

**The issue of majority in a federal system - the particular cases
of constituent power and of amendment of the federal compact**

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In this lecture, I would like to study the hypothesis which holds that the issue of majority is posed in a different way, at least partly so, depending on whether a Federation or a state is concerned. This assumption of a *relatively* singular nature of the federal case is completely in line with the more general thesis I have put forward in a recent book, in which I have tried to show the autonomy of the notion of Federation in relation to that of the state and the specificity of the public law of the Federation in comparison with the public law of the state¹.

However, it cannot be argued that the federal framework imposes a complete reversal in the way the issue of majority is tackled. Indeed, a framework homogeneous to the Federation and the state does exist, for there is a “right of the majority” or a “majority regime”² which is common to *all* political entities. Indeed, the political and legal problem that the majoritarian decision poses is, most of the time, presented in the same terms: how and why is the decision which has been taken by a majority valid as the decision of all? More to the point, why does the minority, who has voted against the decision of the majority, have to abide by it all the same? Clearly, such an issue takes two forms, depending on whether we consider the majority to be a “technique” of decision-making or a “principle”, one of legitimacy³.

As a *technique of decision-making*, the issue of majority is of paramount interest for jurists, for it is one of the central questions in the law of legal entities, in corporate law⁴. It concerns as much private law –law of partnership, of public limited companies– as public law, national as well as international law, and the great deal of thought given to the role of majority in international organizations is testimony to this⁵. As a principle, majority is more of interest to political philosophy, which studies its justification. Why does the minority have to obey a majority vote when modern democracy is based on the consent of those who are concerned by the decision⁶ ?

In the programme of this symposium on “*majorities*”, the issue of majority within a federal framework is tackled more from the angle of the technique of decision-making, for its specificity supposedly derives from the requirement of a “double majority”. Such an observation is not questionable, as we will see later on the question of the amendment of the constitution of the Federation (see *infra*, II). However interesting it may be though, the analysis of the majority as a technique of decision-making does not take into account the fact that, in a Federation, the acceptance of a majority decision is far from being obvious, contrary to what happens in a state. This is due to the particular political nature of the Federation. The political structure of a Federation is triangular. It includes the federation, the member states and the individuals, and the pivot of it all is the member state. Consequently, when the application of the majority rule in a Federation is referred to, the unity that is concerned by that rule is not so much the individual as the member state, which we will see later may be a “federating” state (it co-constitutes the Federation) or a “federate” state (it is a member state of an already existing Federation).

Above all, it follows from the conventional genesis and from the ends of the Federation that unanimity must govern its foundation as well as its workings⁷. Each individual state, which becomes a member state, first expresses its *sovereignty* by “founding” a Federation – that is, by “co-founding” it– and aims at keeping its sovereignty after the federal entity has been formed by remaining free to take its own decisions. That is the reason why in a federal system all the member states must give their consent to the fundamental decisions that are taken by the federal authorities of which they are a part. The Federation requires unanimity insofar as the states which unite together to embark on the federal adventure “still want to keep their own particular existence and are all the more attached to it as each one of them is conscious of its own personality”⁸. As a consequence, a federate state does not want to have imposed on it a decision that has been taken within the federal authority by the majority of the other states. The jurisprudence of the French Constitutional Council on the issue of integration into Europe shows, in its own way, the difficulty represented by the change from the unanimity to the majority rule. Such a shift within, for example, the Council of Ministers of the European Union –in some fundamental matters– has been considered to be an unconstitutional assault “on the essential conditions of exercise of national sovereignty”⁹.

That is the reason why it was recently claimed that the “political and constitutional essence of a federation-based state is the assent of all the member states”¹⁰. It ensues that the principle of unanimity is to the Federation what the principle of majority is to the unitary state, that is, its

“aggregating principle”¹¹. The specificity of the Federation comes sharply into focus here. It lies in the predominance of the unanimity principle. Or, to say it differently, the majority as a “*principle*” seems to be *illegitimate*, as a principle, in a federal body politic because of the very nature of that body. Such is the starting point of any analysis on the issue of majority within a federal framework, but it is only a starting point.

For, in reality, all the federal systems are not entirely based on majority, be they what we usually call Confederacies of states or federal states¹². More precisely, in the practical working of the Federation there is always some space left for the majority rule, beside that of unanimity. In this matter, the analogy with the workings of international organizations is striking¹³. In order to illustrate this thesis, I could have dealt with the question of the application of the majority rule within the “*system of the federal Diet*”, which is the constitutional model describing emerging or nascent Federations that are governed by a Diet, an assembly of representatives of the member states performing as a decision-making authority¹⁴. I could also have shown that, in modern federal states, which are largely state-controlled and only slightly federal, the bicameral type of legislature works on a majority basis. Such bicameralism is different from unitary bicameralism as one chamber represents the people and the other the states, according to the models of the American Senate or the German *Bundesrat*, which is not without having consequences on the general direction of the majority decisions. In some countries nowadays, in what may be called the community type of federalism (i.e. multiethnic federalism), there emerges the technique of the so-called “*overqualified*” majority. This is what the double majority required for the adoption of the “special laws” in institutional matters is called in Belgium. It implies that within a two-third majority –first majority requirement– there must be an absolute majority of the members of the two linguistic groups of the Chambers of Parliament –second majority requirement¹⁵.

My lecture, however, will not focus here on the way the federal *Diet* works, or on the legislature in contemporary federal states, or on community federalism (i.e. multiethnic federalism). It will mainly focus on the exceptional case, which is even a borderline case, of the constituent power and on the slightly less exceptional case of the amendment of the constitution, being understood that, following the views put forward by other authors, I make a distinction between the original constituent power and the constitution-amending power¹⁶.

What is meant by “*constituent power*”, is the sovereign prerogative of determining the form of a political entity by means of a constitution¹⁷, and not the power to amend the constitution. The

constituent power is the authority which, by establishing a constitution, expresses a “political will” which is enough in itself to validate the constitution¹⁸. That doctrine tries to explain the birth of a constitution by means of the “political will”, thereby reintroducing into the constitutional law a dimension of legitimacy that the primacy of legality forbids to take into account in the prevailing positivist doctrine¹⁹. Most of the time, the elaboration of a new constitution comes from a political process during which and at the end of which a people becomes conscious of its political existence and asserts itself by opposition. The constituent power expresses the intense historical moment(s) when a will to live together crystallizes. Such a founding moment has allowed some authors to make the judicious distinction between “constitutional politics” and “normal politics”²⁰, or “politicizing politics” and “politicized politics”²¹ and other authors to magnify that moment of “political foundation” of a “nation of citizens”²².

Within the federal framework, the theory of the constituent power is particular in the case of a Federation insofar as the constitution is not that of a nation-state and its form is not the same. Here the federal constitution is viewed as a constitutional compact, as a federal compact²³, that is, a convention between several states which decide to unite and set up a Federation together. The compact is also a “founding act”²⁴, but it founds a political entity which is a federal union, and not a state. Such a thesis is in the minority in legal writings, for most jurists think of the federal constitution as another type of constitution, one that is identical to the unitary one. It would then be a supreme *law*, and not a *compact*. Consequently, it is easy to declare in accordance with such a position, that the constitution, like any law, must be *modified* by the majority. Moreover, it may readily be asserted that the issue of the creation of the constitution being nothing but a “fact” escapes legal analysis. Thus, the positivist reduction of the federal constitution to the constitutional law greatly simplifies the problem.

On the contrary, the notion of federal compact implies, by definition, the consent of all the states since there cannot be any contract, any compact, without it being concluded by the party involved which consents to it by force of circumstances. The case of the association of majority and constituent power in a Federation thus becomes highly paradoxical too, for the question seems to be solved in advance, at least as far as the adoption of the federal constitution is concerned. Unanimity is required, for it would be impossible for a contract to bind a party which had not consented to it. For the same reason, it is considered that a federal compact cannot be modified by a majority, but only unanimously. This is in keeping with the logic of contracts. Thus, at a federal-provincial conference in 1945, Maurice Duplessis, who was then First Minister of Quebec, declared that “(…).

From the principle that the federal constitution is of a contractual nature there ensues a consequence that admits of no contradiction: the organic law of the Confederacy must only be modified by the unanimous consent of the Provinces (...). Any modification otherwise introduced constitutes an attack on the respect that is due to contracts²⁵. Contractual logic would thus impose that the initial convention which was at the source of the Federation can only be changed, *“above all on a vital question by the unanimous consent of all the contracting parties”²⁶*. We will see how that doctrine of the amendment withstands facts and what may be called the majority constraint.

Beside this extraordinary hypothesis of the constituent power founding a Federation, there exists another more peaceful hypothesis, which is that of the modification of the federal compact, that is, the amendment of the constitution. This lecture will focus in a different and complementary way on the issue of majority in a Federation by revealing how we are to understand that double majority. The cases of the formation of the federal compact (I) and of its amendment (II) must therefore be looked at.

I – The adoption of the federal compact or the difficult realization of the unanimity principle

II – The specifically federal meaning of the majority rule in the amendment of the federal compact, or compound majority as a reflection of the dual structure of the Federation

I – The adoption of the federal compact or the difficult realization of the unanimity principle

Because the federal compact “founds” a political entity, it is an act of the constituent power. For, most of the time, it leads to the elaboration of a “federal constitution”, which in most cases is written to solve the crucial issue of the relations between the federation and the member states. As a legal act, it is adopted at the end of a procedure, which I call “higher law making process”, during which several votes are cast. The mode of adoption of the federal compact then requires that decisions should be taken by a majority or unanimously.

In order to shed some light on such a complex problem, the starting point will be an observation made by Jean François Aubert, the great Swiss constitutional law expert. He perfectly pointed out what makes the specificity of the federal compact. It has “two natures, *a legal one and a*

contractual one". The constitution of a unitary state is "a species of the genre of law", therefore a "unilateral act"²⁷. What is more interesting for our purpose though is the remark he makes in passing on their different mode of adoption.

"The situation is not exactly the same when one considers the formal constitutions the adoption of which coincides with the creation, by means of the association of preexisting states, of a *federation*. What one cannot expect from a people –that all the inhabitants of a country agree with their Constitution– one may, in the case of states which are federating, make it a condition of the formation of the new federal state, that is, that all the members of the future entity have given their assent to be part of it, that all of them have accepted the new Constitution."²⁸.

In the author's mind, that quotation is used to prove the partly contractual character of the federal constitution. But for us, its interest lies in the fact that it points to the quantitative difference that exists between the two procedures of adoption of the constitution. In the federal case, the relatively low number of "federating" states that must "consent" to the constitutional compact is very little when compared to the millions of votes in a referendum on the constitution in a unitary state. It may therefore be possible to require that all states agree, so much so that the unanimity rule is of practical significance and that, technically speaking, it is possible to use it to have the founding act of a Federation of a modern democratic state adopted. However, in order to check whether that idea is realized in the higher law making process (B), a short typology of federal compacts must be drawn up to determine what the compacts which are of a "higher law making" nature (A) are.

A/ A Typology of federal compacts

When presented by the constitutional doctrine, the notion of federal compact seems to be of a united and unitary nature. As soon as one tries to understand it in a more empirical way though, it seems to belong to several categories. That is what I am going to try to show now.

The first important distinction to be made between different federal compacts depends on the question of whether they create a Federation *ex nihilo* or whether, on the contrary, they are concluded even though there already exists a Federation, which of course implies a continuity of the federal institution.

The compact which creates both the Federation and its form of government will here be called a “*founding compact*”. It creates a new political form –a federal one– as well as a new form of government which determines the constitutional organization of the federation. This act is thus quite polyvalent²⁹ since it establishes a *federal being*, that is, a new legal entity in the sphere of international relations, and also corresponds to “the creation of a new political organization inside” that federal being³⁰. In short, the singularity of the federal compact lies in the fact that “in a single act the birth of a political community coincides with the configuration of the principle of its government”³¹. Some historical examples of this in modern times are the Union of Utrecht (1579), which created the United Provinces, the Articles of the Confederacy of the United States, the British North America Act (1867) or the act which created the German Confederacy (1815).

Once the Federation has been founded however, it may happen that, as in the case of a state, the decision is taken to *modify* or to *change* its constitution. The founding compact may give way to at least two different kinds of compacts – one that will modify it, and the other that will re-found it.

In the first case, that of the *modifying compact*, the federal constitution may well be modified, but it only consists in a simple *amendment* of the federal compact. It is an amendment because the written compact itself indicates the procedure to follow for the modification of the constitutional statute of the federal being. That may be called the *amendment of the federal compact*. In that case, the continuity with the founding compact is present as much in the respect of the amending procedure as in the respect of the main principles governing the initial constitution. In short, the content of the compact in force is modified, without any revolutionary change being made. The federal constitution is therefore simply adapted to better correspond to the new political and legal circumstances. This was the case, for example, of the modification of the Swiss federal Constitution in 1874 (which modified the 1848 Constitution). This hypothesis of amendment will be studied later on (see *infra*, II).

In the second case, that of the “*re-founding*” compact, the constitution is changed. The modification of the compact results from the exercise of a constituent power insofar as those on whom such power is conferred take the decision to reconfigure the political entity they have created. Such a federal compact is here called a “re-founding” compact. It is different from the founding pact in that it is decided upon even though the Federation already exists, so that it does not create the Federation. It is not a founding but rather a “re-founding” act. The re-founding may be explained by the consequences of the change that has been made. Such a re-founding compact is

different from the modifying compact, for the change goes beyond the simple amendment of the compact (be it partial or complete). Such a compact aims at changing the type of relations between the federation and the member states as well as the form of the federal government. It “*re-founds*” the Federation since it gives another configuration to the constitutional structure of the federation.

In addition, that “re-founding” compact is original in that it is the result of an illegal procedure, even as it creates a new constitutional legality. On that point, it is also different from the revision of the federal compact, for the “re-founding” compact takes the place of the new one in an *illegal* manner, that is by not respecting the “legal” way of amendment, nor even taking into account the fact that there is no amendment possible. In all cases, the urgent matter of the political unity’s reconfiguration prevails over any other consideration, and in particular over the respect due to legal forms. As such illegality always points to the presence of a higher law making phenomenon, the move, which is revolutionary in its form, from one federal compact to another proves that a higher law making process is at work. At least two major federal countries – the United States and Switzerland– have gone through such a revolutionary change, in 1787 and 1848 respectively.³²

For this lecture, it is sufficient to remember that the founding federal compact and the re-founding compact are of the same nature, as they are the expression of a constituent power. Now it is time to look at what an analysis of the higher law making process teaches us about them.

B/ Higher law making process and modes of adoption of the federal compact

The constitutional doctrine rarely analyses the higher law making process at the level of the Federation³³. The preambles to the constitutions indicate that all the states wanted to unite by means of a mutual agreement in order to found a Federation³⁴. Everything then seems to point to unanimity, which would be the corollary of the contractual conception of the constitution. We should examine whether those compacts have actually been agreed upon by all the states or whether some “proportion” of majority was introduced at some point in the process. As little data is available on the adoption of federal constitutions³⁵, our description of the ordinary higher law making process (1) and our more empirical study of the retained modes of adoption, whether unanimity or majority ones (2), will be of an exploratory kind.

1 / Higher law making process in normal situation

- There exists a great variety of modes of adoption of a federal constitution. I do not intend to give an exhaustive account of them. I will only focus on the two most common processes. They are different from one another in that the adoption of the compact by the federal authorities is or is not followed by a ratification by member states.

1/ In the first case, that is, when the higher law making process involves a single phase, which is that of a simple adoption (without ratification), the federal Diet, be it ordinary or extraordinary, plays the role of constituent assembly. A federal authority definitively adopts the federal compact, without a subsequent approval by the states being necessary. For example, the creation of the first modern federation, the United Provinces of the Netherlands by the Union compact of Utrecht (1579) corresponds to that hypothesis. The same may be said of the adoption of the Swiss federal compact by the federal Diet (*Tagsatzung*) which convened in 1815 in Zurich. That federal Diet was a permanent organ, but from being a legislative assembly it was transformed into an extraordinary constituent Diet. Finally, there is the example of the constituent assembly of Weimar (1919) which adopted a federal constitution in the name of the German people and the German Länder without either of them ratifying it.

In that kind of process, the federal Diet fulfils a higher law making function, and is the only one to conclude the federal compact, for it acts in the name and on behalf of the *federate states*. It is an assembly which is supposed to represent those states. In that way, it is greatly similar to the constituent assembly of a unitary state which adopts a constitution without having it ratified by the people. That negative criterion –the absence of ratification– distinguishes it from the two-phase process (adoption + ratification) which will be studied now.

2/ The two-phase higher law making process best corresponds to the federal structure of decision-making insofar as it associates the federate authorities with the federal ones. In that case, one must add the *phase of ratification*, by which the “federating” authorities are invited to give their approval to the federal compact once it has been ratified by a federal authority, to the *phase of adoption*. That process will remind jurists of the procedure which governs the elaboration of international treaties³⁶. In the context of a federation, such a process, which amounts to giving the last word to the states, is championed by the supporters of the “States’

Rights”³⁷, but it is also an objective fact that even the most impartial historians acknowledge³⁸. There are two variants to the last phase depending on the actors of the ratification of the draft federal constitution.

According to the first variant, which is “representative”, the competent authorities of the member states ratify the constitution. Here the case of the first federation of the United States is enlightening. The continental Congress, working as a sort of constituent Diet, elaborated and adopted the text of the “Articles of the Confederacy” on September 15th, 1777. The text was then submitted to the ratification by each one of the states, as indicated in the last clause of the “Articles” (Art. XIII par.2). Within that variant, another distinction is to be made depending on whether the ratification is enacted, in the federate states, by ordinary legislatures or by “constitutional conventions”, that is, extraordinary assemblies.

The second variant of the ratification results from the competition that the institutions of direct democracy progressively impose on the representative democracy. The law of the federate states may provide for *the people* taking part in the process of ratification. This was the case in Switzerland as early as 1848 when the Constitution was approved, in some of the cantons, by the people, in a *referendum*.

2/ The issues of majority and unanimity in the adoption process

Such a question is rarely at the centre of discussions. It was in some cases, however, and in Switzerland in particular, when the Constitution was changed in 1848. It has been said on that subject that “the issue that stood at the heart of the whole reform” was none other than that of knowing whether that reform could be initiated by the cantons “unanimously or by a majority” of them³⁹. The problem was often posed, and even constantly posed, but regularly masked because it was unsettling. One may even make the supposition that in many cases decisions that were taken *de facto* by a majority were presented as if they resulted from consensus or unanimity, as though it were important not to abandon the fiction of unanimity which was often resorted to before the principle of majority was accepted.

a/ In the case of the *constituent Diets*, be they sovereign or not, which adopt the federal compact, it is easy to see how the rule of unanimity of votes is inconceivable, if the votes to be counted correspond to individuals. In fact, one should distinguish whether the vote of the federal

Diet is based on “individuals” or on “states”⁴⁰. As I cannot be very precise here, I will refer to only two particular cases which show the emergence of a practice of majority.

The first case is that of the adoption of the federal compact in Switzerland in 1815. It is now a well-known fact that when the compact was first adopted by the “long Diet” on September 8th, 1814, the text was approved by the assembly, “despite some opposition from Schwytz, Uri and Nidwald in particular”⁴¹. In addition, everything seems to point to the fact that the majority rule was implicitly followed for the final adoption of the federal compact on August 7th, 1815. That is the reason why some Swiss jurists defended the idea that, because the federal compact had been adopted by “the majority of the cantons”, it could be “amended and transformed (*umgewandelt*) by a simple majority”⁴². Nowhere is that majority adoption to be found however.

The second example, again taken from Swiss history, is that of the replacement of the 1815 federal compact by the 1848 Constitution, which was a “re-founding compact”. Here things are clearer. The process which took place at the federal level was clearly majoritarian and was imposed by the progressive cantons which had defeated the minoritarian cantons in the *Sonderbund* war. On August 16th, 1847, the federal Diet initiated a process of amendment of the 1815 compact, and its decision was adopted by a majority of thirteen cantons. Almost one year later, on June 27th, 1848, the Diet adopted the federal constitution by a majority of thirteen out of twenty-two cantons⁴³. Some cantonal opposition was more or less expressed⁴⁴, but it is certain that the canton of Schwytz, a historical canton if ever there was one, “explicitly rejected it”⁴⁵.

In any case, here is a perfect example of a draft federal constitution being adopted by the constituent Diet *by the majority*, and not unanimously. Some jurists think that if that process had been interpreted as that of an amendment of the 1815 compact, the vote, which was obtained in the Diet by an absolute majority of the cantons, and not by a qualified one, would have meant the rejection of the new constitution for such an amendment would have required that it be voted by two thirds of the states at least. Other jurists however contend that the final adoption of the constitution was postponed to the ultimate phase of ratification⁴⁶.

b/ In the case of ratification by federate authorities, the unanimity rule seems to be a prime requirement as, in theory, it must be supposed that all the states have given their consent to the federal compact for it to be legally valid. The study of constitutional practice reveals situations that are more contrasted however.

First of all, there are cases in which the unanimity rule was strictly respected. This was the case for the Articles of the Confederacy, the ratification of which was delayed by the State of Maryland, which refused to ratify the “Articles” in December 1778, and cast a *veto* which it declared it would only lift provided the issue of the “land” situated west of the states was solved. It maintained that veto as long as the issue of the land of the west was not solved, which meant that the Articles “remained a dead letter”⁴⁷. It was only on February 2nd, 1781, that the assembly of that state ratified the text. Unanimity being then reached, the Articles of the Confederacy could come into force. On July 7th, 1781, the compact was deemed accepted unanimously by Congress, which checked the reality of the ratifications by the states.

2°/ There were cases however in which the requirement of unanimity for ratification by the federate authorities was less strictly fulfilled. If we look at the practice adopted, it was the qualified majority that was chosen. In other words, the constitutional history of the Federations teaches us that *there were attempts to avoid or bypass the unanimity rule*, so as to avoid the veto of some minority states. Here, once again, the examples of the United States and of Switzerland will be our models.

The American case of 1787-1789 - Following the adoption of the Constitution in Philadelphia, the continental Congress submitted the text, which it called a “Report”, to the different states. The resolution of the continental Congress dated September 28th, 1787, indicates that the representatives of the states who were present in that assembly unanimously decided to refer the Report to the federate states⁴⁸, even though the State of Rhode Island was not included. The Congress thereby implicitly approved the project of a constitution, but it was the text written at the Philadelphia Convention which determined the mode of ratification by the federate states. According to Article VII of the draft Constitution, the “ratification of the conventions of nine states [would] be enough for the implementation of the present Constitution *between the states* which [would] thus have ratified it”. The legal condition for the coming into force of the constitution was set out in the following terms: it is enough that nine states ratify it for it to come into force, but with the limit that it applies only between them. Thus, the (really) minority states cannot prevent the ratification by the other (really) majority states.

The practice followed in 1787-1788 showed the practical intelligence of the *Founding Fathers*. For indeed, when the ninth state, the State of New Hampshire, accepted the Constitution on June 21st, 1788, the continental Congress, which was the authority competent to decide on

the implementation of the Constitution, did not even wait for the results of the other states which had not voted yet. On July 2nd, 1788, the Congress commissioned a congressional committee to establish that the process of ratification had succeeded⁴⁹. Legally, the phase of ratification could be considered as being “perfect”, but it was not finished yet, as other states still had to reach a decision on the said ratification. Their decision however could not challenge the fundamental fact that the Constitution could already come into force “*between*” those nine states.

It has quite rightly been remarked that the disposition of Article VII amounted to inventing a “rule which allowed to count the ratifications that could bind the thirteen states together by means of a mode of counting which excluded unanimity”⁵⁰. The disposition was ambiguous enough not to decide between unanimity and majority, and, above all, it presented the advantage of leaving “the door open for a future integration of the other states”⁵¹, that is of the states which would not have ratified the Constitution and which could thus later tacitly join the new Confederacy –through participation in federal elections and authorities– or explicitly so –through the admission process–. But that “door left open” by the said clause was of no use, since that judicious disposition acted as an effective constraint on the states which were tempted to reject the Constitution but which were trapped by its early acceptance by the other states. It did not leave them any other choice but to be part of the Federation or stay outside of it and step out of the re-founded Union⁵².

This analysis shows that the ratification process that was chosen managed to sidestep the unanimity rule without formally imposing a rule of qualified majority which would have led to explicitly granting a right of veto. Nevertheless, the majority was subreptitiously introduced and the ratification by nine members of the Union (out of thirteen) was *de facto* enough for it to be re-founded. I will remark that the Constitution of the confederate States passed on March 11th, 1861 used the same technique as that used in 1787, but reduced even more drastically the requisite number, since only five secessionist states ratifying the Constitution were enough for it to be adopted⁵³.

The Swiss case of 1848 – The ratification of the 1848 Constitution is different from the other ones in that the project was put to a popular referendum in some of the cantons⁵⁴. The point is to understand the consequences of the irruption of the people into the process of the approval of the Constitution.

What happened was that after the results were announced in all the cantons, the federal Diet convened in September 1848 to officially acknowledge the approval of the Constitution. The results of the ratification were unquestionably in favour of the Constitution, since according to the official figures, on the one hand fifteen cantons (and a half-canton) accepted it, while on the other hand six cantons (and a half-canton) rejected it, to which must be added the invalid vote of the canton of Tessin, which cast a conditional vote. Related to the number of states, the majority was unquestionable (fifteen against four). Nonetheless, as some of the cantons had rejected the draft constitution, the Diet deemed it more prudent to commission a committee to establish the statistical count of the votes. The committee introduced a demographical element in its calculation, in particular when it declared that

“fifteen cantons and a half-canton have accepted the new Constitution, which cantons, according to the census ordered by the Diet on September 7th, 1836, *represent 1 897 887 people*. (...) [on the contrary], the federal Constitution was rejected by a minority of six cantons and a half-canton, which *together represent a population of 292 371*”⁵⁵

The committee wrote a draft decree which it submitted to the Diet, in which the main disposition concerned the fact that the approval of a majority of cantons was enough to entail the acceptance of the Constitution, and so implied the rejection of the complaint lodged by the minority cantons which wanted to apply the former unanimity rule. That draft project was passed on September 12th, 1848 by the Diet, with a majority of fifteen cantons and two half-cantons⁵⁶. In its preamble, there is a summary of the results which legitimizes the decision of acceptance.

“Considering that a meticulous examination of all the reports related to the vote that was cast in all the cantons shows that the said Constitution of the Swiss Confederacy was accepted by fifteen cantons and a half-canton, which together amount to 1 897 887 people, in other words to *the preponderant majority* of the Swiss population and of the cantons”⁵⁷

The great novelty lay in the fact that that “preponderant majority” informally included the demographical criterion related to the whole of Switzerland. The introduction of such a qualification to a democratic end aimed at backing up the legitimacy of that Constitution which had been adopted not only by the majority of the cantons, but also by a large overall majority of the Swiss population. The reference frame of voting was thereby necessarily modified, since the calculation of the votes pro and against was extended, from the cantons taken one by one, to a single “voting area”, which was the whole of the territory of the Federation. Thus, beside the federal principle, which fragments the representation, the democratic principle seems to be a second pertinent criterion to legally assess the decisions of a Federation. The small minority

cantons, which are often politically conservative, are “minorized” by the bigger cantons, which are often politically progressive. The taking into account of such a democratic factor stands outside the legal and constitutional framework, but bears witness to the will to democratically legitimize the majority vote of the cantons.

The legally delicate issue is how the minority cantons, which have refused the constitution, are deemed to be the authors of a constitution they have explicitly rejected, or have refused to vote for⁵⁸. The first interpretation consists in acknowledging that the constitutional practice has introduced the *majority rule as being valid for the ratification of the constitution*. But we are then compelled to justify that such a choice of the majority was “an illegal act of sovereignty, which could not have been conceivable without the political, military and economic power of the majority cantons”⁵⁹. It is a revolutionary fact to which the cantons subsequently submit by taking part in the election of the legislatures and the Council of States, thereby in a way acknowledging the *fait accompli*.

The examination of the higher law making process relative to the federal compact shows that its particularity is obvious if we compare it to the case of a unitary constitution. Such singularity lies in the role of unanimity which remains important, in particular when the states ratify the constitution. But the majority rule has been forcefully introduced, in particular during the phase of the adoption of the draft constitution. The federal specificity seems to lie rather in that unequal mixing of majority and unanimity, with a predominance of the unanimity principle, whereas the state does not know anything other than majority. I am now going to show that it is not exactly the case for the amendment of the federal compact, in which the majority rule is quite strong.

II – The specifically federal meaning of the majority rule in the amendment of the federal compact, or compound majority as a reflection of the dual structure of the Federation

The amendment of the federal compact is the modification of the constitution that is made in conformity with the law in force and which does not change the political configuration of the Federation (see *supra* I). Contrary to the higher law making process, the process of the amendment of the federal constitution has been widely studied⁶⁰. I could apply to it the paradox

that I remarked whereby a constitution that has been adopted by the majority may require that its amendment be enacted by a qualified majority⁶¹. I will nonetheless mainly ask what, in a Federation, distinguishes the majority required for a constitutional amendment from the other kinds of majority required in other cases. To answer that question, I must first of all give a few examples of “majority” amendments (A) before trying to show the intrinsically federate signification of that amendment majority (B).

A / The “majority” amendment as a normal rule in modern Federations

On reading most of the amendment clauses of the *modern* federal constitutions, it is clear that they impose a majority condition. The typical example of it is that of the famous clause of the current American Constitution on amendment, which is to be found in Article V. It is notably on that point that the Philadelphia Constitution is different from the “Articles of the Confederacy” which required the unanimous consent of the states to obtain the amendment⁶². Article V breaks with the logic of unanimity by providing for a double qualified majority. A first qualified majority is needed to initiate the amendment (a two-third majority, be it within the Union or within the member states) and a second one to pass the draft amendment (a three-quarter majority)⁶³. As a result of this, the written Constitution is quite “rigid”, in the constitutional meaning of the word, that is, very difficult to modify, because of that series of obstacles that the constitutional amending power must overcome.

This article of the American Constitution stands as a significant constitutional precedent, for it imposes a particular configuration on the amending process, which has often been taken up. Among the federal constitutions that largely drew from it was the 1848 Swiss Constitution, even though it was itself quite innovative in the possibility it provided for a popular initiative of amendment (Art. 113). Article 114, which concerns the final phase of ratification, sets out the double majority rule in the following terms: “The federal constitution which has been amended comes into force if it is accepted by the majority of the votes of the Swiss citizens and by the majority of the cantons”. It is indeed partly because of that amendment clause that some authors have, for a reason of symmetry, pleaded in favour of the majority adoption of the ratification of the new constitution (v. *supra*, I,B). The Swiss case presents the ideal kind of amendment rule that tries to reconcile the democratic principle (1st majority, that of the Swiss citizens) with the federal principle (2nd majority, that of the cantons) by virtue of the rule of the *combination* of both majorities, which gives a sort of predominance to the cantons. The

Constitution of May 29th, 1874 does not radically change that configuration, but adds something interesting to it: “the result of a constitutional referendum in each canton amounts to the vote of the canton itself” (Art. 123 par. 3). The new Constitution of Switzerland of April 19th, 1919 contains the same idea, but not as well expressed, in Article 195⁶⁴, and includes a major change in that the majority rule is now implicit.

To conclude this study, which is far from being exhaustive, I will observe that some modern federal constitutions have reintroduced the unanimity condition. Thus, the Canadian Constitution, amended in 1982, provides for a complex process of amendment (Art. 38 to 49 of the 1982 law)⁶⁵, the characteristic of which is to require the assent of all the Provinces, in some cases, or of the Provinces that are concerned by the reform in other cases⁶⁶. The processes of the constitution amendment are thus differentiated and the amendment by the majority reappears.

The political meaning of the double majority is, undoubtedly, to give the right of veto to a series of member states which, if they unite, can block the mechanism. In Switzerland, the requirement of double majority first aimed at protecting the German-speaking Catholic cantons situated in central Switzerland. The practice of constitutional amendments shows that the small cantons are overrepresented and that the majority of the cantons wins out over the majority of the population, which is evidence of a “discordance of majorities”⁶⁷. Politically speaking, the right of veto confers a privilege on the old minorities, but indirectly sanctions the nascent ones, which are scattered across the territory. So it is possible to interpret this phenomenon as a tendency of the federal principle to counterbalance the democratic principle and its dynamism.

B/ The meaning of the double majority that is requisite for the amendment of the constitution

Louis Le Fur, a respected French jurist, sees Article V of the American Constitution as the proof that the amendment of the federal constitution “depends on the sole states”⁶⁸. He however adds that such a disposition constitutes a consolidation of the federal union insofar as “the consent of the two-thirds is enough”, so that “the *federative* state is no longer entirely dependent on its members”⁶⁹. But such an interpretation masks the singularity of the federal case which lies in the particular nature of that double majority and in its end.

1/ I will illustrate that federal specificity by looking more thoroughly into the expression used so far: “*double majority*”. What is important, from a strictly federate point of view, is less the degree of majority that is requisite, be it qualified or not, than the authorities which are competent to express it. On that matter, it is to be noted that the amendment of the federal compact depends on a double consent –on the one hand that of the federation (through the federal chambers) and on the other hand that of the member states (through the chambers or the people). It may be observed in the United States where, as far as the initiative of the constitution amendment or its final adoption is concerned, a first majority is to be obtained at the level of the federal chambers and then a second majority at the level of the member states, be they federate chambers or *ad hoc*⁷⁰ constitutional conventions.

In other words, if it is called a *double majority*, it is in the sense that it is required in *both* spheres of the Federation, that is, the federal and the federate⁷¹. That double majority is composed of a majority at the same time in the federal sphere (1st majority) and in the sphere of the member states (2nd majority). It is true that it results from the addition of two different majorities (whatever the proportion of those majorities), *but what is important is the double source* it comes from, that is, *federal and federate*. Indeed, because it results from two distinct political entities which intend to remain so, any Federation is divided into two entities. On the one hand there is the federation, which has been artificially created by the federate compact, and, on the other hand, the member states, which are the former sovereign states, which have decided to federate⁷². Rather than calling it a double majority, it would be better to call it a *compound majority*, as one talks of a *compound republic* to designate the federal republic. Here is the real specificity of the amendment majority in a Federation.

That compound majority rule for amendment does indeed appear as the normal rule. The proof of it lies in the precedent of the repatriation of the Canadian Constitution in 1982. The question then was whether the Canadian Provinces (member states of the Federation) were to be associated with the amending process following that repatriation from London, and if so, under what form. There was no text governing the matter, which gave the problem all its legal interest. The Canadian federal judge, to whom Quebec submitted the matter, acknowledged a customary right for the Provinces to participate in the amending process because of the existence of a convention of the Constitution, but refused to submit the amendment to the unanimous assent of all the member states. However, he made it quite clear that the amending

of the compact also required a majority in the provincial sphere, which majority he was really careful to avoid the graduation of:

*“Without expressing any opinion on its degree, we come to the conclusion that the consent of the Provinces of Canada is constitutionally necessary for the adoption of the ‘Project of resolution bearing common address to Her Majesty the Queen concerning the Constitution of Canada’ and that the adoption of that resolution without such consent would be unconstitutional, in the conventional meaning of the word”.*⁷³

In other words, the federal authorities cannot “unilaterally” modify the constitution of the Federation⁷⁴. The consent of the federate authorities must be interpreted as a right of veto, as a “negative process guarantee”⁷⁵. Thus, as no text exists, the normal rule on the matter of the amending process is the idea of a “*compound majority*” in the sense I gave it earlier.

2/ The second meaning of that compound majority lies in the *political end* of those amendment rules. I must here start from the idea, which I have already mentioned, that a federal constitution aims at governing not only the workings of the federal institutions, but also the relations between the federation and the member states. To change it, as Dicey says, an authority must stand above the federal as well as the federate authorities⁷⁶. Consequently, if some balance is to be maintained between the federation and the member states, which is the political end of the Federation, it is important that the amending process not be in the power of one of the poles of the Federation, that is, that one of them should have the power to unilaterally change the federal constitution. Taking the example of the American Constitution, Dicey remarks that if Congress amended the Constitution on its own, that would be the death of federalism, for the Union would become a “unitary republic”⁷⁷. That was exactly the reasoning expressed by Léon Duguit who lamented on the fact that the positivist doctrine of his time had turned into a doctrine of the “competence of the competence”, according to which the sphere of competence of the member states could indefinitely be reduced by the successive amendments of the federal compact. Against such theories, Duguit defended the idea that the “federal principle” was unavailable⁷⁸ and that the amendment power was not absolutely without limit.

Seen from that angle, the qualified double majority takes on another meaning. It is indeed a decision-making technique, but it is meant to protect the federal balance, the balance between the federation and the member states. It is a source of rigidity, but, as we have seen, constitutional rigidity is one of the requisites for a federal constitution⁷⁹. One cannot

understand the requirement for that compound majority without knowing the institutional structure that determines and explains it.

I - From this study of the unanimity/majority pairing in a Federation, two clear conclusions with different consequences for a theory of the Federation may be drawn:

1°/ In all its theoretical purity, the notion of federal compact implies unanimity. Nonetheless, the examination of positive law reveals on the one hand that the majority rule appears at the very moment when the federal compact is concluded, which is paradoxical, and, on the other hand, that the amendment of the federal compact gives a role that is even more important to majority when the Federation strengthens.

2°/ The second lesson is probably of a greater consequence for the theory of the Federation. The programme of the symposium presented majority in a federal framework as a “double majority” that applied at the same time “at the level of individuals and at the level of member states”. For us, in a Federation, the structural opposition is less between individuals and states than between federation and member states. The compound majority does nothing other than reflect the dual structure of any Federation, which is divided between the member states and the federation they have created.

II - A last point is worth mentioning: the list of examples that illustrate the dual structure of the Federation is not exhaustive. The constraint of the dual structure is also to be felt in elections, and the case of the election of the president of the United States is a topical example of the federal singularity. From the outset, the federal structure of the United States imposed an electoral college composed of members that were designated within member states. That college of “presidential electors” who indirectly elected the president of the United States at the beginning, is the proof of a “partial acknowledgement of the states”. As Carl Friedrich remarkably noted, in the United States, the “President is not elected by the majority of the whole country (...), but by a majority of majorities within the states”⁸⁰. That “*majority of majorities*” shows that the reference area, in relation to which it is calculated which of the two candidates obtains the majority, is the area of the federate state, and not of the Union. That is the reason why Bruce Ackerman considered, after the oh-so controversial election of George Bush in 2001,

that such a mode of election was anachronistic because it confirmed the following principle: “each state counts, and not each elector”⁸¹. The contrast between the Constitution of 1787, the written letter, and the living Constitution is striking since we know that the modern democratic principle is precisely “one man, one vote”. But the American system of the election of the president sacrifices the democratic principle to the federal principle or “federal ritual”, to quote Bruce Ackerman⁸². I will finish this lecture with the idea, which is quite disturbing, in fact, that, in some cases, the federal principle may be in contradiction with the democratic principle. But we already saw this on the point of the majority discordance in the case of the amendment in Switzerland.

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NOTA: *This article was translated by Borénis, and reviewed by Peter Greaney. Many thanks to both of them.*

¹ *Théorie de la Fédération*, (2007), Paris, PUF, 2^{ème} édition, 2008.

² L’expression, très judicieuse, est de L. Konopczynski, *Le Liberum Veto. Etude sur le développement du principe majoritaire*, trad .fr. Paris, Librairie Champion, 1930, p. 4. Malgré son titre trompeur, car réducteur au cas de la Pologne, cet ouvrage reste la meilleure étude sur la genèse du principe majoritaire dans les démocraties occidentales

³ C’est l’intérêt du petit livre de Claude Leclercq de signaler la dualité du mot de majorité dans la littérature politico-juridique, *Le principe de la majorité*, Paris, A. Colin , 1971.

⁴ L’auteur de référence reste ici l’historien du droit allemand, Otto Gierke, ‘ über die Geschichte des Majoritätsprinzips ’, in Paul Vinogradoff (ed), *Essays in Legal History* (Londres, 1913, pp. 312-335. V. pour une synthèse, L . Konopczynski, *op. cit.*, et pour un aussi un article plus récent de P. Grossi, ‘ Unanimitas. ‘ Alle origine dello concetto di persona giuridica nello diritto canonico ’ *Annali di storia di diritto*, 2, 1958, 229 p. (page exactes).

⁵ V. la thèse d’E. Lagrange, *La représentation dans les organisations internationales. Une contribution à la théorie de la personnalité morale des organisations internationales*, La Haye, Kluwer, 2002 pp. 20-21.

⁶ V. pour un renouvellement de la question, le chapitre que Jeremy Waldron consacre à cette question, *The Dignity of Legislation*, Cambridge Univ. Press, 1999, chap 6, pp. 124 et s.

⁷ On renvoie une nouvelle fois à notre ouvrage, *Théorie de la Fédération*, chap. 3, pp. 105 et s. et chap 7, pp. 273 et s.

⁸ L . Konopczynski, *Le Liberum Veto*, p. 97.

⁹ Règle jurisprudentielle fixée dans décision 308DC du 9 avril 1992 (dite ‘ Maastricht I), ‘ considérant n° 49 ’, et constamment appliquée depuis.

¹⁰ S. Ortino, *Introduzione al diritto costituzionale federativo*, Turin, Giappichelli, 1993, p. 259. Ortino parle de ‘ *Stato a base federativo* ’ là où nous parlons de Fédération

¹¹ *Ibid.*.

¹² Plus exactement, certaines décisions sont prises à la majorité, et d’autres sont prises à l’unanimité dans les Confédérations naissantes. Dans les Fédérations consolidées, la majorité commence à devenir la règle.

¹³ V. la section intitulée ‘ le mythe de l’unanimité dans les organisations internationales ’, dans l’ouvrage précité d’E. Lagrange, *op. cit.* pp. 269 et s.

¹⁴ Voir notre ouvrage, *Théorie de la Fédération*, Paris, PUF, 2007, chap. 11, pp. 351 et s., et une application au cas suisse : ‘ La Diète suisse de 1815 à 1848 : contribution à l’étude du système de la Diète fédérale ’, in *Commentationes historiae iuris helveticae*. – Berne, 2, 2007(2008), p. 82-105 .

¹⁵ C’est l’article 4 de la Constitution belge du 17 février 1994 qui définit cette majorité : ‘ (...)Les limites des quatre régions linguistiques ne peuvent être changées ou rectifiées que par une loi adoptée à la majorité des

suffrages dans chaque groupe linguistique de chacune des Chambres, à la condition que la majorité des membres de chaque groupe se trouve réunie et pour autant que le total des votes positifs émis dans les deux groupes linguistiques atteigne les deux tiers des suffrages exprimés. ' Le texte de la constitution fait ensuite référence à plusieurs reprises aux cas d'application de cette majorité ' surqualifiée '.

¹⁶ C'est la raison pour laquelle on a un peu modifié le titre de notre intervention qui ne contenait pas à l'origine l'hypothèse de la révision de la constitution.

¹⁷ Pour une définition voisine, celle de C. Schmitt : ' le pouvoir constituant est la volonté politique dont le pouvoir ou l'autorité sont en mesure de prendre la décision globale concrète sur le genre et la forme de l'existence politique propre, autrement dit déterminer l'existence de l'unité politique dans son ensemble. C'est des décisions de cette volonté que procède la validité de toutes les prescriptions ultérieures des lois constitutionnelles '. *Théorie de la Constitution*, (1927), trad. fr., Paris, PUF, 1993 chap. 8, I, p. 211/12 (*Verfassungslehre*, p. 75).

¹⁸ ' La constitution est valide grâce à la volonté politique existante de celui qui la donne ', *Théorie de la Constitution*, chap. 8, I, p. 152.

¹⁹ Pour une synthèse juridique, voir surtout, Cl. Klein, *Théorie et pratique du pouvoir constituant*, Paris PUF, 1995.

²⁰ Distinction effectuée par B. Ackerman, entre ' *constitutional politics* ' et ' *normal politics* '. *We The People*, I, et II.

²¹ J. Elster, *Ulysses and the Sirens. Studies in rationality and irrationality*, Cambridge, 1979, p. 94.

²² U. Preuß, ' Der Begriff der Verfassung un ihrer Beziehung zur Politik, ' In U. Preuß, (hg.) *Zum Begriff der Verfassung. Die Ordnung des Politischen*, Fischer, 1994, p. 29.

²³ V. pour l'analyse de ce concept, Carl Schmitt, *Théorie de la Constitution*, chap. 7, pp. 197-198, chap. 29, p. 514.. V. aussi notre article : ' La notion de pacte fédératif. Contribution à une théorie constitutionnelle de la Fédération ', in H. Mohnhaupt, J.-F. Kervégan, (hg.) *Liberté sociale et contrat dans l'histoire du droit et de la philosophie*, Francfort, Klostermann, coll. Ius Commune, 1997, pp.197-270. On notera que Albert Dicey évoque cette notion dans son grand Traité de droit constitutionnel : ' The foundations of a federal state are a complicated contract. This compact contains a variety of terms, which have been agreed to, and generally after mature deliberation, by the States which make up the confederacy. To base an arrangement of this kind upon understandings or conventions would be certain to generate misunderstandings and disagreements. The articles of the treaty, or in other words of the constitution, must therefore be reduced to writing. ' *Introduction to the study of the Law of the Constitution*, 8^e éd., 1915, rééd. Indianapolis, Liberty Fund, 1982, p. 79.

²⁴ V. ici S. Ortino, *op. cit.*, , p. 261 et s.

²⁵ Déclaration reproduite in R. Arès, *Dossier sur le Pacte fédératif de 1867 – La Confédération : pacte ou loi ?*, Montréal, p. 99. Cité par F. Joly, *Fédéralisme et parlementarisme au Canada*, Thèse, Paris II, dactyl. 2007. p. 595.

²⁶ Télégramme de Maurice Duplessis au Premier ministre fédéral King (cité in *ibid.*, p. 98). Cité par F. Joly, *op. cit.* p. 595.

²⁷ J.F. Aubert, ' Notion et fonctions de la Constitution ' in Daniel Thurer, JF Aubert, Jorg Paul Muller (hrsg), *Verfassungsrecht der Schweiz. Droit constitutionnel suisse*, Zürich, Schultheiss, 2001, p. 8.

²⁸ *Ibid.*

²⁹ L'expression est de S. Ortino, *Introduzione*, p. 264.

³⁰ S. Ortino, *Introduzione*, p. 264.

³¹ *Ibid.*, p. 264.

³² Faute de place, nous renvoyons à des démonstrations déjà faites : pour les Etats-Unis, voir le chapitre intitulé ' Reframing the Founding ' dans B. Ackerman, *We The People, Transformations*, Harvard Belknap Press, 1998, , pp. 32, le commentaire d'Edward Corwin, *The Constitution and what it means today*, 12^{ème} éd., Princeton Univ. Press, 1978, p. 284 - et pour la Suisse, les deux traités d'histoire constitutionnelle suisse de Eduard His, Eduard His, *Geschichte des neueren Schweizerischen Staatsrechts*, tome II : *Die Zeit des Restauration und der Regeneration (1814 bis 1818)*, Bâle, Helbing & Lichtenhahn,1929, p. 24 et de A. Kölz, *Histoire constitutionnelle de la Suisse moderne* (1992), trad. ; fr. par A. Perrinjaquet, S. Colbois) Bâle et Bruxelles, Stämpfli et , Bruylant, 2006, p. 67.

³³ C'est une question sur laquelle Carl Schmitt fait totalement l'impasse ; dans son traité de droit constitutionnel ; il ne figure aucun développement sur la procédure constituante dans une Fédération, mais seulement un court paragraphe sur la procédure d'adoption de la Constitution de 1787. *Théorie de la Constitution*, chap. 8, pp. 221-222. Il n'y a guère de précision non plus dans le livre si éclairant par ailleurs de Sergio Ortino.

³⁴ V. les exemples empiriques données dans notre *Théorie de la Fédération*, pp. 123-129.

³⁵ Par exemple, il est très difficile de savoir comment le Congrès continental a adopté les Articles de la Confédération. Le livre le plus informé sur la question, Jack Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1982) ne donne pas la réponse.

³⁶ La phase de conclusion du traité, le plus souvent opérée par les autorités exécutives est suivie de la phase de ratification au cours de laquelle ce sont les organes prévus par les constitutions internes – le plus souvent des autorités législatives, parfois par le peuple – qui font entrer en vigueur dans le droit interne le traité si elles le ‘ratifient’ le traité proposé.

³⁷ Il faut rappeler ici les thèses de John Calhoun sur la constitution américaine : ‘ It received the assent of the States in all the possible modes in which it could be obtained ; first – in their confederated character, through its only appropriate organ, the Congress ; next, in their individual character, as separate States, through their respective States governments, to which the Congress referred it ; and finally, in their high character of independent and sovereign communities, through a convention of the people ; called in each state, by the authority of its government. The states, acting in these various capacities, might at every state, have defeated it or not, at their option, by giving or withholding their consent. ’ *A Discourse on the Constitution and the Government of the United States*, in Ross Lence (ed), *Union and Liberty. The Political Philosophy of John C. Calhoun*, Indianapolis, Liberty Fund, 1992, p. 91.

³⁸ Murray Forsyth écrit : ‘ Ratification was unequivocally a matter of each state individually ; none could be bound without their assent. Massachusetts in its formal act of ratification expressly called the constitution a compact, and in the debates in the various conventions, it was also referred to as such. ’ *Unions of States: the Theory and Practice of Confederations*, Leicester Univ. Press, New York, Holmes and Meier, 1981, p. 65.

³⁹ J. Schollenberger, *Bundesverfassung der Schweizerischen Eidgenossenschaft : Kommentar mit Einleitung*, Berlin, Häring, 1905, p. 22.

⁴⁰ Un exemple de ce dernier genre : le pacte fédéral suisse de 1815 et son §15 : ‘ ce Pacte fédéral sera non seulement signé par les députés de chaque Etat, autorisés à cet effet (...), ces députés étant d’ailleurs des plénipotentiaires accompagnés de ‘conseillers de légation’. in A. Kölz, , *Quellenbuch zur neueren schweizerischen Verfassungsgeschichte*, Bâle, tome I, 1992, p. 202

⁴¹ A. Kölz, *op. cit.*, p. 196.

⁴² J. Schollenberger, *op. cit.*, p. 26. . Il s’appuie aussi sur le droit international qui a reconnu le ‘ Bund des 22 cantons ’ (p. 26) en dépit de l’opposition de certains cantons

⁴³ Voici la liste : Zürich, Lucerne, Glaris, Zoug, Fribourg, Soleure, Schaffouse, Saint-Gall, les Grisons, l’Argovie, la Thurgovie, le Valais et Genève (source : J.F. Aubert, *Traité*, tome I, n° 65, p. 31).

⁴⁴ Le demi-canton de Bâle-Campagne avait accepté ce projet, mais l’autre demi-canton (Bâle-Ville) le refusa. La demi-voix ne compte donc pas. Les délégués du grand canton de Berne et du Tessin refusèrent de prendre part au vote. Ceux de deux cantons et demi n’adoptèrent le texte que sous réserve de l’approbation ultérieure par référendum. W. Burckhardt, *Kommentar der schweizerischen Bundesverfassung*, Bern, Stämpfli, 1905, p. 48

⁴⁵ A. Kölz, *op. cit.*, p. 668.

⁴⁶ A. Kölz, *op. cit.*, p. 49.

⁴⁷ J. Rakove, *op. cit.* p. 190. Juridiquement, le pacte n’était pas entré en vigueur.

⁴⁸ Resolution of Congress of September 28, 1787, Submitting the Constitution to the several States. Avalon Project Yale (http://avalon.law.yale.edu/18th_century/ressub02.asp)

⁴⁹ Resolution of Congress of Dated 2 July of, 1787, Submitting Ratifications of the Constitution to a Committee. (http://avalon.law.yale.edu/18th_century/ressub03.asp#2)

⁵⁰ S. Beer, *To Make a Nation. The Rediscovery of American Federalism*, Harvard University Press, 1993, p. 331.

⁵¹ Charles Pinckney, cité par S. Beer, *op. cit.* p. 332.

⁵² L’Etat de New York, dont la majorité des représentants à la Convention constitutionnelle était fort hostile à la clause de Commerce, donna finalement son assentiment car ses représentants décidèrent qu’il valait mieux pour leur Etat, à long terme, s’engager dans l’aventure fédérale plutôt que de rester à quai.

⁵³ Article VII – 1 : ‘ The ratification of the conventions of five States shall be sufficient for the establishment of this Constitution between the States so ratifying the same. ’ Sur la procédure de ratification, voir en français, J.-Ph ; Feldman, ‘ Les Constitutions des Etats confédérés d’Amérique ’, *RFDC*, 2004/3, n° 59, pp. 522-525.

⁵⁴ Dans 14 cantons, soit par les urnes (vote classique) soit publiquement dans les *Landsgemeinde*. Alfred Köl en donne la liste exacte, *op. cit.* p. 668

⁵⁵ Cité par W. Rappard, *La constitution fédérale suisse de 1848*, Neuchâtel, Iles et Calendes, 1948, p. 125.

⁵⁶ L’article premier de ce décret dispose : ‘ La constitution fédérale de la Confédération suisse, telle qu’elle a été élaborée par la Diète du 15 mai au 27 juin, et soumise au vote dans tous les cantons, conformément à l’art. 1^{er} des dispositions transitoires y annexées, est par le présent décret solennellement acceptée et déclarée loi fondamentale de la Confédération suisse. ’. Cité par W. Rappard, *La constitution fédérale suisse de 1848*, Neuchâtel, Iles et Calendes, 1948. p. 128.

⁵⁷ Cité par W. Rappard, *op. cit.* p. 128. Ces chiffres sont fictifs, écrit J.F. Aubert. Il faut, d'après les estimations plus précises, admettre que 140 000 citoyens acceptèrent la constitution, et 60 000 la rejetèrent.

⁵⁸ Lors du vote définitif du 12 septembre 1848, les cantons de Suisse centrale ont donné pour instruction à leurs délégués de ne pas participer au vote. A. Kölz, *op. cit.* p. 671.

⁵⁹ A. Kölz, *op. cit.*, p. 671.

⁶⁰ V. notamment W. Livingston, *Federalism and Constitutional Change*, Londres, Oxford Univ. Press, 1956

⁶¹ J. Elster, 'Majority Rule and Individual Rights', in S. Shute, S. Hurley, (eds), *On Human Rights*, Oxford University Press, 1994, p. 179.

⁶² Art. XIII. Cet article exige l'accord du 'Congrès' et des 'législatures de chaque Etat'.

⁶³ 'Le Congrès, toutefois dès que les deux tiers des deux Chambres l'estimeront nécessaire, proposera des amendements à la présente Constitution ou, sur la demande des législatures des deux tiers des États, convoquera une convention pour proposer des amendements qui, dans l'un et l'autre cas, seront valides à tous égards et à toute fin, comme partie intégrante de la présente constitution, lorsqu'ils auront été ratifiés par les législatures des trois quarts des États, ou par des conventions dans les trois quarts d'entre eux, selon que l'un ou l'autre mode de ratification aura été proposé par le Congrès (..) ' (selon la traduction de S. Rials, *Textes constitutionnels étrangers*, Paris, PUF, coll. Que-sais-je, 2005, p. 43).

⁶⁴ Art. 195 : 'La constitution révisée totalement ou partiellement entre en vigueur dès que le peuple et les cantons l'ont adoptée'

⁶⁵ Pour l'analyse détaillée de cette procédure et des nombreuses voies possibles de révision (la question centrale étant de savoir dans quelle mesure associer les Provinces [unités fédérées] à la révision, voir P. Hoog, *Constitutional Law of Canada*, Carswell, 2001, chap. 4, pp. 61 et s.

⁶⁶ Voir les articles 41 et 43 de la Constitution modifiée en 1982.

⁶⁷ Y. Papadopoulos, 'Connecting Minorities to the Swiss Federal system : a Frozen Conception of Representation and the Problem of "Requisite Diversity"', *Publius*, Vol. 32, n3, (Summer 2002), pp. 47-65. p. 59.

⁶⁸ L. Le Fur, *Etat fédéral et Confédération d'Etats*, thèse de droit 1896, rééd. Paris, éd. Panthéon-Assas (préface Ch. Leben), 2000, p. 218.

⁶⁹ *Ibid.* p. 218-219.

⁷⁰ Avec une exception, le texte prévoit une initiative par les législatures des Etats-membres (2/3), est ensuite une ratification par les Etats-membres (3/4), ce qui exclut ici les instances fédérales.

⁷¹ On n'utilise pas, sciemment, l'expression de 'niveau' ou 'degré' pour éviter de créer l'illusion hiérarchique selon laquelle le 'niveau fédéral' serait 'au-dessus' du niveau fédéré.

⁷² Voir, *Théorie de la Fédération*, 2008, chap. 4, pp. 139 s..

⁷³ *Renvoi : Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753.

⁷⁴ Ce que fait justement observer P. Hoog, *op. cit.* p. n° 5.4, p. 124.

⁷⁵ Pour reprendre l'expression de Fabien Joly, dans sa thèse, *Fédéralisme et parlementarisme au Canada*, Thèse, Paris II, dactyl., p. 596.

⁷⁶ 'The law of the constitution must be either legally immutable, or else capable of being changed only by some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures, existing under the constitution.' (*Introduction to the study of the Law of the Constitution*, 8° éd., 1915, Liberty Fund p. 80.

⁷⁷ For so to vest legislative sovereignty would be inconsistent with the aim of federalism, namely, the permanent division between the spheres of the national government and of the several States. If Congress could legally change the Constitution, New York and Massachusetts would have no legal guarantees for the amount of independence reserves to them under the constitution. ∴ (..) the Union would cease to be a federal state, and would become a unitarian republic.' *Op. cit.* Liberty Fund p. 80.

⁷⁸ V. notamment *Études de droit public*, t. II : *L'État, les gouvernants et les agents*, (1903) rééd. Paris, Dalloz, 2004, p. 762-763.

⁷⁹ V. une fois encore Dicey, 'The constitution of a federal state must, as we have seen, generally be not only a written but a rigid constitution, that is a constitution which cannot be changed by an ordinary process of legislation.' *Op. cit.* p. 99.

⁸⁰ C. Friedrich, *La démocratie constitutionnelle*, Paris, PUF, 1958. p. 183

⁸¹ 'Anatomie du coup d'Etat constitutionnel américain', *Le Monde* 27 fév. 2001.

⁸² *Ibid.*