

Federalism, bordering, and the federalist response to the boundary problem

Paper prepared for 2019 CPSA Conference
Vancouver, June 4-6, 2019

Jan Smolenski
ABD, Politics Department, New School for Social Research

[NOTE: This is a draft and it requires fixing. Please do not cite without author's permission.
Author may change his mind on many issues discussed here.]

[NOTE: This is a part of a larger project and for this reason many ideas presented here might seem in need of a broader context and/or further development. I kindly ask the reader to take this into account while passing their judgement on this piece of work.]

1. Introduction

The purpose of this paper is to reconstruct a concept of bottom-up federalism and to explore its potential in address the boundary problem in democratic theory. In short, the boundary problem rests on the problem of demarcating the boundaries of the demos as the subject of democracy. The two typical responses to this question are a cosmopolitan one, denying any legitimacy to existing boundaries,¹ and a statist one recognizing the necessity of boundaries and settling on existing borders of existing States.² Both take the State, with its fixed borders understood as clear markers of the inside/outside distinction, as its point of reference.

In this paper I propose a different answer. I do so by drawing on a frequently neglected strand of federal theory, the one I call – borrowing from a Catalan Spanish theorist and politician Francisco Pi y Margall – bottom-up federalism. It originated in the experience of rebellion and was explicitly theorized against the State. This strand of federal theory weaves together the federal principle with popular sovereignty understood as constituent power. The federal principle in this case does not consist of two governments in one territory (essentially the idea of the federal State)³, but is understood as self- and shared rule centered around the practice of the compact. Although not necessarily coherent and definitely marginalized, this line of thought produced a unique understanding of political power rooted in a different spatio-political imaginary than the statocentric one. This imaginary with its emphasis on pluralism, heterarchy, and coordination (as opposed to monism, hierarchy, and subordination) and predicated on more flexible bordering and geographically expressed pluralism, it construes political space in a different manner than statist monism. I believe that it can give us unique resources to address the boundary problem in political theory.

In what follows I first very briefly describe the boundary problem in democratic theory and see how it is related to statist bordering. Second, I will address bottom-up federalism by describing theories of Johannes Althusius, Thomas Jefferson, and Fransico Pi y Margall, focusing on the spatial implications: spatial contraction through secession, spatial extension by the iteration of the founding foedus, and spatial distribution of difference. Third, I explore the potential of bottom-up federalism to respond to the challenge posed by the boundary problem and, relying on that, I sketch a democratic – as opposed to republican and liberal – justification of federalism.

2. Boundary problem and statist bordering

Democratic legitimacy of rule depends on the presupposition that those over whom rule is exercised participate in the ruling. The collective object of rule needs to be always already the collective subject of rule, the demos. This question is not important in the case of monarchical rule: the One who exercises the rule over the Many does not need to be a member of the collective subject over whom the One exercises their rule. However, the question of democratic legitimacy of political power implies another question: who is the collective subject that is both the subject and the object of rule. In other words, it is a question of the boundary of the demos, the core of the boundary problem. Demos itself cannot answer this question, because at the moment of posing this question it is not known who belongs to the demos.

Given this conundrum, there are two main responses to this question.⁴ A cosmopolitan one is advanced by Arash Abizadeh, and it is based on the coercion principle, that is, principle

1 E.g. Arash Abizadeh,

2 E.g. Susan Song

3 Lacroix, Patrick Riley

4 I am interested here in democratic responses, that is, responses that are primarily rooted in the claim to self-rule.

that all who are bound by a collective decision should have a say in it. He argues that any attempt to find a criterion for assessing boundaries of the demos that does not fall into such circularity falls on a prepolitical quality that bounds the demos together. The reason for this is that “civic boundaries pose an externality problem: On one hand, enforced decisions about who is granted and who is denied membership and political rights are among the most important instances of the exercise of political power; on the other hand, the exercise of such power is intrinsically over both insiders and those whom the boundary picks out as outsiders.”⁵ Even social contract theories cannot address this problem properly because “legitimate boundaries require that *every* individual consent not just to his or her own inclusion or exclusion, but also, in the case of willing would-be insiders, to the inclusion of *each* other willing individual.”⁶ Therefore, even democratic theory falls on prepolitical qualities in order to bound the demos. However, such prepolitical source of the legitimacy of the boundaries of the people is essentially arbitrary since it is based on historical arbitrariness. Thus, “the collective subject of self-rule is in principle unbounded precisely because there are no prepolitical grounds for constituting the legitimate boundaries of the demos.”⁷

Susan Song points out, however, that if used consistently the coercion principle has a different implications for bordering. She points out that, the coercion principle rejects the “*territorial* sovereignty as the basis of fixing democracy’s boundaries in favor of *functional* criteria of inclusion”.⁸ It is so, Song argues, because the set of those who are owed justification is not based on the principle of territorial extent of the validity of the decisions but rather on whether a person is subject to coercion or not. Thus, the right to participate in the decision-making is a function of the coerciveness of the decision. And given Abizadeh's broad definition of being subject to coercion – it includes threat of using actual physical coercion in order to influence future actions of individuals⁹ – it radically extends the possible boundary of the demos, but also, and more importantly, makes them volatile. “[T]hose decisions that will coerce ... virtually all of the world’s people require a global demos, but there will be many other cases in which the demos is a local or regional grouping, or a geographically dispersed grouping of people smattered throughout the world. What the [coercion principle] actually require[s] is *different demoi for different decisions*”.¹⁰ (Song 2012, 56). It is not only a practical problem, but also a normative one. Conditions of democracy, according to Song, are equality and solidarity. Episodic demoi are not capable of creating between individuals proper ties which could support solidary redistributive policies required to establish political equality.¹¹ In other words, boundaries of the demos cannot be ephemeral, otherwise there is no demos to speak of. Boundaries of the demos are legitimated by the fact that they provide for conditions necessary for functioning democracy. The institution that can bound the demos this way is the modern State: “Because of the territorial state’s role in securing the basic conditions of democracy, territorial boundaries should have priority in defining the boundaries of democracy.”¹² Bounding demos with State borders is democratic because it provides for conditions in which democracy is

5 Arash Abizadeh, “On the Demos and Its Kin”, 875.

6 Arash Abizadeh, “On the Demos and Its Kin”, 875.

7 Arash Abizadeh, “On the Demos and Its Kin”, 868.

8 Sunsan Song, “The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State.” *International Theory* 4 (1), 2012: 56.

9 Arash Abizadeh, “Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders.” *Political Theory* 36 (1), 2008: 57.

10 Song, “The Boundary Problem in Democratic Theory”, 56.

11 Song, “The Boundary Problem in Democratic Theory”, 57-58.

12 Song, “The Boundary Problem in Democratic Theory”, 62.

practicable.

What both these answers have in common is that they assume that the demos itself cannot answer the question of their own boundary, because before the decision over the boundaries of the demos requires a previous knowledge regarding who can participate in this decision, that is, knowledge of the boundaries of the demos. The problem with this argument is that the imply or expect the fixity of the boundary of the demos, fixity, that is characteristic of State borders, although in the case of Abizadeh it is the negative point of reference. As such, then, it assumes the naturalness of statist bordering, neglecting historical alternatives to the State. State borders are a historically contingent way of bordering tied to the political form of the State. From the process of the consolidation of European States and the State system, the State emerged as the centralized set of institutions and personnel exercising an authoritative monopoly of rule making over territorially demarcated area backed by the threat of coercion.¹³ Of particular importance were here three logically independent yet historically connected processes. First was the consolidation and centralization of power, especially law making and execution of laws, to which corresponded the emergence of the absolutist theories of sovereignty.¹⁴ The other one was war making which initially was armed competition among various potentates and had no clear distinction between internal pacification of unruly local lords and what we would call today international war.¹⁵ The third one was colonialism as it created international legal condition for recognizing equality of sovereigns¹⁶ (as opposed to inequality of opponents in pursuit of ultimate universal power) as well as it provided for a space in which drawing borders as linear and separating mutually exclusive jurisdictions under the rule of equals could be first implemented.¹⁷

State borders define the spatial extent of sovereignty attributed to the State as a personification of the supreme power.¹⁸ Borders serve “to describe the areas of legal jurisdiction and to indicate *where* states [have] rights and responsibilities.”¹⁹ Within these limits the State holds the ultimate power, i.e. the monopoly of the means of violence to back up the monopoly of binding rule-making. For this reason, borders define the limits of the social processes that the State can legitimately claim and is responsible to regulate.²⁰ Internally, the border defines geographically the space of monistic legal order homogenized under one unified supreme power. Negatively, the border signifies that beyond a certain line in space, claims to the monopoly of violence and binding rule-making are illegitimate. Externally, borders “are lines which mark the limits of the territorial claims and jurisdiction of the two states concerned.”²¹ The border, thus, gives the spatial tangibility to the friend-enemy distinction.²²

Thus, statist bordering is guided by the principles of clear inside/outside distinction, and fixity. This clear inside/outside distinction separates the domestic from the foreign, the national from the international, the internal from the external in the realms of law, politics, and socio-

13 See: Michael Mann, “The Autonomous Power of the State: Its Origins, Mechanisms and Results,” in *States, War and Capitalism: Studies in Political Sociology* (Oxford, New York: Blackwell Publishing, 1992), 1–32.

14 Strayer, Spruyt, Bodin, Hobbes.

15 Tilly

16 Carl Schmitt, *The Nomos of the Earth*; Anghie, Imperialism, Sovereignty and International Law.

17 Jordan Branch, “Colonial Reflection”

18 See: Popescu, *Bordering and Ordering the Twenty-First Century*, 14–15.

19 Harvey Starr, “International Borders: What They Are, What They Mean, and Why We Should Care,” *SAIS Review of International Affairs* 26, no. 1 (2006): 4, doi:10.1353/sais.2006.0023.

20 See: Peter J. Taylor, “The State as Container: Territoriality in the Modern World-System,” *Progress in Human Geography* 18, no. 2 (June 1, 1994): 151–62.

21 Fawcett, *Frontiers*, 22.

22 Claudio Minca and Nick Vaughan-Williams, “Carl Schmitt and the Concept of the Border,” *Geopolitics* 17, no. 4 (October 2012): 756–72.

economic processes. Fixity in this context has a double meaning. On the one hand, it is about fixing the state in space: bordering gives the state its spatial extent, its territory, it grounds it by attaching it to land.²³ “Borders permit a spatial approach to international or global politics by setting out the location of states and their absolute and relative distances from each other.”²⁴ On the other, it refers to the fixity of the inside/outside distinction: it is binary and mutually exclusive following the either/or logic.

Importantly, bordering contains populations and transforms bordered states into their representatives at the international (or actually: interstate) arena. Again, it has a double historical root, one part located in European nationalism and its democratization, and the other in decolonization. In the former case, it has made the boundary of the State and spatial extent of the nation congruent homogenizing the population²⁵; democratization gave it popular legitimacy. In the latter, the statehood became the only viable way of asserting self-rule against colonial powers.²⁶ Thus, the people as a macrosubject can assert itself politically only through the political form of the State. Thus, it has clear territorial area of jurisdiction and clear boundaries: the assumption that the demos needs to have fixed and clear boundaries is a result of this historical development.

2. Bottom-up federalism

The argument behind the two main answers to the boundary problem assumes that the people acts through a historically contingent political form of the State. In fact, however, the State is not the only political form that used to be viable in modernity. First modern theories of federalism and the political form of the federation were theorized at the threshold of the modern age as an alternative to the modern State and deployed in the theoretical and political struggles against it.²⁷ Equally importantly, they were developed in conjunction with the theories of popular sovereignty as constituent power. They imply different bordering and thus can offer a ground for a different answer to the boundary problem.

2. 1. *The rebellious roots*

A tentative link between the two concepts was made in *Vindiciae, Contra Tyrannos* (1579) written in the wake of St Bartholomew Day's massacre in order to justify resistance of the Huguenots against the French king. The author (identity of whose is a still contested issue) justifies the right of resistance by referring to the constituent power of the people: “the people constitutes kings, confers kingdoms, and approves the election by its vote”.²⁸ The duty of obedience on the part of the people is conditional on the fulfillment of the duties on the part of the king.²⁹ Effectively, the king is a mere supreme magistrate and not a sovereign. If the king violates the terms of the compact, he commits high treason and the people may legitimately resist and forcefully depose the tyrant.³⁰

The act of constituting the king is described in terms of exchange of oaths between the

23 See: Schmitt, *The Nomos of the Earth*. On the importance of land boundaries for any claims regarding territorial waters, i.e. water boundaries, and air boundaries, see also: Prescott, *Political Frontiers and Boundaries*.

24 Starr, “International Borders,” 9.

25 Sahlins,

26 Spruyt

27 See: Forsyth, *Unions of States*; Cohen, *Globalization and Sovereignty*.

28 Stephanus Junius Brutus, the Celt, *Vindiciae, Contra Tyrannos: Or, Concerning the Legitimate Power of a Prince over the People, and of the People over a Prince*, ed. George Garnett (Cambridge ; New York: Cambridge University Press, 2003), 68.

29 Hueglin, *Pre Modern Concepts*, p. 58.

30 *Ibid.*, 156.

people understood as a corporate body represented by lesser magistrates³¹ and the king.³² Importantly, this act of constitution entails coming together of lesser territorial magistrates who themselves are not appointed by the king but constituted by the people of these parts of the kingdom.³³ The duty of these magistrates is “to protect the people within the extent of their jurisdiction.”³⁴ This insistence on the role of provincial magistrates in leading resistance against tyranny results in understanding resistance (at least partially) in terms of secession: provincial magistrates should vindicate “that part of the kingdom over which they have assumed tutelage” and “expel him (the tyrant) from their borders [*finis*].”³⁵

2.2. Althusius and secession

The logic of bottom-up federalism, only incipient in *Vindiciae* due to its focus on justifying the right of resistance,³⁶ is developed by Johannes Althusius in the treaty *Politica Methodice Digesta*. It is important to stress that important inspiration for Althusius' theory was the successful Dutch Revolt against the Spanish Empire and the federal republic established in its aftermath.³⁷

The fundamental innovation of Althusius is that he puts the practice of coming together at heart of political practice.³⁸ It is already clear in his definition of politics as “the art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them.”³⁹ He adds that “the efficient cause of politics is consent and agreement among communicating citizens. The formal cause is indeed the association brought about by contributing and communicating one with the other, in which political men institute, cultivate, maintain, and conserve the fellowship of human life through decisions about those things useful and necessary to this social life.”⁴⁰ The emphasis on pledges given each other by the associates, tellingly called “sympiotēs” and “participants and partners,”⁴¹ to each other privileges heterarchical and egalitarian relations of co-ordination over the hierarchical relations of subordination. The act of associating is generative of a new association form established immanently, that is, from among the associating participants as opposed to external imposition. It implies voluntary collective practice, that is, free and active participation of partners who in this way constitute themselves as a collectivity. This consensus-based creation of an association implies also the right of resistance against the abuse of power.⁴²

Essential part of Althusius' federalism is its emphasis on plurality which pervades his

31 Ibid., 46.

32 Ibid., 129, 131.

33 Ibid., 84, see also 46.

34 Ibid., 86.

35 Ibid., 166; Ellen Meiksins Wood sees it as an indication that, under the guise of the right to rebellion, the Huguenots defended withering away sectional privileges of lower, provincial sectors of the French nobility which was highly overrepresented among the French Calvinists: Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from the Renaissance to Enlightenment*, 1 Original edition (London ; New York: Verso, 2012), 155 and further. Irrespectively of the material interests behind writing the treaty, insistence on the role of the provincial magistrates introduces federal element into this theory of resistance.

36 Cf. Salmon, *Society in Crisis*, 189.

37 It is not the place to enumerate all sources of Althusius' thought. I mention the one important for my argument. However, influences of Aristotle, canon law in general and Church corporation theory in particular, and the germanic idea of *Genossenschaft* (besides the *Monarchomachi* and the Dutch revolt) are clear.

38 Hueglin

39 Althusius, *Politica*, 17.

40 Ibid., 24.

41 Ibid., 19.

42 These four characteristics map onto four principles of the concept of constituent power; see: Kalyvas, “Constituent Power.”

theory through and through: it defines his idea of constituent power and the design of the polity and institutional unfolding of popular sovereignty. When it comes to the plurality of constituent power, Althusius states that the right of the realm (called also right or rights of sovereignty) “is the means by which the members, in order to establish good order and the supplying of provisions throughout the territory of the realm, are associated and bound to each other as one people in one body and under one head.”⁴³ This one people, however, is internally plural: “[t]he people, or the associated members of the realm, have the power (*potestas*) of establishing this right of the realm and binding themselves to it.”⁴⁴ It is significant that Althusius refers to the people in third person plural (“the people ... *have* the power ... of binding *themselves*”)⁴⁵ as it points to the collective and concerted action establishing of the new polity from below. Popular sovereignty understood in such way originates “through the members.”⁴⁶ The preposition “through” indicates, plurality is the precondition for the emergence of sovereignty: it originates between and among the members from sharing and for this reason is impersonal.

Althusius continues to assert that popular sovereignty “cannot exist except in them, nor be conserved except by them.”⁴⁷ The people as the subject of constituent power are the members of the realm, that is “cities, provinces, and regions agreeing among themselves on a single body constituted by mutual union and communication.”⁴⁸ Provinces and cities themselves are also “mixed societies”⁴⁹ comprised of smaller associations.⁵⁰ As the right of sovereignty cannot exist except in the members of the community, this this plurality has to be institutionally manifested. It happens in three ways. First first one is legal pluralism.⁵¹ Second are representative assemblies of provinces and the realm. On the one hand these assemblies are supposed to provide proper representation for the diversity of the members; on the other they are participatory institutions preserving the affairs liberty of the members as they have institutional avenue for participating in the more extensive association.⁵² The third one is the dependence of the more extensive associations on smaller, constituent units which implies that not the overarching unity but the underlying plurality takes precedence.⁵³

This third way, however, can be fully realized only under the specific type of polyarchical supreme magistrate: democratic supreme magistrate in contrast to monarchical or aristocratic supreme magistrate. We deal with democracy “when certain persons elected alternately and

43 Ibid., 69.

44 Ibid., 70.

45 In this context the statement that one can bind oneself only with the help of another is not a superficial platitude.

46 Althusius, *Politica*, 7.

47 Ibid.

48 Ibid., 67. Communication, that is sharing, logically presupposes that there are at least two subjects who share things among themselves. I cannot share things with myself.

49 See: *ibid.*, 66.

50 Ibid., 40, 51, 54. Althusius’ emphasis that not individuals but corporate bodies are members of more extensive associations should be read in contradistinction to (originating in the distinction between private and public law in Roman law, already incipient in Bodin and fully developed in Hobbes Otto von Gierke, *Political Theories of the Middle Age*, trans. Frederic William William Maitland [Martino Fine Books, 2014]) idea about the absolute character of the relationship between the individual and the State as the personification of sovereignty. .

51 Althusius, *Politica*, 67. Importantly, these special provincial laws do not depend on the consent of the sovereign like in Bodin.

52 “For no one can be sufficient and equal to the task of administering such various, diverse, and extensive public business of a province unless in part of the burden he avails himself of skilled, wise, and brave persons from each class of men. ... Indeed, by this arrangement certain traces of liberty are retained by the provincials, for each and all see themselves admitted to the administration of the public matters” (*ibid.*, 54). The same pertains to the assemblies of the realm (185-186).

53 See: Hueglin, “Federalism at the Crossroads,” 276.

successively from the people for definite periods of time ... exercise the rights of sovereignty and supreme power according to the votes of the entire people gathered by the centurial divisions, by tribes, or by curia.”⁵⁴ Additionally, in democracy “[t]hese intermediate magistrates frequently depend immediately upon the people when it predominates, in which case the people prescribes the principles of their administration, and constitutes and dismisses them.”⁵⁵ Althusius provides us with the first vision of the democratic federalism where the people constitute successively more comprehensive communities by uniting as corporate bodies.⁵⁶ The relationship between the people and the supreme magistrate is mediated by the intermediary magistrates who, just like the supreme magistrate are dependent on the people. It is a democratic federation that most fully realizes Althusius' definition of politics as the art of associating men. As Thomas Hueglin accurately puts it, Althusius' federalism “means pluralization of governance among members of a commonwealth wherein all higher levels of authority are as a matter of principle constituted on the basis of consent and solidarity from below.”⁵⁷

The process of associating unfolds in a progressive consensual creation of communities, from a nuclear family to a universal commonwealth as the “human society develops from private to public association by the definite steps and progressions of small societies.”⁵⁸ Smaller associations are creators and members of more comprehensive ones, and despite successive compacts they maintain their integrity. At each step, the principle of governing the association is the same: the elected leader of the association is its mere administrator, is bound by the oath to attend to the welfare of the association, and “has authority and power over individuals by general mandate of the organized community, but not over the group.”⁵⁹ Effectively, the universal realm is a federation of families and colleges, villages and towns, and provinces created through consensual coming together enacted in a series of increasingly extensive compacts. Althusius understands the constitution of the supreme magistrate as a compact involving election by officials representing territorial communities⁶⁰ and sees armed resistance, also justified in terms

54 Althusius, *Politica*, 206.

55 Ibid.

56 It is worth exploring in detail the metaphor Althusius uses to describe the membership of the universal realm. While discussing mixed constitutions he does use the metaphor of the body politic; however, when he talks about federalism, he uses a different one. While discussing the relationship between the members of the universal realm and the realm itself he states that “[i]t can be said that individual citizens, families, and collegia are not members of a realm just as boards, nails, and pegs are not considered parts of a ship, nor rocks, beams, and cement parts of a house. On the other hand, cities, urban communities, and provinces are members of a realm, just as prow, stern, and keel are members of a ship, and roof, walls, and floor are essential parts of a house.” (ibid., 67). First, this means that the realm is not a natural thing but it is artificial, it is created, built. Second, that this each member of the community itself is a compound entity and a product of labor of many persons. (For the importance of taking metaphors used in political theory seriously, benefits derived from their detailed analysis, and analogous interpretation of the metaphor of the weaver in Plato’s *Statesman*, see: Andreas Kalyvas, “The Sovereign Weaver: Beyond the Camp,” in *Politics, Metaphysics, and Death: Essays on Giorgio Agamben’s Homo Sacer*, ed. Andrew Norris and Thomas Carl Wall [Duke University Press Books, 2005]).

57 Hueglin, *Early Modern Concepts for a Late Modern World*, 153.

58 Althusius, *Politica*, 39.

59 Ibid., 42; this specific quote refers to the city. For the collegium, see: 34. The exception here is the head of the province as a member of the universal commonwealth, who is appointed by the supreme magistrate. Thomas Hueglin attributes this deviation from the principle to the political conflict Althusius was involved in as a syndic of Emden between the city and the count of Easter Frisia (Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* [Waterloo, Ont: Wilfrid Laurier University Press, 1999], 36).

60 Johannes Althusius, *Politica* (Indianapolis: Liberty Fund, Incorporated, 1995), 99, 101.. Althusius calls them ephors.

of popular sovereignty as constituent power, as a legitimate remedy for tyranny.⁶¹ This paves the way for conceptualizing resistance against tyranny in terms of secession. Althusius makes a specific reference to the Spanish king Phillip who according to him has broken his oath to the people of the Netherlands and thus violated the constitutional order.⁶² In such a case, writes Althusius having the Dutch provinces in mind, “it shall be permitted one part of the realm ... to withdraw subjection to the tyranny of the magistrate and to defend themselves.”⁶³ Such means are considered “defensive, not offensive” because they are contained to “the boundaries of the territory” of a specific community.⁶⁴ The right to secession as means of resisting tyranny is simply logical consequences of the consensual constitution of the plural political community. Thus, Althusius' definition of politics should be amended to “politics is the art of associating *and dissociating* men for the purpose of good life.”

2.3. Jefferson and the expansion

This concept of bottom-up federalism travelled from early modern Europe across the Atlantic and its different facets were enacted at different moments of the struggle for independence of the United States.⁶⁵ Important role in its development was played by Thomas Jefferson. Jefferson presented his quasi-federal ideas already in 1774 in his *Summary View of the Rights of British America*⁶⁶ but later in the wake of the American War of Independence (essentially a secession for the British Empire as the Declaration of Independence presents it doubtlessly)⁶⁷ elaborated it into more democratic direction.

Jefferson conceived the US Constitution as compact of states and peoples.⁶⁸ For him, the national government erected by the Constitution was a creature of the peoples of the several states and an instrument for the cooperation among states. The people of the several states delegated certain powers to state governments individually, and in some very restricted powers delegated in concert to the national government.⁶⁹ Rather than relying on the concept of unitary sovereignty, Jefferson speaks of powers delegated by the popular sovereigns separately (to state governments) or in concert (to the national government). Thus, the Constitution created general government as the one of limited powers, with residual powers belonging to states. It followed that there was “no common judge”⁷⁰ to adjudicate in the case of conflicts between the states and the general government. Thus, in the case of the assumption of undelegated powers by the general government, “every State has a natural right in cases not within the compact, (*casus non*

61 As a side note, it is important to note that Althusius sees the supreme magistrate as a creature of the constituent units and that its constitution is confirmed by exchanging the oath – the supreme magistrate promises to rule in accordance with the constitution of the polity and the people promise obedience. However, the people oath is conditional upon fulfillment of the oath by the supreme magistrate.

62 Althusius, *Politica*, 192.

63 Althusius, *Politica*, 194.

64 Althusius, *Politica*, 195.

65 Its earlier iterations can be found in the Mayflower Compact, which, in Arendt's description receives a federal quality of an agreement among individuals constituting a new community, or in the Fundamental Orders of Connecticut. See: Arendt, *On Revolution*, PAGE; Stephen L. Schechter, *Roots of the Republic: American Founding Documents Interpreted*, PAGE

66 Jefferson

67 Jefferson penned the Declaration of Independence, that echoed the Act of Abjuration and articulated the normative ground for dissolving “the political bands” which have connected one people with another as an enactment of “the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

68 Jefferson, *Kentucky Resolution and Protest of Jean*

69

70 *Draft of the Kentucky Resolutions*, 449.

fœderis,) to nullify of their own authority all assumptions of power by others within their limits”.⁷¹ This power is what distinguishes a state under a limited general government from a de facto province under unrestrained power of the modern State. Jefferson urges self-restraint when it comes to the exercise of this power, however, there is a limit to this self-restraint and it is “submission to a government of unlimited powers”.⁷² Thus, it follows that once the nature of the compact is violated, that is once the government of limited and delegated powers dependent on the constituent states becomes an independent government of with the competence to judge its own competences, the character of constituent states is obliterated, secession as means of preserving one's independence is permitted.

It is worth mentioning that the several states themselves are compound republics. An example of this thinking can be found in his 1776 draft of the Virginia constitution. In the article regarding amendment procedure the two thirds of the counties need to accept the change in any provision, rather than two thirds of all votes. A more comprehensive sketch was presented in Jefferson's brief description of the ward system forty years later.⁷³ “The elementary republics of the wards, the county republics, the States republics, and the republic of the Union, would form a gradation of authorities, standing each on the basis of law, holding every one its delegated share of powers, and constituting truly a system of fundamental balances and checks for the government.”⁷⁴ Within such a scheme of vertical checks and balances each republic receives duties and responsibilities appropriate for its scale. Thus, the national government is responsible for foreign and defense policy, as well as “federal relations”, i.e. relations among the several states; state governments are responsible for protecting civil and political rights, police, and administration of laws within their bounds; counties should be concerned “with the local concerns of the counties;” and a ward should “direct the interests within itself.”⁷⁵ Effectively, the United States is a compound republic in which each constituent unit is itself compound.

Federal expansion of the United States. In his “Report on the Government for Western Territory” of 1784, written still when the Articles of Confederation were in force, Jefferson spells out the expansion towards the west. The process can be summarized as consisting in three main steps. First, the settlers are empowered “either on their own petition, or on the order of Congress ... to meet together for the purpose of establishing a temporary government, to adopt a constitution & laws of any one of these states, so that such laws nevertheless shall be subject to alteration by their ordinary legislature, and to erect, subject to a like alteration, counties or townships for the election of members for their legislature.”⁷⁶ Then, once the population reaches twenty thousand inhabitants, they are permitted to establish a permanent constitution. Both temporary and permanent constitutions are supposed to follow republican principles and in principle are supposed to aspire to the membership in the Confederation. Finally, once a new state reaches population of the least populated member-state, and provided that the two thirds of the member-states agree, it becomes a full member of the Confederation “on equal footing with the said original states.”⁷⁷ The Northwest Ordinance of 1787 amended some of the democratic elements of the 1784 Report (particularly temporary government of the governor and the secretary was supposed to be erected by the Congress of the United States) but even in this

71 Draft of the Kentucky 453.

72 Declaration and Protest, 484

73 Thomas Jefferson, “To Joseph C Cabell, February 2, 1816,” in *Jefferson: Political Writings*, ed. Joyce Oldham Appleby and Terence Ball (New York: Cambridge University Press, 1999), 202–6.

74 To Joseph C Cabell

75 To Joseph C Cabell

76 Report on Government for Western Territory, 376

77 Report on Government for Western Territory, 377

document it was made clear that the statehood of new territories comes before their access to the United States.

The question of the expansion of the United States after the Constitution came up during Jefferson's presidency during the Louisiana Purchase controversy. Importantly, the Constitution did not give the general government the power to acquire territory. The constitutional problem of the issue did not escape Jefferson's attention, however his justification of the purchase was both pragmatic and principle-based. Pragmatically, Jefferson believed that control over that area was essential for economic and military security of the United States. As he states, it is better to have “our own brethren and children” settle the other bank of the Mississippi river rather than “strangers of another family”.⁷⁸ Additionally, Jefferson stated in his Second Inaugural Address that the “federative principle” cannot be limited spatially.⁷⁹ That it was not a purely rhetorical move suggest his private remarks from 1803 regarding the Purchase. The new territories would be inhabited by “our sons” who would occupy “distinct but bordering establishments”.⁸⁰ Effectively, they would become independent states whose membership in the Union, as much as it was desired, depended on their autonomous decision.⁸¹ Recognition of statehood was not conditional upon membership in the Union.⁸² Only through the iteration of the federal compact can limited size of the polity, the condition of effective self-government,⁸³ and the extension of the spatial limits of the realm of liberty,⁸⁴ be pursued at once.

2.4. *Francisco Pi y Margall*

United States had been changing in the direction of the national State already in the early 19th century⁸⁵ until the civil war, when the force of arms resolved American disputes regarding the nature of the Union.⁸⁶ Meanwhile, the concept of bottom-up federalism has returned to the Old World. Upon that return, federal thinking has encountered proliferating nationalism. Here an important contribution to theory of federation as an alternative to the State and emerging nationalism has been provided by the Spanish politician and political thinker Francisco Pi y Margall.

Pi y Margall was a follower of a French libertarian socialist Pierre-Joseph Proudhon, who formulated his federalist response to nationalism in 1863 in his *Principle of Federation*.⁸⁷ He envisioned the creation of the federation as an iteration of compact on different scales from families to a large scale polity, surprisingly harking back Althusius' vision of the politics of association. Drawing on French law, he compares it to the syallagmatic contract guided by the principle of commutative justice,⁸⁸ that is, a contract in which each party is obliged to provide something to other parties and whatever is provided is considered of equal value. It is important to remember, that does not reduce federalism to private law exchange; for him the federal compact is of a public law character – and constitutional at that. Importantly, Proudhon stresses the sociological dimension embedded in his vision of federalism. Specifically, his federalism rests social diversity, not expressed in national terms, nonetheless expressed in political and

78 Second Inaugural Address, 519

79 Second Inaugural Address, 519

80 To John C. Brackenridge, 1138

81 To John C. Brackenridge, 1138

82 To Albert Gallatin, 1449

83 Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System, 244.

84 Negri, Insurgencies

85 Stability without statehood

86 Schmitt, Constitutional Theory

87 Pierre-Joseph Proudhon, *The Principle of Federation* (Toronto: University of Toronto Press, 1979).

88 Principle of Federation,

economic life of the communities.⁸⁹ For this reason, the normative basis for it is not simple equality of members but exchange in accordance with the principle of commutative justice.⁹⁰ The principle of commutative justice, of equitable exchange, implies that different parties come to the compact with different qualities. As such, thus, it necessarily presumes territorially concentrated social diversity as the sociological basis for political diversity within the federation.

Given that with each iteration of the founding compact that creates another scale within the federation this new scale receives less powers and competences than founding members retain, there is a natural limit to the federal expansion. There is a point, Proudhon observes, at which a new scale of a federation receives so little power that it becomes dysfunctional. Similarly, even if the iteration of the compact is purely horizontal, as in the case of admitting a new polity to already existing federation, the goals of the federation including mutual defense and the principle of commutative exchange become impracticable. [QUOTE]

Pi y Margall, who translated Proudhon's *Principle of Federation* into Spanish, developed Proudhon's ideas in his major 1877 work *Las Nacionalidades* into a constitutional model for republican Spain. While predicated on the same anti-nationalist sentiment as Proudhon's, Pi y Margall's argument is much less abstract, much more historical and rooted in the analysis of Spanish conditions.

Pi y Margall states that historically, different regions of Spain used to be independent kingdoms and were united only by conquest and force of absolutism.⁹¹ Centralization managed to unify country's penal code and foreign policy. Yet, as Pi y Margall points out, the principle of unitary State had not been able to homogenize Spain, even in legal terms – Spain, according to him, was characterized by legal pluralism. Additionally, provinces maintained differences among them, starting from linguistic differences to differences of customs to differences in measures.⁹² Differences of custom in particular, ran much deeper than provinces: “They change vary from province to province and from town to town.”⁹³ *A propos* languages, Pi y Margall observes that they were both vernaculars and literary languages undergoing revival: “Now great poems of special nature and tendency are written in all these Languages, primarily in the Latin ones, in which sentiments towards ancient homeland predominate.”⁹⁴ What is important about these differences is that they pertain to everyday life and affective bonds between individuals and their communities of different scales.

As Pi y Margall stresses, the unitary principle cannot effectively embrace and reconcile this diversity within one national community. Political crisis brought about the 1868 Glorious Revolution which deposed queen Isabella II created the conditions in which constitutional reorganization of Spain along federal lines would be possible. Although Spain functioned as a unified State under monarchy for centuries, Pi y Margall did not envision federalization of Spain as a mere devolution or granting autonomy. Rather, as the collapse of monarchy signaled the rupture in legality and legitimacy, for federal constitution making for Spain was a genuine constituent moment unfolding as coming together. As a result of rebellion, provinces would declare independence, establish their provincial and town assemblies. Leaders of provincial rebellions would travel to Madrid in order to have their authority recognized by central

89 Richard Vernon, “Introduction,” in *Principle of Federation*, by Pierre-Joseph Proudhon (Toronto: University of Toronto Press, 1979), xxviii.

90 *Principle of Federation*

91 *Las Nacionalidades*, 248

92 *Las Nacionalidades*,

93 *Las Nacionalidades*, 278.

94 *Las Nacionalidades*, 277

government.⁹⁵ Then, the constitution-making process follows. Each town designs its own “regime”; delegates of towns, “having established a compact uniting the towns, draft a provincial fundamental law, and in Madrid delegates of provinces, “united through another compact” draft the federal constitution.⁹⁶ Meanwhile, central government would function as a provisional one, composed from delegates of provinces.⁹⁷

Thus, federalism of Pi y Margall is, as he describes it himself, bottom-up, *de abajo arriba*.⁹⁸ The basic unit of the federation is a city of a town (*la ciudad* or *el pueblo*). “It constitutes in its principle a complete and independent whole.”⁹⁹ It is self-sufficient in the sense capable of meeting needs of their members (families).¹⁰⁰ As Pi y Margall states, it is “the political society par excellence”¹⁰¹, a nation (*una nacion*) in miniature: “It has its cult, its laws, its government, its administration, its tribunals, its treasury, its army”.¹⁰² The city or the town has its own customs and it is there where the actual, concrete life of families and individuals unfolds. The city or the town has the loyalty of its members. It is “the true homeland”.¹⁰³ Links between cities and towns are established due to the economic development that encourages these polities to reach out beyond their limits.¹⁰⁴ Pi y Margall credits economic factors as crucial, federative arrangements are not a mere function of economic expansion. There is an important role reserved for political variables: federalism is means of organizing social and economic differences politically. The bottom-up construction of it was supposed to guarantee that this diversity is not forcefully erased by the concomitant nationalism and centralization of the State.

3. Bottom-up federalism and bordering

In the three previous section I presented historical trajectory of the concept of bottom-up federalism. Now it is important to analyze it in formal terms and look at the characteristic features of bottom-up federalism.

The concept of bottom-up federalism originated from the experience of rebellion linking together the federative principle and the principle of constituent power. There are conceptual, normative, and logical connections underlying the elective affinity between the concept of constituent power and that of bottom-up federalism. The conceptual link is the concept – and practice – of compact,¹⁰⁵ *foedus* in Latin. Its primary meaning was political and referred to a treaty, alliance, or league. *Foedus Cassianum* of 493 BC, reportedly the first known non-legendary treaty,¹⁰⁶ established, according to its provisions, lasting peace between the Romans and the Latin league after a period of hostilities.¹⁰⁷ Besides the prohibition of hostilities and

95 Las Nacionalidades, 318

96 Las Nacionalidades, 321

97 Las Nacionalidades, 320

98

99 Las Nacionalidades, 116.

100Las Nacionalidades, 116

101Las Nacionalidades, 118

102Las Nacionalidades, 116, all translations are mine.

103Las Nacionalidades, 119

104Las Nacionalidades, 120

105Here I follow those who distinguish between compact and contract by claiming that the latter has a private character whereas the former has a public one.

106At least according Encyclopedia Britannica (). Livy refers to this treaty as *foedus* but, in contrast to his treatment of the *foedus* with the Albans, he does not go into details regarding its provisions or the manner it was enacted. <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0199%3Abook%3D2%3Achapter%3D33>

107Dionysius of Halicarnassus, *Roman Antiquities*, vol. IV, p. 139. By securing peace for “as long as the heavens and the earth shall remain where they are”, *Foedus Cassianum* differed from the truce terminating a war which

aiding any third party hostile to either Romans or the Latins, obligation of mutual assistance, equal share in the spoils of war, and mutual recognition of private rights of contract, it stipulates that any amendments to the terms of the treaty require unanimous agreement of all the parties: “it not be permitted to add anything to, or take anything away from these treaties except by the consent both of the Romans and of all the Latins.”¹⁰⁸ Effectively, the *Foedus Cassianum* put Rome on equal footing with other Latin cities.

Thus, the *foedus* was a formalized way of establishing a lasting relationship between Rome and other groupings based on mutual recognition of rights and obligations as parties to the *foedus*, and backed by a ritualized oath; the specific provisions specified the conditions of the *foedus*. From means of establishing initially equal relationship based on mutual recognition, *foedus* over time, and with the growth of Rome's power vis-a-vis other groupings, turned into a tool of expansion, albeit alternative to outright conquest. *Foederati*, the non-Roman parties to these treaties, were obliged to furnish military contingents subject to the Roman army. Nonetheless, *foedus* resulted in the preservation of the integrity of the *civitas foederata* despite the fact that, especially in the later period of expansion, it usually had to recognize and preserve the *majestas*, effective superiority, of the Roman people. Thus, what distinguished *civitates foederatae* from other groupings that were not conquered by Rome is that their freedom was explicitly recognized by the practice of the treaty making and the power of the pledge behind the treaty.¹⁰⁹

The concept of *foedus* was picked up by Heinrich Bullinger in his federal theology which placed the covenant between God and the man in the center of his reading of the Scripture. In his examination of the covenant between the Jewish god and Abraham and his descendants, Bullinger uses the term *foedus* and explicitly refers to its Ancient Roman public legal meaning.¹¹⁰ In Bullinger's analysis, through the *foedus* Abraham does not simply acknowledge the existence of God. Rather, through it, the God becomes the Jewish god and Abraham and his descendants become the God's chosen people: God promises them blessings and benefits while Abraham and his descendants are obliged to keep faith and follow God's commandments. In other words, the *foedus* creates a specific relationship between the covenanting parties based on consent, established through formalized promises and pledges, and implying mutual obligations:¹¹¹ “Those who are connected by covenants are joined together by certain regulations, so that each of the parties might know its duty”.¹¹² In this relationship, while God is the primary party¹¹³ – he initiates the covenant – the parties recognize their integrities and to the extent that enter the covenant voluntarily, they become morally obliged to one another partners.¹¹⁴

When re-secularized by Monarchomachi, Junius Brutus in particular, it was used interchangeably with its synonyms *pactum* and *confoederatio* to signify the act of creating public law constitutional relationship between the monarch and the people based on mutual obligations in the name of the prosperity of the kingdom. Althusius adopted the secular term *pactum* and applied it to the horizontal bonds between groups regulating interactions and obligations among

was established for a specific duration. (Digest 49.15.19.1, Digest of Justinian, vol. 4, p. 404)

108Dionysius of Halicarnassus, *Roman Antiquities*, vol. IV, p. 139.

109<http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0063:entry=socii-cn>

110Heinrich Bullinger, “A Brief Exposition of the One and Eternal Testament or Covenant of God,” p. 103, in

Charles S. MacCoy and J. Wayne Baker, *Fountainhead of Federalism: Heinrich Bullinger and the Covenantal Tradition*

111Cf. Daniel Elazar, “The Political Theory of Covenant” p. 6.

112Bullinger 108.

113Bullinger, 108.

114Daniel Elazar, “The Political Theory of Covenant” p. 15.

them.¹¹⁵ Additionally, he spoke of *fedus*¹¹⁶ when referring to the bond uniting, for example, Helvetic cities. Last but not least, he referred to the constitutive members of the city or constitutive members of the confederation as *socii confederati*.¹¹⁷ In Althusius *fedus* receives the meaning of a mutual horizontal relationship among equals that has public law consequences and creates a new political entity.

Compact, *foedus*, is the basic nucleus of a federation.¹¹⁸ Analytically, this concept has three interrelated aspects. The first one is a generative one: through the compact, parties create a new entity based on the bond they establish among themselves.¹¹⁹ This new entity cannot be reduced to the sum of its parts but at the same time, its members retain their integrity. This bond of a political and constitutional character creates a new political order and its institutional framework. Importantly, and this is the second aspect, this new political order is generated immanently from among the federating parties, with their consent, and active participation. *Foedus* has a voluntary characters as parties enter it to further specific agreed upon goals – common security in particular – jointly and in concert without sacrificing their autonomy.¹²⁰ The third one is egalitarian aspect. To the extent that parties to the compact enter it voluntarily, they are considered fundamentally equal in the act of creating new political framework.¹²¹

The normative connection between constituent power and bottom-up federalism follows from the analytical structure of the concept and practice of compact. It implies that heterarchical relationship among the federating parties is preserved within the new federative constitutional order as one of its operating principles.¹²² It is particularly visible in the procedures regarding constitutional amendment which approach consensus-based procedure. This heterarchy is institutionally embedded in devices like equal representation of members of the federation irrespectively of their size and constitutional guarantees of their integrity within a broader whole. Jefferson's "sister states" and Althusius' "symbiotes" refer to this bond. The aim is to preserve autonomy while furthering common objectives implies consent as a criterion of legitimacy.¹²³ Preservation of integrity functions also as a limit to the perpetuity of the union: the union serves its purpose only as long as and to the extent that it guarantees autonomy and integrity of its members. Secession follows as a remedial revolutionary right and legitimate means of resisting tyranny.¹²⁴ Ultimately, the continual existence of the federation depends on its constituent parts as they collectively are its constituent power.¹²⁵ In this sense, federation is based on a dynamic relationship (Althusius writes about communication of things, services, and right; Elazar speaks of sharing; Proudhon about exchange in accordance with principles of commutative justice) and thus is rather marked by internal tensions.¹²⁶

Thus, the practice of bottom-up federalism is unfolding of constituent politics. The federation is a political form within which the analytical elements of constituent power, i.e. egalitarian relations among participants, immanent and coeval constitution of the new political

115Pactum is used in Althusius' general definition of politics, see: *Politica* in Latin 15

116*Politica* in Latin, 41

117See: *Political* in Latin, 41 and 131, respectively.

118E.g. Elazar, Rufus Davis, Proudhon,

119Jean, Schmitt, Elazar,

120Schmitt, Jean, Pi y Margall, Riker

121Jean, Elazar

122Carl J. Friedrich, *Trends of Federalism in Theory and Practice*, 1st Edition edition (New York: Frederick A. Praeger, Publishers, 1968), 6.

123Jean

124Junius Brutus, Althusius,

125Jean

126Proudhon, Schmitt, Goldstein

order and the subject of the collective constituent action, and ultimate dependence of the constituted on the constituent,¹²⁷ can be institutionally expressed. In other words, the concept of constituent power logically implies bottom-up federalism as its practical enactment.

4. Spatiality of bottom-up federalism and bordering

Bottom-up federalism is a spatial relationship manifested in the principles and practices of bordering particular for the federation. The influence of the federal principle on the principles and practices of bordering cannot be denied. It undermines the clear inside/outside distinction constitutive of the statocentric spatiopolitical imaginary, and domestic public legal order vs international public legal order characteristic of the statocentric approach to federalism. Federal authors were aware of it and, whether they used the word “bordering” or not, they at least touched on this issue. The spatial implications of the principle of bottom-up federalism distinguish the federation from the modern State, whether unitary or federal, and upset the statocentric spatio-political imaginary. Joint exercise of competences typical for sovereign States, like foreign policy, and pacification of relations among the constituent units, together with retaining of certain equally essential competences exclusively at the level of the constituent units, effectively means the the projection of the characteristics typical of an internal order without (when looked from the perspective of constituent units) and the internalization of relations characteristic of international realm (when looked at from the perspective of the federation as a whole) Thus, the federal principle opposes the statist principles fixity of borders and rigidity of mutually exclusive inside/outside distinction with its principal flexibility and negotiability of borders and bridging of the inside/outside distinction, that is, internalization of the external relations and externalization of the internal relations.

There are three main ways this spatial impact of bottom-up federalism has manifested itself in federal theories. First, as it has been mentioned, writers like Junius Brutus and partially Althusius construed constitution of the supreme magistrate and – to use Althusius' expression – universal realm in terms of coming together of communities already organized in provinces in order to justify resistance in general and secession in particular. The act of secession effectively amounts to de-bordering (and at the same time re-bordering), nullification of a previously existing union and previously existing markers of inside and outside, internal and external, for the sake of new separation and new markers, both spatial and political. In other words, secession redraws the inside/outside distinction by relocating it geographically and changing political and constitutional status of both the federation and the seceding party vis-a-vis each other.

Second, ideally-typically, federation has also a peculiar principle of spatial growth. Unlike the State, it does not annex the territory by subsuming it under a monistic and homogenous juridico-political order fully incorporating what was outside inside. Unlike the empire, it does not expand by capturing new areas into a differential relation of dependence and effective control of political sovereignty, turning external into internal but maintaining relation of inequality. Rather, the federation grows through the iteration of *foedus*, recognizing equality of its new members.¹²⁸ It establishes a relationship of unity for certain purposes while maintaining relation of externality for others. It extends the constitutional framework on the egalitarian basis and with maintaining the autonomy of the new member-unit. In other words, it re-borders by admitting a new unit inside on equal terms (unlike the empire) not erasing its autonomy and integrity.

The third point follows from the second one and it pertains to internal territorial

¹²⁷Andreas

¹²⁸Montesquieu, Jefferson, Jean

heterogeneity of a federation. The federation is a compound polity. Rousseau in his *Government of Poland* reiterated this point but explicitly linked it to the question of borders: his suggestion of turning Polish-Lithuanian Commonwealth into a commonwealth composed of three provinces and thirty-three palatinates was a “substitute” for “contracting ... frontiers”.¹²⁹ and thus possibly combining the internal advantage of small size (protection of liberty) and external advantage of large size (strength and capacity for self-defense)¹³⁰ or even providing institutional environment for lasting peace among its members.¹³¹ These designs are possible because they internalize external relations among political units (like maintaining separate autonomous spatially defined jurisdictions within a federation) and externalize elements of internal order (like juridical institutions adjudicating conflicts among the constituent members).¹³² Thus, federation is based on spatial concentration of differences which are asserted and expressed politically within the federation.¹³³ As William S. Livingston phrased it, “Federal government is a device by which the federal qualities of the society are articulated and protected.”¹³⁴ Similarly, in his *Revolutionary Catechism* of 1866, when describing a federation as a form of anti-statist organization, Mikhail Bakinin observes that the actual geographical organization in case of each community forming a federation “will naturally depend on the traditions, the specific circumstances, and the particular nature of each country.” In other words, it depends on sociological variables. This sociological element gives a degree of historicity to politically expressed groupings in a federation, a feature giving the dynamic quality of federative bordering both across space and time. The federation gives an expression of a particular pluralism that renders its *demos* multiple *demoi*. This results in the internal pluralism and heterogeneity of a federation as it “bridges inside/outside distinction.”¹³⁵

5. Federalism, bordering, democracy

In lieu of conclusions I would like to go back to the boundary problem I started with. The weakness of the responses to the boundary problem I diagnosed rests on the fact that boundaries are presumed to be fixed. This, however, does not mean that arguments advanced by Abizadeh and Song are invalid. From a normative point of view, they present an important challenge. Abizadeh's position points to arbitrariness of prepolitical criteria for bounding the *demos*. At the same time, as Song argues, democracy requires lasting bonds among members of the *demos*. The boundaries of the *demos* cannot be arbitrary in order to be democratically legitimate, but they also cannot be ephemeral for otherwise there is no *demos* to speak of.

Secession, extension through iteration of *foedus*, and internal plurality upset the fixity and clear inside/outside distinction. Bordering of a federation is thus more flexible and bridges inside/outside dualism. Thus, it addresses the challenges raised by Song and Abizadeh: in a federal spatio-political imaginary, *demos* does not have any determinate boundaries yet at the same it is bound. Let me explain how.

When it comes to the challenge posed by Song, bordering of the federation does not assume unbound *demos* and therefore federal spatio-political imaginary does not run into the

¹²⁹Rousseau, “Considerations on the Government of Poland,” 263.

¹³⁰Pufendorf, Montesquieu, Riker

¹³¹Rousseau, Kant

¹³²Riley, “The Origins of Federal Theory in International Relations Ideas,” 89 Incomplete quotation mark in the original text). This internalization of international relations gives particular instability to federal polities (the issue here in particular is secession).

¹³³Dikshit

¹³⁴William S. Livingston, A Note on the Nature of Federalism, 84

¹³⁵Jean, see also Schmitt, Forsyth, Beaud

same problem of instability of the demos and lack of solidary bond among the members of it. Indeed, the federation and its compound demos are bound as bound are constituent units of the federation. The existence of the federation is an expression of a desire to be bound by a solidary bond. The affective bonds among members of the federal demos and federated demoi are established over time and confirmed though and by constitutional compacts – the boundaries of the demos/demoi are not ephemeral and the demos/demoi is/are not episodic.

At the same time, however, bordering of the federation is not arbitrary. It is contingent. The federal demos can expand through iteration of the foedus or contract through secession. The compound quality of the federation permits different demoi for different decisions. Moreover, the it permits contestation over the appropriate scale for a decision – conflicts over competences between federal government and governments of constituent units are expression of such contestation. Thus, it makes boundaries of the demos contingent on the outcome of this contestation. It is important to distinguish here between arbitrariness and contingency. Arbitrariness presumes lack of any legitimization; contingency, by contrast, presumes that legitimization is temporary and can be challenged in a political struggle.

Temporality and, in fact, historicity of the federation is crucial here. Within the federal spatio-political imaginary, popular sovereignty does not manifest itself in the moments of instantaneous decisions, but unfolds over time as it unfold in space. It receives processual character even if it is punctuated by ruptures and discontinuities.¹³⁶ Even if popular sovereignty is asserted in particular events these events are connected through time through different relations. It is true that bottom-up federalism relies of sociological variables, that is, it relies on already existing groups (notably, Thomas Jefferson is an exception among theorists of this strand in the sense that he does not consider a family, and not an individual, the basic community). One can interpret it as concession to reality that humans do not just emerge “from earth like mushrooms and [grow] up without any obligations to each other.”¹³⁷ It is true that they are arbitrary and if they were fixed this would have been fatal for the argument I am making. Yet, temporal extension of popular sovereignty understood as constituent power in the federal spatio-political imaginary, allows for contestation of the boundaries set by these sociological variables and this turn their arbitrary character into contingent one.

This leads me to the point at which I would like to sketch a democratic argument in favor of federalism. What all arguments for federalism have in common that they consider federalism means of preservation in a hostile geopolitical environment.¹³⁸ However, additional justifications, that have implications for the institutional set-up, differ. Democratic justification for federalism differs from a republican and a liberal one. According to the republican argument, the main role of federalism is to prevent tyranny. Territorial division of powers among several levels of government plays a similar role to that of functional separation of powers.¹³⁹ Federative polities are characterized by the multiplicity of loci of power; these loci of power not only are pinned against each other preventing tyranny by practice¹⁴⁰ but also are too numerous to be acquired by one actor preventing tyranny by usurpation.¹⁴¹ A liberal justification comes from the republican

136For the idea of processual popular sovereignty see: Paulina Ochoa Espejo, *The Time of Popular Sovereignty: Process and the Democratic State*. In contrast to her, however, I do not place such emphasis on continuity.

137Hobbes, *On the Citizen*, 102

138Even if it is not made explicit, it is assumed. Sources supporting this statement are so numerous that listeng them is pointless.

139Jean

140Publius

141This is what Montesquieu hints at when he speaks of federal republic having a capacity to impede tyrannical ambitions by a ruler of one of its constituent units by the rest of these units. Montesquieu

one, but focuses on the rights of individuals and minorities. By compounding the demos and multiplying seats of power, and by pinning different special interests against each other, it prevents creation of entrenched and permanent majorities that can capture loci of public power in order to infringe on the rights of minorities.¹⁴² Effectively, it turns federalism into a tool for protecting individual rights against tyranny of majority. It is important to know, that these justifications for federalism rely on peculiar political spatiality and political geography of federative polities.

Democratic justification is a different one, and the one I will advance here is intimately connected to federative bordering. In a democratic polity, the people is considered the author of its laws and, more importantly, its constitutional structure. Federation, by combining a limited government on a larger scale with governments with residual powers on smaller scale, diminishes the possibilities of tyranny by a distant center.¹⁴³ Additionally, due to its multiscalar character, federation increases participatory opportunities by combining direct decision-making, representation, and deliberative mechanisms.¹⁴⁴ What the argument regarding federal bordering adds to it is that bottom-up federalism creates flexible and responsive boundaries of the demos and demoi, thus introduces contestation over boundaries and allows for its legitimation. “Federalism multiplies the loci of decision-making and so increases the avenues through which citizens can attempt to realize their preferences, try out new ideas, protect their interests and their rights, and foster the common good or general welfare.”¹⁴⁵ Additionally, it opens a possibility to define boundaries of the demos democratically.

142Publius

143Jean, 97

144John Stuart Mills, Consideration on Representative Government

145Jean, 98