

---

## Faculty of Law

Research Paper No. 3/2015

---

### Representation theory re-presented

A review of: Beatrice Brunhöber, *Die Erfindung „demokratischer Repräsentation“ in den Federalist Papers* [= The Invention of “Democratic Representation” in the Federalist Papers], Mohr Siebeck: Tübingen 2010 (vol. 14 of the Series *Grundlagen der Rechtswissenschaft* = Fundamentals of Legal Science)

*Elena Barnert*<sup>\*</sup>

**Abstract:** Dieser Beitrag ist ein Besprechungsaufsatz zu Beatrice Brunhöbers 2010 erschienener Dissertation *Die Erfindung „demokratischer Repräsentation“ in den Federalist Papers* (Mohr Siebeck, Tübingen: Grundlagen der Rechtswissenschaft, Bd. 14), in der Brunhöber die innovative – und auch die Verfassungsentwicklung andernorts prägende – Kraft der Verbindung von Demokratie, politischer Repräsentation und Föderalismusidee durch die amerikanischen Verfassungsväter herausarbeitet. Auf der Basis von Brunhöbers Untersuchung geht es insbesondere darum, wie sich das von Hamilton, Madison und Jay entworfene ‚alte‘ Konzept zur Gestaltung eines starken Gemeinwesens (eingeschlossen das vertrauensbildende Prinzip der Gewaltenteilung) für einen integrativen Umgang mit den ‚modernen‘ Gegebenheiten pluralistischer Gesellschaften nutzbar machen lässt, im Blick die Gesamtheit (und Vielfalt) des Staatsvolkes als Geltungsfundament legitimer Herrschaft. Im Hintergrund steht die Frage nach Möglichkeiten zur Nutzbarmachung historischer Vergewisserungen für heutige Debatten überhaupt.

---

<sup>\*</sup> Dr. iur., LL.M. (Berkeley), Habilitandin (post-doctoral researcher) at the Goethe-University Frankfurt am Main, Faculty of Law; [barnert@jur.uni-frankfurt.de](mailto:barnert@jur.uni-frankfurt.de). – I wrote this text during my LL.M.-year at Berkeley 2013/14, and I would like to thank Richard Buxbaum and Malcolm Feeley (whose seminar “Courts & Social Policy” gave rise to writing it) for many helpful comments and suggestions.

*In the Federal City you been blown and shown pity  
In secret, for pieces of change  
The empress attracts you but oppression distracts you  
And it makes you feel violent and strange*

*Memory, ecstasy, tyranny, hypocrisy  
Betrayed by a kiss on a cool night of bliss  
In the valley of the missing link  
And you have no time to think*

Bob Dylan: No Time To Think (1978)

## **I. Introduction**

- 1 A view from outside the home context can sharpen the internal perspective – all the more if it permits reexamination of well-established values and achievements often too easily taken for granted. Especially the old tried-and-true needs periodic rethinking. Recently, a powerful external stimulus encouraging the American legal and political community to revisit one of its deep-rooted and long-lived tenets has become available in the form of a German dissertation: Beatrice Brunhöber's book *Die Erfindung „demokratischer Repräsentation“ in den Federalist Papers* (The Invention of “Democratic Representation” in the Federalist Papers). Since this book treats one of the most prominent cornerstones of American constitutional thinking, the Federalist Papers, and in particular one of this cornerstone's most significant systemic engravings; namely, the Janus-faced principle of democratic representation, its short introduction here by a German legal traveler to the United States may be of some interest to that community. Indeed, as Brunhöber's study provides an elaborate foil for some general reflections on the addressed subject of democratic representation, its value is not limited to particular legal or civic communities, but can be extrapolated beyond national borders and other, sometimes even more tangible boundaries between societies, cultures and mindsets.

- 2     So far as the subtext of “federalism” is concerned, Germany differs from the United States. In the latter, federalism is not only a basic principle of the political structure, but also a keyword in public debates, indicating political differences of opinion about the question whether a strong federal central authority – associated with truncated competences and limited scope for autonomy on the part of the individual states – can be considered as favorable in terms of well-understood *Realpolitik*, or is treated unfavorably as a precarious basis for enforced conformity. In Germany, on the contrary, the term federalism is commonly used and understood in a much more neutral way and not immediately linked to left-right connotations: Positivized in the German Constitution,<sup>1</sup> federalism announces that public power shall neither entirely nor exclusively be concentrated at the nationwide federal level. Nonetheless, it is a commonplace that Germany’s sixteen states (*Bundesländer*) possess, in relation to the federal power, far less sovereign autonomy than the fifty American states vis-à-vis Washington. In addition, federalism in Germany includes an incisive cooperative component, especially also at the interstate level.
- 3     In both polities, however, federalism is intertwined with the related organizational principle of democratic representation. And in both countries the issue of who is granted the right and realistic opportunity to be politically represented has gone through many changes. Some of these changes proceeded in parallel moves, others were country-specific. At least throughout the modern era, Germany has never, for instance, encompassed ethnic and racial minorities comparable in size, impact and diversity to those living in the United States. Yet, things are in flux. Over the past decades, and ever more rapidly, Germany has become a country of immigrant destination from all over the globe – a social reality the nation, in terms of self-definition, still now and then stumbles over. Although beliefs in the sole authority of ‘Christian-occidental values’ are steadily evaporating, Germany still is experiencing in respect of cultural pluralism a kind of collective reciprocal learning phase. I dare

---

<sup>1</sup> Art. 20 para. 1 of the Basic Law for the Federal Republic of Germany: “The Federal Republic of Germany is a democratic and social federal state.” This norm is one of the ‘eternal’ constitutional provisions which are legally unamendable (Art. 79 para. 3: “Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible”).

say it is a phase with good prospects. By now, a realistic as well as programmatic statement like “The Islam belongs to Germany” – thus former German Federal President Christian Wulff in his speech on the occasion of the 20<sup>th</sup> anniversary of German unification – on the whole garners as much acclaim as rejection.

4 Brunhöber’s thesis was published in 2010, the same year in which this speech was delivered. In a matter-of-fact-way, though not without passion, she comprehends federalism, in the German style, as a distributive form of public organization of power essentially outside of the entanglements of biased party-political argumentation. Her study deals with momentous intersections between federalism, representation mechanisms and social pluralism, and does so against the background of political philosophy and intellectual and legal history. Brunhöber does not want to participate in the conventional current methodological debates about legal interpretation approaches and ambitions. Nonetheless, I would like to begin the presentation of her book here with a few suggestive considerations on semantics and methods.

5 History and philosophy, admittedly, cannot airily be lumped together with methodology. Yet, the inspiration for providing some preliminary, sketchy cross-connections in this review emerge from another observation any visitor to the American legal world almost inevitably makes, comparable to the unavoidable perception of the multilayer ‘sound’ of the word “federalism” in American debates. In the United States, certain methodological standpoints are clearly classifiable as political statements, and the apt way forward through the plurality of methods is – as though there were only one way that would incessantly, quasi eternally lead to just and deliberate decisions – as contested as the ‘right’ political handling of pluralistic concepts of life and morality. Of course, deductions from historical reappraisals like those carried out by Brunhöber cannot provide any direct assistance to present-day legal assessments. *Mutatis mutandis*, though, determining methodological coordinates in a way that helps guide to justice in the individual cases can profit from insights gained through historical details such as Brunhöber’s context-sensitive reconstruction that does not see the historian’s work as a timeless end in itself. In this sense, following interdisciplinary, historically and culturally contextualized approaches may well

benefit any strictly legal evaluation. How this might be achieved in the case of Brunhöber's approach is described in some detail later in this review.

## **II. "... for pieces of change": The permanent need for interpretation**

- 6 As Bob Dylan represents some of the best of American music, the maxim of sovereignty of the people represents the lead ideas of individual liberty and self-determination; the Members of Congress represent the American citizens; courts represent justice. Which of these statements is deceptive? None? All four of them?
- 7 The more concentrated the catchphrases, the less plausible the 'answers' they suggest. Any non-enigmatic, resilient, plausible answer has to be up to the spinning out of the meanings, undertones and implications of the keywords in question; in short, depends on interpretation. Principles, too, require interpretation, as much as any other terms and definitions. In and of themselves they are only spots of ink on mind or paper, reflecting conceptual daydreams that suggest the capacity to regularize if not also to regulate intricate social reality. In fact, of course, interpretation can go in many directions. Some jurisprudential wayfarers leave well-trodden paths in order to search for possible new approaches to a more felicitous construction of 'law and order'. Others keep an eye out even for the faintest footprints of their forerunners, demanding respect for time-tested authoritative pronouncements. Both courses of deliberative action are hazardous, and not only because each by implication is open to strategic political exploitation: The former approach falls prey to the many contingencies a disengaged, open-ended search entails, the latter is compromised by the lack of courage to discard answers no longer suitable to present realities. However, even historically oriented (path-dependent) findings, under whatever premises they take place, never are mere imitations – every follower reinvents the track anew.

## **III. "Memory" and the "Federal City": A re-told story and the American way**

- 8 Beatrice Brunhöber, currently a post-doctoral research associate and lecturer at Humboldt University Berlin, comes across as the first type, a creative tracker. Her three-hundred-page dissertation on the theory of democratic representation put forward in the Federalist Papers – based in part on her work in Washington,

D.C., where she consulted numerous original historical sources – not only bears witness to the inventive genius of America's founders but also demonstrates a notable amount of exploratory spirit itself. Selected in 2010 as one of the seven German "Legal Books of the Year" by a national academic jury, her study represents the genesis of the notion of democratic representation in 18<sup>th</sup> century America. To 'Old Europe's' astonishment America had decided to strike a new path through the thicket of societal governance possibilities. Yet, according to a prevalent credo this path would not have been viable without some theoretical groundwork (pre-)fabricated by the Americans' European 'ancestors'. In terms of democratic representation, Brunhöber systematically decodes and revises this explanatory narrative, exposing a crucial component of the ideological foundation and the organizational matrix of the native American federalism, thus granting it a discrete significance in the comparative history of political ideas.

9 After introductory reflections on motivation, notional premises and procedure of her work, Brunhöber addresses in her first of five chapters the role of the federalist concept of representation in later American and German constitutional theory. For America, she arrives at the conclusion that the development of several very different paradigms of interpretation of the Federalist – economic liberalism in support of upper-class property interests, classical republicanism with its return to Aristotle's outline of an aristocratic constitution, and reformist social-contractual thinking in reconnection to John Locke – did not lead to a comprehensive conceptual analysis and discussion of the Federalist's idea of representation in light of state theory. In the German constitutional landscape, however, the body of thought constituted in the Federalist Papers has (so far) lived in the shadows of a variegated European theoretical heritage. (It may be remarked in passing that a complete German translation of Hamilton's, Madison's and Jay's commentaries was published only 20 years ago.)

10 After concisely presenting the Federalist Papers as the "political gospel" of the United States, Brunhöber prepares the ground for her core topic – the federalist theory of democratic representation – by sketching its philosophical as well as its political-practical context. In contrast to numerous voices in the relevant literature, she locates the birthplace of the notion of democratic representation neither in England nor in France. At the time of the molding of the U.S. Constitution, England still lived in a feudal framework – which, based on the

postulate of an identity of interests, included the notion of a “virtual” rather than an actual representation of the governed by the parliamentarians and thus did not provide the legitimacy of the governance institutions through general elections – and had not yet replaced it with more direct, democratic representation patterns. Contemporary French theorists of democracy (Rousseau in particular), still facing royal claims to absolute truth and authority, took a radical point of view by refusing to regard democracy and representation as combinable parameters. This dichotomous viewpoint, adopted from Aristotle’s political philosophy, has proved to be a tenacious element in theories of the state ever since.

- 11 In America, though, British-inspired pragmatism prevailed and led to a new model of multidimensional ‘agency thinking’ that rests neither on the fulfillment of any identity criteria nor on the position that a powerful government cannot tolerate a close connection to the people’s volatile will. The fourth (and, by far, longest) chapter of Brunhöber’s study deals with the “representation process” and the “purpose of representation” in the Federalist Papers. As she points out, according to their authors democracy and representation are to be seen as interrelated factors; and with the pioneer postulate that representation must be democratic, the Federalist took, in Brunhöber’s words, democracy out of heaven and brought it down to earth.<sup>2</sup>
- 12 In consequence of this forward-looking postulate, democracy and representation were conjointly institutionalized in the Constitution. This conjoined institutionalization allows for citizens’ participation as equals on the political decision-making stage while also enabling the people’s ‘substitutes’ to make consistent and generally binding decisions on the erratic basis of the diversity and variability of individual emotions, preferences and opinions, without flattening them out in some hypothetical common position. From a factual point of view, the theoretical heads of America’s nation-building endeavors faced the challenge of piecing together a unity capable of coordinated acting within and across a wide and spacious, continuously growing

---

<sup>2</sup> Brunhöber, p. 255: „Alexander Hamilton, James Madison und John Jay ... stellen in den Federalist Papers ... eine zukunftsweisende Forderung auf: Repräsentation muss demokratisch sein. Sie legen damit den theoretischen Grundstein für die praktische Konstitution moderner Staaten als ‚repräsentative Demokratien‘. Erst mit dieser Forderung holt der Federalist die Demokratie vom Himmel auf die Erde.“

regional, cultural, spiritual and economic patchwork (a historical circumstance that, among other reasons, made Hegel, in his *Philosophy of History*, refer to America as not yet constituting a “real state” beyond ‘open-ended’ social particularism, i. e. with compact, more than inchoate institutional structures<sup>3</sup>). Seeing this challenge, the inventors of the federalist theory of democratic representation designed a constitutional framework in which individual interests are bundled, institutionally cabined and expressible politically only in an organized mode. This is done in favor of the *bonum commune*, not by considering the content of the common good as a fixed and foregone conclusion – which would degrade the common good to a purely instrumental value –, but rather as the adjustable result of a negotiation process between the different segments of society and society and its exponents: For the Federalist, the common good – regarded as “the permanent and aggregate interests of the community” – is, as Brunhöber accentuates, a plural.

- 13 Simultaneously, the authors of the Federalist Papers applied two other central ideas possessing an enormous emancipatory force. In contrast with the identitarian belief that the heads of the nation *embody* the ‘relevant’ parts of the people in a system that is metaphysically justified in its own right, their concept of power of representation implies that this very power can be *revoked* by the represented people – who as a whole constitute the primal governmental pillar. That basic assumption finds coherent expression in the periodic right to vote. However, I would at this point once again like to refer to the overall necessity of interpretation: The will of the electorate has to be construed. But a dark spot on a piece of paper – everything that the voter on election day reveals about his will and wishes – is extremely hard to construe. An array of spots might be more meaningful, may create a picture; but voters do not have to explain themselves and indeed are given no opportunity to do so. They cast their votes on the basis of a variety of grounds, among which party campaigning plays a role that is at least as important as that of party programs. The voters’ representatives, in turn, having a wide scope for agenda-setting, maneuver and decision on the

---

<sup>3</sup> To Hegel’s view of America, characterized by him as “the land of the future where, in the ages that lie before us, the burden of the World’s History shall reveal itself” and as “a land of desire for all those who are weary of the historical lumber-room of old Europe”, see *George A. Kelly*, Hegel’s America, in: *Philosophy & Public Affairs*, vol. 2, No. 1 (1972), pp. 3 ff., and *Stephen Skowronek*, *Building a New American State*, Cambridge 1982, esp. p. 6 f.



other side of election day, generally are not obliged to comment on how they deduce the assumed will of the people. Nor does the internal momentum and hypertrophy of the daily political business permit ready response to demands for interpretation and full disclosure of the forces and motivations behind the representatives' actions.

- 14 If one now wonders, how and along what theoretical control criteria, in the best of all possible worlds of social regulation through chosen representatives, the will of the people might be framed and translated, one could bring into play the second cardinal idea that the originators of the federalist theory of democratic representation, according to Brunhöber, wanted to have acknowledged as a guiding principle. Beside the root concept that the government's power and authority can be traced back to articulations of the people, they understood social pluralism with view to a functioning statehood not to be a disruptive impediment that must for better or worse somehow be administered. In Brunhöber's excellent paraphrase, they instead took pluralism to be a prerequisite and constitutive principle of successful political reasoning. Under this precondition, a heterogeneous structure of society can, on a larger scale, generate a unifying impact. In other words: A firm and lasting political structure under the rule of law is compatible with some chaos, clashes and disharmony at the grassroots; if not allowed for, it can neither guarantee protection and a reliable frame of reference nor personal freedom. And without the guarantee of personal freedom, a personal commitment to solidarity and 'playing by the rules', conditions that by and large ensure social cohesion, can hardly be expected. The hoped-for outcome that the recognition of diversity will, on the whole, generate a consolidating outcome is counterintuitive only if the various fragments of social reality – for example political sub-clusters, ethnic groups or ideological communities – are regarded as self-contained and merely driven by their own logic. The Federalist, however, credited them by way of institutional interlocking (and without foreshadowing any preconceived outcomes) with the will and the capacity to communicate in a sound, reasonable and consensus-oriented way and thus to synergistically benefit from each other, in analogy to the manner in which the Federalist made the people's representatives dependent on the people's (revisable) trust and credit.

#### IV. “Betrayed by a kiss”: Montesquieu et cetera

- 15 Brunhöber’s excursus on the role of the judiciary within the “representation process” illustrates how closely mutual trust and credit are connected with the synchronous idea of separation of powers. This idea, functionally assuring personal freedom from arbitrariness through a dispersal of ruling capacities among several decision-makers who keep an eye on each other, was persuasively formulated by Charles de Montesquieu and for the first time ever implemented in America – and that, as Brunhöber emphasizes, with a democratic twist. Montesquieu tied his theoretical diagram of a mixed government and an interactive mutual constraint to the corporatist hierarchy of the society he lived in. The Federalist moved on towards a simple yet powerful idea. The entity of the people, consisting of free and equal citizens, should decide on the composition of its different and discrete representative organs in the genuine political sphere, dissociated from traditional societal apparatuses of power allocation, and each of them, for the sake of arriving at well-balanced mutual final decisions, composed according to its own organizing rules.
- 16 Nowadays, the principle of separation of powers is, as a state organizational *sine qua non*, well-recognized though controversial in detail, especially with regard to the influence of the judiciary on the direction of policy-making movements. In view of this fact, it seems worth noting that Brunhöber leaves unmentioned that Montesquieu’s depiction of the judge merely acting as “the mouth of the law” (*la bouche de la loi*) cannot, as consistently occurs, be categorized as a plea for a purely deductive, mechanical application of a definitive and elsewhere predetermined law. Montesquieu himself – fully aware of the fact that every approach to justice, whether based on written law or not, requires individual hermeneutic efforts – formulated his famous metaphor only with regard to specific problems in the English jury-based court system. Later, before its consistent misinterpretation as a general vision of an automatic and apolitical decision-making, the phrase was strategically deployed for liberal political purposes: Used as a kind of rhetorical trick to wrench from the monarch an autonomous judiciary, it was meant to persuade the sovereign that he need not fear independent judges since they would solely express his will as laid

down by his law.<sup>4</sup> Thus, history cannot support finding a normative charge in Montesquieu's dictum. As for a 'self-neutralization' of the judiciary in the impartial exercise of its function and duties, Montesquieu can serve neither as its proponent nor be accused as a denier of reality.

## V. "In the valley of the missing link": Dealing with imperfection

- 17 The framers of the United States, however, did not rely on shrewd tactics to achieve an institutional arrangement that draws its legitimating power and integrative appeal from a concept of representation that provides both for liberty of action of the people's trustees and, under the constraint of the "checks and balances" rationale, for independent control. That, however, is merely the ideal conception. At the end of her clear and convincing study Brunhöber succinctly gets to the bottom of some weak points – in her words: "blind spots" – in the federalist theory of representation. She notes the original absence of codified basic rights, the only rudimentary recognition of the need to protect visible as well as hidden minorities and not to lose sight of the theory's actual social operating conditions, and finally the conflicts related to finding an auspicious 'golden mean' between the opposing poles of public welfare and individual interest. In particular, the postulate of actively approving societal pluralism can easily remain a mere sacred truism if not actively cross-checked with regard to its conditions for success and to social realities. Also, the inventors of the federalist theory of democratic representation did not perceive society to be as pluralistic as it already was and increasingly became. Over the years, many groups in society had to struggle hard for acceptance as "free and equal" and the influence that status brings with it, and this struggle largely took place outside the Federalist's political fabric. Abstracting from the historical data on which Brunhöber builds her analysis, it appears that all the theory's inherent problems converge in her closing appeal „*Mit dem Federalist gegen den*

---

<sup>4</sup> As to Montesquieu's line of attack and to the intentions of the 19<sup>th</sup> century advocates of the *bouche de la loi*-doctrine, see Regina Ogorek, De l'Esprit des légendes oder wie gewissermaßen aus dem Nichts eine Interpretationslehre wurde, Die erstaunliche Karriere des 'Subsumtionsmodells' oder wozu braucht der Jurist Geschichte?, and: Inconsistencies and Consistencies in 19th-Century Legal Theory, in: id., Aufklärung über Justiz, vol. 1, Frankfurt am Main 2008, pp. 67 ff., 87 ff. and 157 ff. The last-mentioned (English) article is also available under [www.germanlawjournal.com/index.php?pageID=11&artID=1305](http://www.germanlawjournal.com/index.php?pageID=11&artID=1305).

*Federalist (weiter)denken*“ (p. 252; roughly translated as “Using the Federalist to move beyond the Federalist”) – which is only apparently paradoxical.

- 18 The Federalist suggests the prospect of a strong, representatively organized egalitarian democracy across traditional barriers, be they manifest or latent. Whether despite or because of its idealistic gloss and at the risk of simplification for the sake of symmetry (with which Brunhöber cannot be charged), this prospect can serve both as a regulative idea and as a beneficial corrective within the political and social arena – firstly, when it comes to the task of transforming certain parts of society’s multivalent ‘common sense and prudence’ into policy-making efforts and concrete political decisions, and secondly by shaping the course of the public discussions about the direction and quality of the efforts and decisions taken. Basically speaking, “going with the Federalist beyond it” can be seen as a call for an inclusive understanding of political self-actualization and for strengthening the interconnection between civil society and its leading voices; and it can do so, inter alia, by raising the acceptance of society’s diversity as a good thing, far more useful than obstructive – even if, as usual, the value of every “good thing” depends on the goodness of those who maintain it.

## **VI. “The empress attracts you”: Final considerations**

- 19 Turning from the heart of the “Federal City” to a more general perspective, it seems that historical ascertainties are, at most, of limited and perishable value for present times and circumstances. Nonetheless, the concern with legal, political and intellectual history demonstrated by Brunhöber leads to an insight that is still productive today: Neither the law nor a system of government can be understood on its own terms but rather only as reactions to certain (mutable) social and mental conditions that these laws and systems reshape in turn. This insight rejects illusory claims to eternity and sharpens the eye for regulatory alternatives and potential modifications. Coming back to the earlier question how a focus on legal and political history could potentially also be made useful to the field of methodological debates, my tentative answer is that the engagement with historical trackings and traces fosters the important virtues of contextual flexibility. Such engagement shows that the law, as a reflection of a particular constitution of society, should in general be seen not as a static but

rather as a dynamic value, and it confirms that working on the law is a perpetual task which constantly demands novel efforts to make the law an adequate contribution to the resolution of topical societal problems. And if we equate these “novel efforts” with the equally constant re-making of old efforts, we can realize that any remake needs an innovative approach and some degree of modern pioneering spirit if it is to be more than a contextually ‘timeless’ and therefore sterile replication.

- 20 With the recognition that every interpretation generates new needs for further interpretation, some conclusions seem clear: The maxim of the sovereignty of the people represents the core ideas of individual liberty and self-determination. It rests, however, on the assumption that the right to individual liberty, including the perception of man as a social and political being, requires an act of imagination that can generate a tangible structural counterpart on the governmental level. To use the US context: The Members of Congress represent the American citizens insofar as these Members consider representation to be something substantial – something more than a complexity-reducing efficiency principle – and hold themselves responsible for the real-world acceptability of the *pars pro toto*-rule. The courts represent justice so long as the individual judge acts upon the recognition that justice is seldom unambiguously definable and the search for it an indispensable everyday creative challenge. And Bob Dylan, after all, still represents some of the best of American music.