. It is claimed that, had their anthropological convictions been more optimistic, they might have opted for a unitary state.

This is in line with the analysis Schmitz offers: On his reading federalism with its vertical division of powers is first and foremost a remedy to the infirmity of political virtue. In his tripartite contribution Schmitz first expounds an Aristotelian conception of political virtue. Building on these conceptual premises he goes on to show that the authors of the *Federalist Papers* resorted to federalism as a constitutional construction to compensate the demise of political virtue. However, the *Federalist Papers* are concerned with a federal state among other (foreign) states. The argument from virtue does not apply to a single universal state, not even a federal world state, as can be shown with recourse to Kant. In the *Perpetual Peace* Kant offers four objections against a universal state. It is impracticable in two respects, it is inconsistent and it presents a slippery slope towards despotism. Thus Kant pleads for a *federation* of individual states however not a world state or *civitas gentium*. Schmitz finally demonstrates how federal structures conflict with the Kantian conception of sovereignty of the people. Even a partial ‘waiver’ of sovereignty is excluded.

Nineteenth century reception and criticism of federalist ideas. In a further section the reception and criticism of federalist ideas in the nineteenth century are explored. First, Michael Wolff (Bielefeld, Germany) examines Georg Wilhelm Friedrich Hegel (1770 – 1831) as a critic of Kant and his cosmopolitan and universalistic conception of a federation. Then, Katja Stoppenbrink (Münster, Germany; formerly Luxembourg) sheds light on federalist thinking in John Stuart Mill (1806 – 1873).

Wolff provides a careful analysis of Hegel's views on federalism in the *Philosophy of Right* and related writings, in particular of his criticism of Kant's idea of "Völkerbund" in the *Perpetual Peace*. On the backdrop of a discussion of the classical theory of the state of nature and war (including Hobbes) he points out that Hegel's critique is not polemic but reveals systematic difficulties of the idea of a federal political structure. Although major discrepancies between Hegel and Kant cannot be ignored, Wolff is capable of showing that there is a much too often overlooked consensus between the two thinkers with respect to international right and federalism.

Stoppenbrink takes a closer look into the political philosophy of John Stuart Mill who is a fervent advocate of representative democracy in the line of the *Federalist Papers*. However, following Alexis de Tocqueville and his *Democracy in America* (two volumes 1835 and 1840), Mill fears the 'tyranny of the majority', a *topos* not unusual in early modern commentators on democracy and to be read as 'working classes' in Mill's case. Here, the emphasis is placed on an often overlooked chapter of Mill's *Considerations on Representative Government* (1861) in which he expounds his views "[O]f Federal Representative Governments" (Chapter XVII). Stoppenbrink explains that Mill offers a defense of a certain conception of a federal state, again along the lines of the *Federalist Papers* and, although not explicitly, the eyewitness account of the American political practice of the time given by Tocqueville. Mill argues in favor of bicameralism and a judicial control of constitutionality to watch over the vertical attribution of powers. For him, a constitutional court is the 'logical' counterpart and prerequisite of the implementation of a federal order. As Stoppenbrink argues, in a certain sense in Mill judicial operationalization of the rule of law becomes a by-product of federalism.

The analysis and criticism of philosophical foundations and important philosophical contributions to the history of federalist ideas—however incomplete—is concluded here. The editors certainly would have liked to include critical examinations of other important discussions of federalism, such as for instance the less well-known pleas for an Italian federation ("United States of Italy") embedded in a European federalism as proposed by the philosophical and political

writers of the Italian Risorgimento Carlo Cattaneo (1801–1869)²⁴ or Guisepppe Ferrari (1811–1876)²⁵. Equally, the ‘bottom up’ anti-authoritarian or even anarchistic federalist socialism argued for by Mikhail Bakunin (1814–1876) in his *Federalism, Socialism, and Anti-Theologism* (1867) as a follower of Pierre-Joseph Proudhon and his *Principle of Federation (Du Principe fédératif et de la nécessité de reconstituer le Parti de la Révolution; 1863)* are representative of nineteenth century philosophical approaches to federalism.

We equally acknowledge the important theoretical work on federalism undertaken in the second half of the twentieth century in the English-speaking world, William Riker and Daniel Elazar probably being the most prominent representatives of these scholars. Their research is the object of a considerable number of recent publications on federal thought, highlighting the interconnect-edness and mutual fruitful influences of federal theory and practice and in the aftermath giving rise to numerous comparative and empirical studies (e.g. Burgess 2006; Hueglin/Fenna 2006; Watts 2008).

Still, our aim is not to give a full account of the intellectual history and philosophical foundations of federalism. Far from raising an unattainable claim for completeness we wish to highlight and thereby select philosophically relevant stages in the formation of present-day federalist thinking. In a final section we therefore turn to key notions and problems of contemporary forms of federalism.

Contemporary and systematic approaches to federalism. Contributions by Volker Gerhardt (Berlin, Germany) and Andreas Føllesdal (Tromsø and Oslo, Norway) examine central legal and political principles and resulting problems facing contemporary institutional settings in pursuit of a federal character or—at least—some federal elements. They focus on the meaning and import of the principle of subsidiarity (Gerhardt) for a supranational entity such as the European Union and the doctrine of the margin of appreciation (Føllesdal) in the jurisprudence of the European Court of Human Rights, a court instituted in Strasbourg as an institutional novelty in 1959 in the institutional framework of the Council of Europe and made permanent in 1998. Unlike the US Supreme Court in the aftermath of the *Federalist Papers* and unlike the proposal of a judicial control of attribution of powers, the Strasbourg court is charged with the interpretation and

²⁴ See for an account of Cattaneo’s philosophy, political thought and life Bobbio (1971) and, e.g., Armani (1997), Sabetti (2013). Cattaneo’s philosophical writings have been published in an anthology entitled *Stati Uniti d’Italia* by Norberto Bobbio in 1945; for a new edition see: Cattaneo/Bobbio (2010).

²⁵ Ferrari (1851). See also Bruch (2005), Ziblatt (2006).

realization of the European human rights regime introduced by the European Convention on Human Rights.

In his contribution Gerhardt commences his examination of the relationship of ‘federalness’ and subsidiarity in several grand strides with a historical and systematic outline opening into two central theses and several arguments for the ‘constitutive role’ of these principles. For Gerhardt the Kantian cosmopolitan alternative of a centralized universal republic on the one hand and a federation of free (republican) states on the other hand is but hypothetical. Under real-world conditions—and this, for instance, ties in with the analysis offered by Schmitz—a world republic is both undesirable and undesired. Gerhardt’s first claim is that both *de facto* and *de jure* today’s states are interconnected in so many ways and bound by such a multitude of international legal instruments that there is no need any longer for a single supranational institutional entity at a global scale. Secondly, given the antagonistic interplay of few international actors Gerhardt makes a case for the historical necessity of the European Union. Gerhardt’s argument for intra-European and other federalism is multi-faceted: (i) there is the *formal* aspect of recognition of and respect for the equality of the partners, (ii) the federal structures preserve and accentuate cultural diversity (ethnic, religious, linguistic, regional and other identities), (iii) there is a correlative nexus of ‘federalness’ and subsidiarity which reduces the burden of each sub-unit while promoting the social and political flourishing of the union and (iv) allowing for the greatest possible self-determination of each of the partners such that, in Gerhardt’s terms, “the ‘subsidiarist’ is the *material federalist*”.

Just as the very first text by Brunhöber on the import of the *Federalist Papers*, the final contribution of this book broadens the outlook to take up a philosophically informed legal perspective again and examines the tensions in a multilevel legal and political order created by an international human rights convention and corresponding adjudication. Føllesdal reflects upon the complex and often rather ‘technical’ balancing processes undertaken by the Strasbourg-based European Court of Human Rights (ECtHR) which is assigned the role to watch over compliance by Council of Europe member states with the European Convention on Human Rights (ECHR). EU member states have to be parties to the ECHR and, more recently, the EU itself is supposed to accede. In 2014, however, the Court of Justice of the European Union (CJEU; based in Luxembourg) rejected the draft of the accession treaty—the apple of discord exactly being the question of judicial review of EU and CJEU decisions by the ECtHR. This is but a variant—but a practically very important and prominent one—of the general dilemma between state sovereignty and the requirements of human rights protection imposed by an international human rights regime, here the ECHR. ECtHR jurisdiction and a new protocol amending the ECHR (N°15) explicitly mention the

principle of subsidiarity and refer to member states' 'margin of appreciation' in assessing their compliance with the convention.

Føllesdal's first claim is that the margin of appreciation can be defended but needs to be specified in order to alleviate its vagueness and achieve its objectives. He goes on to introduce the distinction of a state-centric and a person-centered version of the principle of subsidiarity and discusses the role of trust in the rule of law in a federal setting: A person-centered reading of the principle of subsidiarity seems favorable for several reasons, since it does not give the 'last word' to the state's interests. Human rights guarantees and judicial review have a particular bearing in a federation with qualified majority voting. Here, international or supranational adjudication is an additional instrument of control of member state governments where citizens feel it is no longer 'their' government enacting binding decisions and exercising political authority. A centralized human rights court can thus create trust and dispel fears in a multilevel federal arrangement with more and more majoritarian decision-making. Føllesdal argues that on the basis of a person-centered understanding of the principle of subsidiarity the margin of appreciation should be specified according to the likelihood that local authorities and courts will appropriately respect human rights. Thus, in some subject matters, with respect to rights related to political participation and the democratic decision making process, international human rights courts should not grant *any* margin of appreciation at all, in others they should not grant a *wide* margin (e.g. when minority interests such as freedom of religion are at stake).

In lieu of a conclusion. The federalist world is pluralist. Philosophical foundations of federalism are multifarious. Federalism is both a *product* and a *process* concept of political organization, it is a normative idea, a historically versatile phenomenon, an umbrella term which covers very many and very different institutional arrangements. It is interesting to note a basic tendency in federalist thought to find dichotomous conceptual attributes and theoretical approaches to explain federal phenomena: symmetric vs. asymmetric²⁶ federalism, cooperative vs. uncooperative²⁷ federalism, treaty vs. constitutional federalism, views based on religious presuppositions (derived from 'revelation') compete with completely secular(ized) explanations (e.g. based on 'reason'), the idea of a 'given', organic, corporative or covenant nature competing with consensual, contractual or otherwise constructivist foundations of a federal order, teleological with process-driv-

²⁶ I.e., the attributions of power differ between sub-units.

²⁷ In the same vein goes the distinction of a 'separate' or 'interlocking' federalism. (Cf. the introductory taxonomy in Føllesdal 2014.)

en or ateleological conceptions of federalism, etc. Upon closer conceptual or empirical examination these claims for exclusive disjunctions may not be sustainable and give way to more nuanced distinctions. However, there is up until this day no single, unifying, overarching ‘theory of federalism’. Accordingly, the philosophical foundations of federalism are found to be manifold.

Depending on whether we are faced with a ‘coming together’²⁸ (associative) or a ‘holding together’ (dissociative) type of federation the ‘*ratio unionis*’ differs. Federative processes of the first type are moved either by the idea to promote common welfare, to better guarantee individual freedoms, to allow for better defense and, ultimately, sustainable peace or an instrumental combination of any or all of these. With the second type, decentralizing a formerly centralized state to form a federation of states—be it in the form of a federal state with a strong central unit or a mere (con-) federation of independent states with a less powerful central unit—the focus is to further (democratic) self-determination²⁹ by the

28 The ‘coming together/holding together’ distinction has been introduced by Stepan (1999) and is used, e.g., in Føllesdal (2014) and his contribution to this book. The ‘associative/dissociative’ terminology is equally widely used (cf., e.g., Bauböck 2003, 140 n. 12). However, the predicate ‘dissociative’ puts the emphasis on centrifugal forces and fails to capture the integrating tendency of attempts of ‘holding together’. Bauböck prefers to refer to a ‘devolutionary’ federalism instead (ibid., 124). The distinction ‘integrative vs. devolutionary federalism’ (Lenaerts 1990, 206–208) does not sufficiently discriminate between the types of federalism since the intention or purpose of ‘holding together’ is to ‘integrate’ and avoid dissolution, secession or the like.

29 This latter effect may *e contrario* be exemplified by the anti-democratic forced centralization imposed in the German Weimar Republic on July 20, 1932, when in the so-called *Preußenschlag* (Prussian *coup d’état*) the then president of the central level of the *Reich*, Hindenburg, issued an emergency decree under Article 48 of the Weimar Constitution to replace the social-democratic managing minority government of the Republic (*Freistaat*) of Prussia by a *Reichskommissar*. This paved the way for the dissolution of Germany’s federal order after Hitler’s accession to power in 1933 (*Gleichschaltung der Länder mit dem Reich*). The justificatory strategy allowed for by the constitution was to enforce and reestablish ‘law and order’, this being a pretext to get rid of the center-left Prussian government (Walter (2007); see, e.g., Deuerlein (1972, 190–193) for an analysis of the “Preußenschlag” from a federal perspective). However, above all, this incident throws into relief the weakness of the federal order established under Weimar. Deuerlein (1972, 193) concludes “daß das Fehlen eines Macht verteilenden und damit Macht hemmenden Prinzips [...] den Durchbruch der politischen Kräfte begünstigte, die Unität mit Uniformität verwechselten [...]”. The social-democratic government takes recourse to the constitutional court of the Weimar Republic, the *Staatsgerichtshof*. In these proceedings, in which the anti-federal thinker Carl Schmitt pleads the cause of the right-wing government of the *Reich* (federal level), the measure is in part held unconstitutional (October 25, 1932). However, the court ruling is only implemented symbolically and cannot rebuild trust in the rule of law and the federal character of the constitution. For Schmitt, the ‘divided’ or ‘shared sovereignty’ presupposed

then sub-units hitherto integrated into a unitary state. Apart from the aspect of democratic legitimacy, this serves a sense of belonging and attachment since the sub-units may both conceptually and often also empirically be regarded as the institutional substrata of cultural, linguistic, social, economic and political identities.

Furthermore, the field of federal thinking is divided between rights-based and consequentialist approaches. We can distinguish an overall consequentialist reasoning (welfare, common defense, etc.) from a broadly liberty-preserving, rights-based reasoning in favor of federalism. Härtel (2012, 5, marginal no. 5) describes federalism as an “Organisationsform der Freiheit” whereby it remains an open question whether individual liberty is meant or rather the preservation of autonomy and *marge de manœuvre* of a state in the form of a sub-unit. Either reading is conceivable. Härtel’s formula “Autonomiesicherung durch Autonomieabgabe” (ibid., 4, marginal no. 3) is state-oriented, while in the liberal rights-oriented Kantian tradition the very purpose of the state is to enable and protect the exercise of individual liberty. In the current age of international human rights treaties the person-oriented purpose of federalism as an ‘order of freedom’ comes to the fore. Judicial review of fundamental or human rights violations by courts at the federal, supranational or international level benefits and protects the individual invoking her rights and acts as a counterbalance to and constraint on state sovereignty.

The political stances toward federalism and the federal prospects of the project of European unification have changed significantly between 2014 and early 2016 when the European Commission’s president Jean-Claude Juncker³⁰ has unexpectedly become a sceptic with regard to the future of the European Union, in particular the rights of free movement of workers and subsequently also the internal market and common currency. When in 2014 most of the contributions to this book were first presented, the outlook on Europe’s future was an utterly different one: Political actors themselves argued for and examined a pos-

by federal arrangements is even conceptually impossible, a *contradictio in adiecto*. His disciple, conceptual historian Reinhart Koselleck (2006 [1994], 503) proposed just this model for the European integration process: “Unser Handlungsspielraum ist nicht unendlich offen. Föderale Möglichkeiten müssen ergriffen werden.”

30 See the European Commission President’s New Year’s press conference on January 15, 2016 http://europa.eu/newsroom/rapid-failover/mex-16-85_en.pdf. For an example of the corresponding news coverage see <http://www.zeit.de/politik/ausland/2016-01/jean-claude-juncker-schengen-euro> (both 2016/01/16).

sible federalist perspective for the European Union.³¹ More recently, in the case of Juncker, even one of the most fervent defenders of EU cooperation and integration has voiced a rigorous admonition that “[W]aiting at an internal border would cost every lorry 55 euros for every hour.” Sacrificing freedom of movement and the Schengen Agreement of 1985 for a reintroduction of border controls comes at a heavy financial cost and—to take up but slightly adapt Franklin’s article in the *Pennsylvania Gazette*—‘must end in the Destruction of the European Interest, Trade and Prosperity in Europe’. Thus, it seems, apart from individual rights and liberties, defense and security, there is always an aspect of economic welfare involved in ‘federalism’. This adds a consequentialist underpinning to what is otherwise a ‘liberty-preserving’ framework of delegation of authority and powers. In contrast with a unitary state, a federation in the form of a federal state helps to safeguard the sub-units’ political, cultural or other identities while, in contrast with a set of independent states, a federation—*inter alia*—helps to save transaction costs. However, to put it in Koselleck’s words ([1994] 2006, 503), it seems that “[W]as immer Europa sein mag, es gibt ein föderales Minimum, das nicht nur wirtschaftlich, sondern auch politisch erreicht werden muß, und das wir wahren müssen, wenn wir auf diesem Kontinent weiterleben wollen.”³²

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³¹ See for a high-level seminar in April 2014 involving government officials in the context of a Franco-German joint research initiative: <http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/archives/BMF-Programm-Druckversion.pdf> (2016/01/19). Cf. also the then Belgian prime minister Reynders (2012).

³² “Whatever Europe may be, there is a federal minimum to be achieved and preserved not only economically but also politically if we wish to continue to live on this continent” (our translation, the eds.).

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