Part II

Developmental Perspectives

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Constitutionalizing the Federal Vision?

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In March 2003, after a year of intense debates, the conventioneers drafting the new EU Constitution gathered up their courage to state in its first Article that the Union' . . . shall administer certain common competences on a *federal* basis': Mrs Thatcher's dreaded F word was once again out of the bottle. A few weeks later, Tony Blair and Valery Giscard D'estaing, the president of the Convention had dinner together and the genie was bottled back in—replaced by a tautological reference to the 'community way'. When EU governments vetted the final draft in their June 2004 Summit, they were relieved not to have to reopen the issue which had plagued their debates more than a decade earlier at Maastricht. The first European Constitution, a blueprint for a unique kind of federal union, will not speak its name. Like Moliere's Mr Jourdan who spoke prose unknowingly, EU citizens will continue to live under a novel brand of federalism, without calling it as such.

In *The Federal Vision* (Nicolaidis and Howse 2001), we offered a collective take on this European brand of federalism in contrast with that of the United States. We were struck initially with the many similarities in the debates which took place during the 1990s over what Europeans call subsidiarity, specifically over the criteria and methods used to change levels of governance on both sides. Our contributors analyzed the evolving federal contracts of these two polities from a variety of angles, in what we initially thought would be a microlevel empirical analysis. It became clear, however, that asking who does what at what level could not but be embedded into the broader question of legitimate governance in general which federalism in its various guise has long tried to answer. What we referred to then as the 'federal vision'—a noncentralized dynamic and empowering

vision—was part analysis, part prediction, and part utopia. The features of federalism that we highlighted were sometimes incipient, sometimes dominant, sometimes yet to come in either or both polities. While in their many variants they have long been debated by scholars and political figures, we did not seek to revisit the perennial debate on the essence of federalism in the United States and around the world. Nevertheless, the contested nature of what 'federalism' actually means both as an ideal type and as a reality provided the backdrop for our analysis.

This book can be perhaps considered as an extension, deepening and updation of our enterprise. In this spirit, my chapter here seeks to bring to date *The Federal Vision* in light of the new EU Constitution and asks to what extent the blueprint, albeit without using the term itself, brings the EU closer to the variant of federalism we sought to analyze and promote then. In other words, is its formal constitutionalization moving the EU closer to the US version of a *federal state* or is it remaining a *federal union* faithful to the spirit of a noncentralized, transnational type of federalism that has been its wholemark since the 1960s? Does this Constitution reinforce or weaken the spirit of our European third way between a federal state and an intergovernmental entity? I argue that the new constitution does represent such a third way, albeit all too implicitly. It does it better on the vertical dimension of the relationship between the Union and its member-states than on the horizontal dimension of the relationship among the member-states themselves. And as a result it has more to teach the United States on the former front and can learn from it on the latter.

4.1 Naming the beast

The EU has long become part of the comparative federalism family, undergoing its metamorphosis from treaty-based cooperation between states to a federal polity. Nevertheless, the exercise of writing it all down *qua* Constitution cannot simply be presented as mere simplification or consolidation. In fact, this Constitution lays out the three basic principles of federalism as constitutional lawyers would have it and as we find in the United States.

- Structurally, it describes a *multi-tier governance system* where the member-states are units which both constitute and belong to the federal whole, while remaining autonomous from it in a broad range of areas from the welfare state to defense or migration.

- Functionally, it establishes an explicit *division of power* between the constituent states and the federal whole, la grande affaire of federalism, and sets out the way in which the functional boundary between them can be changed and enforced, both by the ECJ and by national parliaments.
- And in terms of process, it organizes an intense *mutual participation* between the respective legal orders involved—states shape the substance of federal supremacy while the federal level cannot be indifferent to the exercise of state autonomy.

An infinite number of constitutional variants can be constructed around permutations along these three dimensions which would all fall under the label of 'federalism'. But of course, as we all know, politics does not follow the logic of political science and legal reasoning. Instead, the politics of labeling within the European Convention catered predictably to the common prejudices of a number of its member-states, starting with the UK where the word federalism itself has always been a 'red line'. The British resistance to the very idea of federalism applied to the EU however, should not be dismissed so easily. In fact, I believe there are indeed forms of federalism that would be acceptable for the EU and others that would not.

Against this backdrop, the debates that took place on the Convention floor regarding the F word were exemplary (Nicolaidis 2003). To be sure, these debates were not widely publicized—although transmitted on the Web for the aficionados. Nevertheless, they reflected broader splits in European public and elite opinion, and can serve as useful starting point for an analysis of the Constitution's 'federal character'.

To do the Convention justice, the debates did reflect the complexity of the issue. Obviously, the British government led the campaign to delete the word 'federal' from the draft. As Giscard, the French Convention president, was keen to point out, these dissenters only represent 15 percent of the Conventioneers. We have to assume, he said, that those who did not express themselves against, actually support the term federal. Giscard may have been right about numbers. But his silent majority often supported the label 'federal' for the wrong reasons. And conversely, I would argue, perhaps a touch provocatively, the naysayers were generally more attuned to Europe's public opinion. That is precisely because their vision is the most 'federal' of the two in the original sense of the word.

For a start, everyone agreed on one point: because the EU is *sui generis* there is no definition of the nature of the beast in manuals of public law. So, argued the British why not avoid the use of such a politically loaded

expression altogether, and simply state the EU's *raison d'etre*—that we can achieve more by working together than working alone? Because, retorted others, its originality makes a label all the more necessary—and federalism is the best we have.

For many of the yea-sayers at the Convention the federal reference was a must simply because it was common ground to 'European circles' in the Union, circles to which most of them belong. One Convention member exclaimed that the younger generation of Europeans 'would not forgive us' if the F word was out. The cries for 'more Europe' by those who marched in their millions against a war in Iraq were also invoked. The short of it, argued the proponents was that dropping the word federal would not convince opponents of the EU and would only disappoint its supporters. Not that simple, countered with gusto Conventioneer Hololei (an Estonian who at thirty-three prided himself as representing the younger generation at the Convention); to stick to traditional concepts would be the real betrayal. Did the US founders in Philadelphia hang on to obsolete labels?

But the EU is not in its infancy, as the United States was at Philadelphia, replied the federal camp. The term simply describes what is—the existence of a federal level of governance in Europe articulates the common interest of all the member-states. We should call a spade a spade, or, for Andrew Duff, a British liberal democrat representative, speak the truth in the clearest possible way. Moreover, supporters noted, the word federal would be used in Article 1 of the Constitution to describe a decision-making process *not* the Union itself—for example, a Union of States administering the objectives they have in common 'in a federal way'. As such, the reference to federalism would cover only some of the Union's activities, like money, competition policy or external trade, and not others, like foreign policy or economic coordination. The latter would continue to be conducted under the so-called intergovernmental method, where the member-states have the first and last word (this argument lost its potency once the pillar structure of the EU was abandoned in the Constitution). Federal in the European context would not mean that the euro and the dollar are managed in a similar way, not that the EU looks like the United States—and indeed there was no backing inside the Convention for changing its name to the 'United States of Europe'. But if federal is neither the best description of what is nor even the dominant way in which things get done, why bother?

Conventioneers offered two types of responses. The most egregious is that intergovernmentalism is simply an interim stage of European

integration and that the 'federal' *telos* should thus be inscribed in the Constitution. What a strange thought, when actually the originality of Monnet's community method lies precisely in combining cooperation between governments—an intense and continuous form of diplomacy—with supranational management of the whole affair. Nevertheless, the idea of the community method as having served its transitory purpose *en route* to a more integrated 'federal' EU was not confined to the confines of the Convention.

The other response was to assert that the virtues of federalism are precisely those prized by the no camp. Yeses insisted that federal is not, emphatically not, synonymous with centralization. Indeed, it is synonymous with the principles of subsidiarity (which states that decisions need to be taken as close to citizens as possible), decentralization and equality between states. Look at Germany they say, not the United States! But this version of the profederalism argument is not necessarily reassuring for the skeptics. Is that what EU federalist want then, they ask, an EU where the member-states have become as integrated as German Länders?

Even the European socialist group acknowledged in its official statement at the time of the debate that the term raises a problem of 'vocabulary'. As a way out of the dilemma, suggests Finnish parliamentarian Kiljunen and others, let us refer to a *supranational* basis, or on a *community* basis for administering EU competences, rather than a federal one. But who will argue that these labels will speak more clearly to the citizens?

Does the semantic solution then lie with the composite terms then, qualifiers for the federal label? This was the line taken in the Convention by the Franco-German couple which, true to expectations, came to the rescue. Fellow conventioneers-cum-foreign ministers de Villepin and Fischer lobbied for Delors' 'federation of nation-states' as conveying the synthesis of Union of peoples and of sovereign states. Instead of the old mantra that the EU is more than a confederation and less than a federation, let us simply acknowledge that it is both. Somehow however, most of their colleagues seemed to read this new grand compromise as another 'cut-and-paste'.

Anti-EU federalists are likely never to embrace any version, composite or not, of a federal vision for Europe. To some extent, they are right, as the history of federalism seems to be one of its unavoidable high-jacking by statism. But they are also wrong, because the spirit of federalism is the best warrant of state autonomy in the EU. In truth, as we argued in *The Federal Vision,* the notion of federalism is as old as human society. It is one hundred thousand years ago, say the anthropologists, that human clans

established cooperative agreements among themselves according to its basic principle: that neither the unit nor the whole should have primacy over the other (Baechler 1994). Federalism is such a universal and resilient AQ1
principle precisely because it does *not* resolve the tensions which exist between the two poles, the One and the Many. In a federation, each part is itself a whole, not a part of a whole, and the whole itself is more than its parts. Neither is the One a simple expression of the Many—collaboration—nor are the Many simply components of the One—hierarchy. Instead, like fractals in our mental and material maps, each exhibits in its own scale its own version of a familiar pattern; each level operates as a whole albeit with multiple and subtle connections with other levels. Federalism does not mean bringing different polities together as one, however decentralized. It means instead retaining what is separate *in spite of* all that is common.

It is not because the practice of federal or quasi-federal polities in the modern epoch has greatly diverged from this ideal type that we must ignore its pregnancy. When in the seventeenth century Althusius developed his model of republican federalism, he did so *against* Bodin's vision of the state. Statism, he argued, was a modern version of Monarchy. A more radical departure from the rule of kings would be to share power among communities of different types, and to do it in such a way as to accommodate a European reality of four or five arenas of governance, not all territorially defined. The history of federalism is that of the progressive demise of the Althusian vision and its subversion by Bodin's paradigm of the state. By the end of the 1800s, would-be federations had all turned into 'federal states'.

To be sure, as Lowi reminds us in this volume, it took the United States until the New Deal to give the federal level the kind of competences (regulatory and allocative) that we associate with a 'state' today. It is not surprising therefore that none of the pre–Civil War American thinkers on federalism—not even Daniel Webster—saw the United States as a 'federal state'. For them the word 'state' still denoted not the whole but the parts of the union (Forsyth 1981). They did disagreed—and debates continue AQ2
to this day—on whether the Constitution established a consolidated government, simply a compact or federation of sovereign states or, as James Madison suggested, 'a compound of both' (Goldwin and Schambra 1986). AQ3
But to the extent that the seeds of 'statehood' had been planted in the American construct, it is precisely because the Founding Fathers, like all other men at the time, and perhaps all other men up to that time, regarded federalism not as a kind of government but as a voluntary association of

states which sought certain advantages from that association. And it is for this reason that, in their majority behind Madison, they considered their construct as a combination of both 'federal' and 'national' (e.g. state level) government (Grodzins 1966). Calhoun's attempt to rescue the vision of a 'genuine' American federation, half a century after its foundation, was doomed to fail posthumously under the combined assaults of the Civil War, the New Deal, the antiprogressive bent of 'State rights' advocacy in the 1950s and 1960s and managerial approaches to governing in the twentieth century. Already, as of 1870, war had imposed the supremacy of the 'whole' over the 'parts' in the United States but also in Switzerland and, most significantly, in the new German empire. European, and above all German, writers at the nineteenth century's end gave the final momentum to the shift to a statist paradigm of federalism. Witness Max von Seydel, founding father of European federalism, quoting a French contemporary in 1872: '*il ne peut y avoir deux unités, car l'essence de l'unité c'est d'être une*'. A far cry from the fractal mental map of federalism. In short, the 'federal' emerged prior to or in contrast with the 'state' before the two converged; only by questioning the attributes of nation-state that federalism inherited in the course of its history can we recover the federal vision. AQ4

And yet today, whether *for* or *against*, most people fail to understand the notion of a federal state as an oxymoron. Were the British representatives true to their own vision of the EU as a neomedieval, noncentralized, postmodern entity, the very opposite of a super-state, they would make it their mission to rescue the federal baby from the statehood bathwater. The federal vision must be reconstructed *beyond the state*. What a tribute to Althusius if we could all agree to call the EU a federal union of nation-states *as opposed* to a federal state.

4.2 The language of European Demoi-cracy and the constitutional promise

In the end, however, and beyond the inclusion of the word itself in the constitutional text, the real question that constitutional lawyers, political scientists, and politicians have been debating for some time is whether the very adoption of a formal EU Constitution itself changes the character of the EU, whether it is bound to do what constitutions do: proclaim the creation of a political community where the One (henceforthed 'constituted') overrides the Many, where the direct relationship established between citizens and the highest level of governance not only takes on a

life of its own but superseded national state–society relationships. Is the difference between the prior constitutionization of the treaties and a formal Constitution—what Miguel Maduro calls 'low density' and 'high density' 'constitutionalism'—one of degree or is it more fundamental than that? In *The Federal Vision,* Joseph Weiler argued that the advent of a formal Constitution would likely shatter the fragile equilibrium arrived at in the EU over five decades between confederal type institutions and a federal-type legal system since this equilibrium rested on what he coined 'constitutional tolerance' (Weiler 2003). Indeed, since 1958, the national constitutions of AQ5
the member-states and the courts protecting them have coexisted without the need for an overarching umbrella. Instead, Europeans have chosen to constantly and willingly renew their commitment to their common rules while conducting an ongoing dialog on their implications. A formal Constitution, in this view, threatens to deny this precious spirit.

As many have argued, and as I did in *The Federal Vision,* there is a flipside to this coin. The writing and adoption of a formal Constitution is a unique occasion for Europeans to renew the bounds that bind them together and adopt a language for what they are trying to achieve together. Beyond the debate over the term 'federalism' itself, why not imagine a new language for a federal union rather than a federal state? And through this new language, could there not be a renewal, not a betrayal, of the project itself? A Constitution consists in 'putting into form' (simplification, consolidation) as well as 'proclaiming' what a given political endeavor is about. The spirit of constitutional tolerance may have been the beautiful thing about the EU that we had, but which European publics were able to connect it with political forms they could relate to? The preconstitution EU had no answer to this problem. And it there is a problem with the EU—clumsily captured under the label of democratic deficit—it is that Europeans do not *recognize* it as a democracy, a political animal they can make their own.

Does the draft Constitution fill this gap? I have provided elsewhere a political assessment against a normative benchmark inspired by the insights contained in *The Federal Vision* (Nicolaidis 2003, 2004). Accordingly, it is possible to view the European polity as we have it as a third way between a *Union of democracies* and a *Union as democracy*, which partakes in its core ideologies of supranationalism and intergovernmentalism yet cannot simply be reduced to something 'in between'. Under this vision, I argued, sovereignists must accept that the EU is a community of peoples, not only of states—peoples who can take on an unmediated role in European politics. Supranationalists on the other hand must accept that democracy in Europe does not require that this community merge into

a single *demos*, its will aggregated through Euro-wide majorities and expressed through traditional state-like institutions.

In my view, today's EU provides all the ingredients for such a third way. The Constitution is at its best when it recognizes and builds on what we have: a European demoicracy in the making. It falters otherwise.

A Constitution starts by telling a story about whom we are or what we are about, *the story of the polity*. A demoicracy is founded on the realization that the old equation (democracy = a demos = a common identity) does not need to hold. The Constitution challenge therefore lies in recognizing that Europeans are part of a 'community of others' who feel at home abroad anywhere in Europe. This idea is more radically pluralist than its American multiculturalist counterpart in that it acknowledges the stable existence of peoples (bounded imagined communities) rather than groups. It was in some ways contained in the founding fathers' intuition: the call for an ever-closer union between the peoples of Europe—an 's' for *peoples* sovereignists often chose to ignore. Indeed, the draft Constitution nowhere calls for a homogeneous community, its law grounded on the will of a single European *demos*. It makes respect for national identities, 'inherent in their fundamental structures, political and constitutional' one of its foremost principles (Article I.5). It therefore seems to accept—if not embrace—the fact that a European demoicracy is predicated on the mutual recognition and evermore demanding sharing of our identities—not on their merger. This means not only proclaiming the respect for differences in the classic communitarian sense, but also urges intense engagement with one another. We do not need to develop a common identity if we become utterly comfortable borrowing each other's. An apt metaphor is provided by the clause originating at Maastricht stating that we can benefit from each other's consulate services outside the EU. Abroad, I can be a bit British, a bit Italian—more than European *per se*. I have nothing to gain by spinning the rainbow white.

If the European demoicracy is not predicated on a common identity, then it does not require its citizens develop a singularly European public space and political life; it asks only that they have an informed curiosity about the opinions and political lives of their neighbors and that their voices be heard in each other's forums. In time, multinational politics and trans-European citizenship should emerge from the mutual accommodation and inclusion of our respective political cultures. As the Constitution recognizes, trans-European political parties and nongovernmental organizations (NGOs) have a key role to play in this regard. Memory is also key to this process. While Europeans must continue their critical reflection on

their intertwined past, they do not need to invent a common European history if they learn to borrow each other's past; even to identify with the victims of their own nations' crimes. Interestingly, the Constitution's preamble starts off with a nod to Europe's 'bitter historical experience'—a crucial addition owed to the Intergovernmental Conference (Conventioneers had been too much in owe with their president's flowery style in writing the preamble). But it fails to recognize another important point that an inclusive mutual recognition must also include the constitutional recognition of regional identities in the European mosaic.

If not a common European identity, the glue that binds the EU together in this view is shared objectives, shared projects, and shared ambitions. This spirit is enshrined in the Constitution's very first article, in which 'the citizens and States of Europe' confer competences on the EU 'to attain objectives they have in common'. The sense of belonging and commitment to the European Union is to be based on what they can accomplish together, not what they are together—the *doing* more than the *being*. A community of project is not necessarily less demanding than a community of identity; but it is voluntary and differentiated rather than essentialist and holistic. The *Europeanization* of national citizens does not necessary require or lead to their *Europeanness*. Witness for example the EU's defining projects to date—the single market, the euro, enlargement—as well as the ambitious list of objectives listed in the Constitution—from the promotion of peace and social justice to gender equality and childrens right, sustainable development, and a highly competitive market economy (Article I-3). Likewise the Constitution's proclamation of common values, including the respect for human dignity and for the rule of law (Article I-2) should not be read as a statement of some unique European essence or some European claim to have invented or incarnated these values (although this is exactly what many Europeans have in mind). Instead these values should be read as a guide for action, inside as well as outside the EU. They are indeed 'actionable' since they can serve as the basis for suspending a member's membership right, and perhaps, ultimately a member's membership *touts court*. The latter, of course, has never been tested.

4.3 What difference does a Constitution make? *The Federal Vision* revisited

How does such a version of the European polity translate into specific rules and institutions, in short governance mechanisms? In *The Federal Vision,*

we argued for a version of federalism—federal unions—based not on a hierarchical understanding of governance, with supranational institutions standing above national ones and European constitutional norms trumping national ones. Instead, we argued, a federal union ought to be premised on the horizontal sharing and transfer of sovereignty and it ought to encourage dialog between different legal or political authorities: constitutional courts, national and European parliaments, national and European executives. A federal union should translate the spirit of demoicracy into political frameworks which are neither national nor supranational but transnational. It must remain multicenterd rather than simply multilevel with decisions are made not by Brussels but in Brussels, and elsewhere around Europe.

More specifically, we argued that federal contracts could be examined along five dimensions, each central to fashioning a 'federal' response to the challenge of legitimacy in the spirit of subsidiarity. Here, I assess the changes brought about by the Constitution against this benchmark (Table 4.1).

1. Change and Flexibility: The Not-so-solemn Constitution: 'A Constitution', according to Jon Elster, 'is a way for the dead to tie the hands of the living'. If he is right, a Constitution not only is meant to create rights and obligations along side institutionalized power structures that are meant to outlast political cycles and struggles; it also grants the 'guardians' of such a Constitution ultimate authority over the constituent parts. Increase

Table 4.1. Paradigm shift and *The Federal Vision*

Shift	Keywords
1. From allocative outcomes to the process of change	Flexibility, open-ended dynamics
2. From distributed to shared competences	Networked cooperation, proportionality, forms of governance
3. From separation of powers to power checks	*Procedural subsidiarity,* structures of governance, mutual control, constitutional constraints, federalism safeguards, agency ties, forbidden interfaces, asymmetric federalism
4. From transfers of power to empowerment	*Proactive subsidiarity,* mutuality, capacity building, positive sum allocation, managed competition
5. From multilevel to multicenterd governance	*Horizontal subsidiarity,* transnational federalism, nonhierarchical models of governance, constitutional tolerance, mutual recognition, mutual inclusiveness, shared projects, shared identities

Source: The Federal Vision (2001).

in hierarchy, constraint and permanence is inherent in the shift from 'low density' to 'high density' constitutionalization. Whether by design or by fiat, the Constitution, I argue, compensates for this trend through widening the scope for exit on the part of member-states.

Indeed, that a Constitution should tie the hands of the living was certainly what Giscard D'Estaing had in mind when he declared that the Constitution should define the EU for the next fifty years. This perception is also what proponents of the Constitution in countries like France seem to have in mind when they argue that it should not be considered as a Constitution but as a Treaty. Their rationale in this case is to quell the fears of those for whom the very solemn nature of a Constitution will make it harder to revise, and therefore for many of them (e.g. in the French left for instance) harder to correct its 'neoliberal' bias with more social clauses. The reverse argument of course is used by opponents who argue that its quality as a Constitution give this blueprint a solemn quality that was lacking in the previous Treaty, its flaws as well as qualities therefore set in stone.

In fact, while there are reasons to debate the legal significance of the Constitution over the constitutionalized treaties of the last forty years, I argue throughout this chapter that there is little doubt about the political significance of a formal Constitution. But there are several reasons for doubting the 'solemn' character of this Constitution.

For one, it is unlikely to command the kind of loyalty of its US counterpart, precisely because it does not purport to proclaim the making of a nation. Practically, this Constitution is actually easier to amend than the treaties that came before it. For one, revisions can now follow an initiative of the EP and not only of member-states and the Commission. Second, the text includes a simplified revision procedure (Article IV-445) which allows the European Council to revise Part III, title III (internal policies of the Union) without convening an IGC and a Convention. Moreover, a so-called 'passerelle clause' has been included in these cases (Article IV-444) which will allow the Council to decide unanimously that an issue area is to fall under majority voting (unless a national parliament objects). In addition, unanimity for revisions itself has been tinkered with under Article IV-8 which allows for a decision of the European Council in cases where less than one-fifth of member-states fail to ratify a proposed revision. What kind of pressure these states might come under is left undefined but the Constitution. But the most important point here is that the Constitution retains the fundamental characteristic of a Treaty in that numerous safeguards still exist against imposing any new Constitutional settlement on any member-state.

Such faithfulness to the principle of federal liberty is spectacularly demonstrated through one of the most innovative clauses of this Constitution, namely the new right of withdrawal for individual member-states. This right can be exercised at any time at the initiative of the member-state itself (including presumably if that state fails to ratify a Constitutional change and decides it does not want to force the others to also remain with the status quo). If such a right was to be exercised the Constitution also creates a new status of associate member that should smooth the conditions for exit.

Ultimately, the new right of withdrawal testifies to the nature of the bond that unites the peoples of Europe. It firmly established the EU as a federal union rather than a federal state, which—as American school children knows from studying the story of their own nation—is defined by the denial of such a right. This is not (or not only) a concession to sovereignists. Its inclusion testifies to the widely shared intuition in the Convention that the peoples involved in the EU adventure are together by choice, a choice repeatedly made, and would continue to make sense apart. It should be defended as the sign that the EU has become mature enough to formalize what is the ultimate mark of a demoicracy.

Short of this most radical version of the exit option, the EU has long invented temporary or sectoral forms of exit (or opt-outs) which come under the generic name of enhanced cooperation. The Constitution seeks to ease the recourse to this option therefore increasing the scope for exit in various ways. First through two modifications of the general principles. For one, the scope of enhanced cooperation is extended to the whole of EU competences including defense. Second, the minimal number of states is to become one-third when in the Nice Treaty it was set at eighth (e.g. half at the time). Even though the absolute number increases, given the arithmetics of enlargement, enhanced cooperation is made more likely. The Constitution also introduces the applicability of the *passerelle* clause in this field again making it easier to move ahead by using a QMV within a smaller subgroup of states (although one may question why a state would accept to be voted down while part of a group that is itself an option). Finally, the Constitution introduces new forms of enhanced cooperation in the area of foreign and security policy, including permanent structural cooperation (Article I-41) in the area of defense which does away entirely with the requirements for a minimal number of states. The same goes for the new European defense agency (Article III-311).

In short, this Constitution might not be as 'solemn' or unchangeable as either its detractors or some of its promoters may claim, but at the same

time exit options are created—on an ad hoc sectorial basis or simply by withdrawing from the Union—to allow individual member-states to retain their autonomy. Federal liberty is upheld more stringently in this constitution than in its state-bound counterparts.

Within this structural context, however, the question remains: does the Constitution reflect or at least induce a new and durable equilibrium in the EU when it comes to the division of power between the union and the member-states? Does it denote the stable end point at least of a period of integration, where a given constitutional settlement has been reached on the division of powers between the federal and state level? We argued in *The Federal Vision* that the quest for legitimacy should focus less on places or loci of governance and more on the process of change in levels of governance. A Constitution for the EU should *not describe an end-state, or even a series of equilibria, but a process*. In fact, we argued, there is no *teleology* of federalism, a centralizing or decentralizing trend, or even the possibility of finding a stable status quo for a significant period. Instead, political communities will oscillate endlessly between the poles of unity and autonomy as they search for the appropriate scale of their collective endeavor. For one, it is a fact that numerous exogenous and dynamic factors such as crisis situations, social demands, internationalization, and changing technology lead to shifts in the exercise of policy responsibilities either suddenly or over time. A rigid delineation of competences is simply counterproductive in this context. And, as is the claim of most theories of integration, endogenous dynamics also drive the wheels of change, which create new reasons and incentives to shift the exercise of competence. Obviously, part of the question here is to what extent and how constitutional design should constrain these endogenous dynamics and the responses to exogenous shocks.

A view inspired by a cyclical account of the history of US federalism suggests that it is fruitless to seek to excessively constrain *ex ante* since 'the natural starting point for that search for an appropriate scale is in the opposite direction from the most recent round of reform' (Donahue and Pollack 2001). In other words, a well-functioning federal system is one AQ6
which is always to be a candidate for change, a system in continuous disequilibrium, where the challenge is to smooth out and 'legitimize' the cycles of changes in levels of governance. Allowing for such cyclical shifts would seem the best way to preserve and even take to its ultimate logic the project-based approach to European integration which consists in mobilizing competences around specific objectives.

During the Convention, and in spite of these arguments, the debate over governance, competences, and subsidiarity continued to be framed as

one of optimal allocation of powers between levels of government. After all, sorting out this issue was perhaps the most urgent task defined by the 2001 Laeken declaration, a goal championed by European Landers and a big part of European public opinion. Arguably, precisely in order to allow for sustainable change, a federal vision calls for embedding flexible adjustment within a context of 'constitutional' stability—whether one values constitutional stability like Hamilton because of the 'reverence that time bestows upon all things' or because it provides for credible precommitments to sustain societal bargains. Meaning borrows from both the mystery and the reliability of time. If constitutional rules change too quickly, the context they provide in which a conflict of interests could be waged disappears and the constitutional rules instead become part of the conflict itself. At the same time, successful federal arrangements develop forms of flexible governance exactly to allow the federal balance to shift with various social, technological, economic, or ideological trends over time, without the need to remake formal constitutional rules. A constitution is not in and of itself anathema to flexibility: it may even be possible to imagine such a document that would enhance the way the Union orchestrates changes in governing allocations.

This was not to be. The blueprint that we have falls short of this ideal. On one hand, it does yield to the demands for a *Kompetenzkatolog*, or 'charter of competence', both as a means of providing greater clarity for citizens and as a break on expanding Union competence. To be sure the list is only indicative and nonjudiciable. It is divided between those competences that are i) exclusive, ii) shared and iii) to support, carry out or coordinate the actions of the member-states. Moreover, the Constitution introduces the issue of competences through an article which enumerates and defines the major principles governing competences, for example, attribution, subsidiarity, and proportionality (Article I-11). At the same time a flexibility clause is introduced to allow for a unanimous decision to act in cases where the Constitution has not given the Union the power to do so. The British government has interpreted this clause as also allowing for the repatriation of competences downwards—in the spirit of the cycle of federalism—although the text itself is far from making such an option explicit. Clearly the Constitution lacks the language of demoi-cracy when it comes to countering the fear of creeping competences so prevalent with its public opinions.

2. *Shared Competences*: *The Undemocratic Character of a Fine-Tuned Division of Labor*: The second shift of emphasis highlighted in *The Federal*

Vision had to do with the observation in most federal systems of the prevalence of shared competences rather than distributed competences between the state and federal level. We noted that 'cooperative federalism' prevails not only on the assumption that only on an ad hoc basis is it possible to know whether a particular topic or area in a given time and place is more properly regulated at one level of governance but, furthermore, that even then most tasks will need to be undertaken jointly, through an increasingly fine-tuned division of labor between levels of governance. In other words, the sharing is not only of the competences themselves but also of their *exercise*, even in instances of so-called exclusive competences. Thus, in practice, considerations of subsidiarity blend into considerations of proportionality. And governance, in the United States as well as in the EU, needs to be analyzed as a multilevel phenomenon (Hooghe and Marks 2001).

The debates during the European convention illustrate the legitimacy problem arising from concurrency. Part of the initial goal of convening such a convention in the first place had been to set out some sort of list of competences to make clear to the citizens who does what in the EU. The classic approach, to spell out shared competence *by default* as those competences not exclusively attributed or reserved—and then been inferred further from the texts through expansive interpretations of market integration clauses—was simply not sufficient from the standpoint of transparency. On the other hand, listing areas where the EU is generally *not* involved but might have a subsidiary role—such as taxation, social welfare provision, defense, foreign policy, policing, education, cultural policy, human rights, and small business policy—certainly would give a wrong impression of centralization.

The Convention adopted a middle ground. For one, it creates a difference between shared competences and areas of 'supporting, coordinating, or complementary action' (industry, health, education, and civic protection). Shared competences are defined by default as neither exclusive nor supporting against the wishes of the *Länders* who had been clamoring for an exhaustive list. At the same time, the text provides an illustration of the 'principal areas' of shared competences (e.g. internal market, freedom–security–justice, agriculture and fisheries, transport, energy, social policy, cohesion, environment consumer protection, and public health). This means that in Part III of the Constitution one can find specific areas not listed in this enumeration such as customs cooperation. Thus, there is no substantive innovation (aside from adding territorial cohesion) but for the first time EU citizens are told what competences are shared.

The real problem during the Convention arose from two broad principles arising from shared competences. First, and for the first time, the principle of primacy of EU law is stated explicitly in the text (Article I-6) : 'The Constitution and law adopted by the Union's institutions in exercising competences conferred on it shall have primacy over the law of the member-states.' As a great majority of delegates pointed out this had always been part of the ECJ jurisprudence and questioning it could have been interpreted as questioning the jurisprudence itself. Nevertheless, the British government protested at the prospect, and while its vocal representative was brilliantly shut down by vice president and lawyer Guliano Amato, the former may have had a point. Primacy as stated by the court has been complex to implement and requires interpretation. Its enshrining in the Constitution may in fact constitute a significant departure.

Second, and more importantly, the Convention includes a *pre-emption clause*. Article 12.2 states '. . . the member-states shall exercise their competence to the extent that the Union has not exercised or has decided to cease exercising its competences.' Reference to the 'ceasing to exercise' was added at the express wish of Germany and helps convey a sense that shared competences are not only irreversibly growing. Nevertheless, the least that can be said is that this article is badly written. For readers who might not be familiar with the intricacies of EU law it gives the impression that it is about 'field pre-emption'—if the EU acts in the transport area for instance, member-states can no longer act in this area. Instead, in a document made public a number of academics suggested an alternative wording to alleviate misconceptions that once the Union acts in a field the member-states can no longer act: 'When the Constitution confers on the Union a competence shared with the member-states in a specific area, the member-states shall each retain the power to legislate and adopt legally binding acts in that area, but only to the extent that such exercise is compatible with the Union's exercise of its competence.' In truth, to explain what pre-emption really means, the Constitution would have required statements as to when various components of 'shared competence' are activated and under what conditions—for example, in the EU: welfare provision are taken at the state level except for regulation related to trans-boundary movement of workers. It is no surprise therefore that the pre-emption clause has become one of the main arguments of the Constitution's opponents.

More generally, I pointed out in *The Federal Vision* the paradox or at least tension between an emphasis on change and cycles of federalism and the assumption that federal dynamics are increasingly about the minutiae of

dividing tasks. I asked how we could argue both that legitimacy in such systems is bound up with finding ways for allowing the periodic reassertion of State or federal primacy and, at the same time, that federalism is above all about the implementation of an ever finer institutional division of competence. One way of (partially) resolving this tension was to point out that the object of change may itself change and that what may come to matter most is the way in which collective *forms of shared governance* evolve over time. As a result, 'subsidiarity concerns variations along dimensions such as the degree of discretion left to the States or lower levels of governance in the interpretation of common policies, the extent to which Union objectives are binding to lower levels, or the relationship between who formulates and who implements policies. Moreover, given that competences are not just about the power to legislate but rather the power to act in general, through framing policies, statements of objectives, financial decision, the delivery of services, various kinds of regulations, judicial rulings, norm creation as well as publicity and communication, then subsidiarity is also about making the appropriate choice between different instruments of action rather than whether or how much to act. Different areas of competences—market liberalization, monetary policy, migration, and environment—warrant different types of instruments over time, more or less intrusive depending on the federal claim to relevance, with different functions exercised by different actors' (*The Federal Vision*, Conclusion).

The way in which the Convention dealt with the 'Open Method of Cooperation' (OMC) illustrates the paradox involved in promoting subsidiarity in a context of reigning shared competences both in the United States and in the EU. The Convention as a whole was indeed very ambivalent about the OMC. On one hand, there may have been a recognition that it was part of a subsidiarity agenda which meant for the Union to adopt less intrusive methods of joint governance, acting in ways deferential to lower levels of government, whether early at the policy formulation stage or late at the implementation stage. As a result, articles were included invoking the OMC in four areas of EU action (employment, social, industry, and research). At the same time, however, there was also great reluctance to adopt a generic article on the OMC as a new form of governance in the EU. In the end, after three attempts by the Secretariat, the idea was dropped. Indeed, it could be argued that 'softer' methods of intervention are ways of 'doing more better', 'buying' less painful central intervention, extending the scope of Union competences—albeit softly exercised—under 'false' pretences. It matters therefore to ask how the

forms of governance associated with *new* Union competences tend to 'harden', and whether methods such as the EU's OMC are introduced only in the context of expanding EU competences or whether they are applied to decentralize the exercise of existing competences in other areas.

In the end, the Constitution does not address the underlying problem of legitimacy created by shared competences whereby citizens face a system of governance where lines of accountability are blurred and available channels for expressing voice unclear. How is one accountable for what one jointly does? As stressed in *The Federal Vision* when considering the implication of shared competences on democratic legitimacy, the state versus union dichotomy gives way to the more fundamental dichotomy—between the sovereign 'peoples' and the various loci of governance 'sharing' competence—and to how the former may control the latter. This theme is taken up in the next section.

3. *Power Checks*: *The New Constitutional Safeguards of Federalism:* The third shift emphasized in *The Federal Vision* was that from eighteenth century concepts of separation of power as the best protector of democracy to power checks or what US constitutionalists call 'the safeguards of federalism'. The classic question is how to design a federal system to best safeguard the interests of all levels of governance. But ultimately power must be checks by individuals themselves. In fact, the question posed by the adoption of a formal Constitution in the EU is to what extent the very fact of such adoption contributes to creating a direct link between citizens and the union so that their voices would require less mediation by the individual state.

This question brings us back to the very foundation of both constitutionalism—as an exercise in limiting power—and of federalist thinking—as an exercise of limiting power through competing jurisdictions: that, however powers are allocated between levels and branches of government, the real issue is whether these powers are checked by and between these levels, how to prevent their perennial abuse, and, in doing so, how to ensure accountability in their use to the ultimate sovereign, namely in this case the peoples of Europe.

The broad principle espoused in *The Federal Vision* was that in a world of cooperative or competitive partnership between levels of governance, modes of interaction and institutional design rather than allocation of powers between levels are the key to the legitimization of the power exercised. What matters, as Elazar (1984) put it, was not the fact of cooperation 'but the degree of coercion involved in the relationship'.

In fact, if there has been not only a real divergence between the legal and the political planes of integration but also a constructive tension between them—above all in the EU but also in the United States—it is because judges, political leaders, and lawmakers hold conflicting views—and change their views over time—of what it is that most needs to be held in check: discretionary State power or expansive Union jurisdiction.

Debates at the Convention demonstrated how the need to agree on adequate approaches to power checks elicits a broad range of responses and how learning to think about them seems to follow a familiar pattern of fine tuning, from subsidiarity to proportionality, from the 'where' of power to the 'how', from first-order rights, responsibilities, or functions to the safeguards that are crafted on to them. It is telling for instance that the protocol on subsidiarity changed its name to 'subsidiarity and proportionality' as the discussions took place inside the Convention.

Most importantly, as mentioned in the previous section, and discussed extensively in *The Federal Vision,* beyond the issue of 'State rights' per se, power checks refer to all forms of democratic control, including on the States themselves. The challenge here is to think together the checks exercised on each other among levels of governance per se and the checks exercised by 'the people' *on* governments acting individually or collectively: the democratic imperative. In short, the question is not just who is to police the boundary between State and Union but whether the boundary itself is the relevant place to look. How then does the Constitution affect the way in which the different safeguards are crafted in the EU?

There is of course a core safeguard of federalism that constraints on the exercise of power at the federal level itself (referred to as a structural safeguard) that is state representation at the center. The single clearest indication of the EU as a federal union rather than a federal state may be that in the EU state representation *is,* to a great extent, the center. And the clearest manifestation of this presence is and remains the use of the veto by a single state. There is indeed a 'principled' defense of the national veto which argues that no EU majority should be able to tell the majority of citizens in a given state what to do about matters that require the kind of reciprocal sacrifices appropriate within single demos. It may have been with this principled defense in mind that several member-states resisted to the bitter end, the Convention's attempt to extend QMV to areas where they believed they ought not to be forced in an outcome against the will of their national majority (fiscal issues for Britain, immigration for Germany, the cultural clause for France). In these areas, the method of consensual bargaining helps curb centralizing tendencies by ensuring that European

new initiatives are Pareto-improving over the status quo, or, as Neil Komesar (1994) puts it, that the 'fear of the few'—vetoes—should not always prevail over 'the fear of the many.' Legitimacy in this context crucially depends on adequate indirect accountability (e.g. is Germany really expressing an 'intense preference' of the German population?).

A great deal of the Convention's energies and indeed media coverage had to do with the contours of this structural safeguard, the weight of the Council among EU institutions and the weight of individual states within the Council. I am not entering into a detailed account of this part of the story here (see Magnette and Nicolaidis 2003, 2004). Suffice to say that AQ7 power 'at the center' as a mode of control by the states themselves seems inevitably on the decline with the maturing of the EU and with the need for effective decision-making. At a minimum, states in the EU will increasingly need to exercise their control at the center through coalitions rather than individually; and relative control will increasingly reflect population weights. Yet the bare basics of democratic theory tell us that formal or informal state vetos will not disappear without prejudice to legitimacy before citizens can be reassured either that they will most likely belong to cross-states majorities or that citizens and decision-makers of other member-states will have sufficiently 'internalized' their concerns. It seems misguided in this light to oppose European 'intergovernmentalism' to the 'federal' aspirations of the Union when the former is an inherent part of a genuine federal vision. The real issue is not that intergovernmentalism is *not necessary* in a federal EU but rather that it is *not sufficient*. Other actors than states and other mechanisms of control must be entrusted with upholding the values of federalism.

Indeed, the Conventioneers did convey a widely shared conviction that the most fundamental alternative focus to representation at the center is to emphasize the *procedural* dimension of subsidiarity, the question of 'how' powers are exercised beyond the formal structures through which they are exercised (procedural safeguards imply that the checks on the actor concerned—the federal government, agencies, and states—consist not only in limiting its sphere of action but, within this sphere of action, limiting its freedom of action). In one of the Convention's boldest moves, and for the first time in EU history, the legislative expansion of community powers is made subject to an 'early warning system': under the *new protocol on subsidiarity*, at least a third of national parliaments can send a proposal back for review on grounds of subsidiarity thus policing the boundary of Union competences in the name of their national majorities. Importantly, the threshold adopted here does not refer to a proportion of

the European population but to a number of parliaments. The message: that the exercise of competences cannot override the wish of a plurality/ rather than a majority of national majorities. Not surprisingly, supranationalists felt uneasy with this experiment in transnational parliamentary empowerment. They successfully resisted going all the way to making such a position taken by a plurality of national parliaments binding (e.g. a 'red light'). Instead, their warning will constitute an 'amber light' leaving the Commission free to decide what to do next. It would seem rather improbable politically however for the Commission to override such an early warning if and when it came to be expressed.

Beyond this promising procedural safeguard the Convention did not innovate much. Economic and Monetary Union's (EMU) 'stability and growth pact' has not been revisited at least at the constitutional level; no clause was introduced to prevent 'unfunded mandates' for those actors of governance who are neither as well endowed nor as 'plugged in' as the member-states: regional and municipal authorities (including through systematic 'financial impact assessment' of EU laws, regulations'); no EU equivalent of the United States's Administrative Procedures. ACT (APA) was put in place, although the commitment to transparency of EU decision-making was reiterated.

4. *Empowerment*: *From Rights to Civic Empowerments*: But in the end, the ultimate power check is of course, the demos itself. What does this mean in an EU of many *demoi?* In a European *demoi-cracy?* Let me refer back again to *The Federal Vision*:

'The fourth shift . . . constitutes as it were the positive counterpart of federal safeguards, namely, a shift towards a more proactive understanding of subsidiarity which implies enhancing the scope not only for mutual containment but also for mutual empowerment between levels of governance. In other words, if we are to reinterpret subsidiarity and devolution in light of the reality of shared competence and therefore shared governance, we need to move away from a zero-sum apprehension of power distribution. How? Through the presumption, to start with, that if the centre or higher level of governance is to act, it need not be as a result of a wholesale transfer of competence but in order to contribute to the better exercise of their own competences by the States and local levels. This presumption would be in keeping with the broader principle of mutuality, that is . . . the obligation of each level of government as it participates in joint decision-making to foster the legitimacy and capacity of the other' (p. 414). If legitimacy is indeed enhanced by the sense that governance takes place as close to the people as possible, then we need to probe into the conditions that make such 'closeness' more likely.

Subsidiarity as traditionally viewed takes these conditions as exogenous: levels of governance are determined by the scale and boundaries of the problems. Mutuality indigenises them: governance is about making it possible to deal with problems at the level commensurate with people's expectations. Rather than asking 'Is this an intrinsically local or supranational issue', we need to ask 'What conditions are necessary to enable state or local government to effectively contribute to the overall management of this task?' And 'how can the 'Union' foster those conditions?: a kind of qualitative interpretation of the principle of proportionality.'

While the draft EU Constitution does not embrace a language of empowerment, it contains elements that can be interpreted as such, to start with if we are to understand empowerment as that of the individual vis-à-vis its own state. Here one of the crucial challenges is to distinguish between collective empowerment through classic democratic schema and a kind of collective empowerment which does not fall prey to the majoritarian rule, *as if* there was a single European *demos*? The emergence of a Constitution raises these questions with great accuracy precisely because the very fact of a Constitution establishes the presumption of a direct link symbolic and political between individual citizens and EU institutions. How can such a direct link be strengthened without *aggregating* the voices of European citizens into a majoritarian voice?

One first response lies in the strengthening of liberalism in the EU, which amounts to empowering individuals through the EU in their dealings with their own state. In this vein, the incorporation of the Charter of Human Rights as Part II of the Constitution is a crucial move which arguably would not have been possible without a constitutional ambition. How is it that at the end of the Convention, Britain accepted what it had adamantly refused two and half year earlier at the Nice Summit (December 2000)? Some would argue that the safeguards clauses included therein (Article II-52) did the trick by clarifying the scope of application of these rights. In fact, the clarification is formal since it was always the fact that the Charter is relevant only when implementing EU law. The real reason for British acquiescence lies in the pull of formalism attached to the adoption of a Constitution. As a result, this Constitution delivers on one of the foremost values of federalism—to provide individuals with rights, claims, and opportunities at least partially lacking within the confines of their own polities.

Hopefully, and combined with EU directives (or now 'laws' according to the Constitution), the Charter will enhance the voice of individuals in various arenas of life in Europe (not only politics, but work, militancy, schools, and public space). But the Constitution does not go far enough in

spelling this respect. There is no denying, of course, the tensions that do or may arise by seeking to empower individuals alongside states, executives within states, regions, cities, and NGOs. In some cases, state actors are likely to be empowered at the expense of civil society and vice versa. The suggestion here is that such tensions be mitigated by thinking more systematically of ways in which citizens and groups within the state can be empowered to better engage with rather than bypass the state. In this light, the Constitution has stopped short of advocating a kind of subsidiarity consisting above in creating process obligations at the national and subnational levels that ultimately empower both states and citizens at the expense of the Union. This implies for instance that the federal level creates duties and responsibilities on the states themselves to inform, involve, and negotiate with those that lay claims upon it. Rather than encourage labor unions, minority protection associations, or consumer associations to bypass the state, invoke federal laws, or negotiate directly at the union level, the Union should lay emphasis on the state's duty to negotiate with its citizens. In the end, such an approach is certainly not less intrusive upon state sovereignty than substantive obligations but it is certainly more likely to foster a participatory culture at all levels of governance.

Which leads me to the second response provided by the Constitution in order to strengthen the voice of individual citizens in Europe: the proclamation of the importance of 'participatory democracy' in the EU alongside representative democracy. Participatory democracy in this context refers specifically to EU institutions and the obligation that they 'give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action (Article I-57). This includes an obligation for the Commission to consult, which has been in effect for many years, through ad hoc consultations, the organization of numerous fora and NGO meetings as well as a great deal of transparency through the Web. Going one step further, the Constitution proposes to politicize this obligation to consult through a new right of petition whereby citizens can ask the Commission to initiate laws if they can gather one million signatures from a 'significant' number of member-states, number to be determined in a subsequent law. This new clause is remarkable in several ways. First, it constitutes the first concession to some form of direct democracy since the Community founding. Second, as with the role of national parliaments in policing subsidiarity, the right of petition is not based on majoritarian thinking but rather on *pluralism*—the emergence of pluralities of national voices. Most probably, the significant number alluded to will be one-third.

Ultimately, the new emphasis on participation points to the fact that genuine empowerment is not mainly about distributed benefits or even rights; it is about distributing means of action and beyond encouragement to discharged one's civic duties.

There are undoubtedly powerful counterforces to the self-limiting commitment of empowerment. They converge in what we may call the demand for 'integrated governance': the need for any political community to generate the institutional underpinning for making interissue tradeoffs at the center—the balancing of priorities, and thus of investment and policy choices, interests groups, beliefs, and arguments—and its capacity to deliver on compensatory mechanisms: if obligations are undertaken by parties that might stand to lose from such implementation, costs ought to be born by the whole community. It is this more than anything that distinguished a federation-in-the-making like the EU from issue-specific international regimes like the World Trade Organization (WTO). And yet EU decision-making structures and processes have long been themselves highly fragmented in comparison with the United States for instance. The Convention sought to remedy this state of affairs by creating a legislative Council which was to replace the sectorial councils when and if these were considering legislation. Such a Council would have met in public and been accountable and would have provided such an integrative function. Unfortunately, the proposal made by the Convention was rejected at the IGC precisely by those who feared that the legitimacy and effectiveness thus conferred to such a legislative Council might allow it to bypass Union obligations of loyalty to the states. Surely, such a chamber of Europe ministers would be less concerned with issue-specific constraints at the state level.

5. *Mutuality, Recognition, and Cosmopolitanism in the Constitution*: In the end, the main message of *The Federal Vision* was that rethinking federalism ought to mean thinking beyond the traditional Weberian hierarchy of the state federalism, an interstate polity which takes the liberal democratic imperative seriously—that submission to power should be a voluntary and contractual. Accordingly, a federal project ought to shed its image as a device for vertical division of labor, with does and don'ts focusing instead on horizontal division of labor, cooperation, and competition among states, regions, and peoples—and so recover a concept of horizontal rather than vertical subsidiarity. This challenge has mainly been lost in the United States. Does it fare better under the new EU Constitution?

The answer should be: to some extent. As Daniel Halberstam has brilliantly discussed the ultimate mark of liberalism lies with the propensity and capacity of a system to temper power with responsibility (Halberstam 2004). In this light, the notion of loyalty is at the core of the federal contract: loyalty of the constituent parts for the whole, of the whole for the constituent parts and of the constituent parts for each other. In other words, top-down, bottom-up, and horizontal loyalty. Halberstam contrasts the *entitlement approach* prevalent in the United States whereby each level of government exercises its entitled power without regard to other levels with what he calls the *fidelity approach* which insists that each level of government must always act to ensure the proper functioning of the system of governance as a whole. Furthermore, he distinguishes between a conservative notion of fidelity bent on harmonizing interests and approximating a unitary system of governance and a liberal vision of loyalty promoting productive democratic conflict throughout the federal system. Conflict in turn is pervasive and productive in a system where no *a priori* hierarchy of laws and institutions has been set, where neither the whole nor the parts are entitled to 'have the last word'. Loyalty or fidelity are therefore the flipside of shared competences and conflict regarding the responsibility associated with such competences in a nonhierarchical system.

I argue that a general duty of loyalty constitutes the foundation for empowerment vertically and recognition horizontally. How much then does the Constitution rely on or contribute to the fostering of loyalty in the EU? And what exactly are the ramifications of this concept in the EU context?

The Constitution does make loyalty one of the foundational principles of the EU under the label, 'sincere cooperation' ('Pursuant to the principle of sincere cooperation, the Union and the member-states shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution (Article I-5, al 2)'). But it does so within limits. For one, the wording of the clause itself reveals the reluctance of the member-states to accept a reading of this principle that would imply any kind of automaticity or implied power for the Union in translating such a loyalty into deed. Hence, while the Convention had referred to this principle as 'loyal' cooperation, the IGC replaced the term with a term previously used in the Nice Treaty, the notion of 'sincere' cooperation which bares no implication with regard to an outcome but only with regard to the intention of the actors themselves. Presumably a State may have sincerely sought to cooperate but ended up with a disloyal outcome. More importantly

perhaps, the article does not recognize (at least explicitly) that this obligation should apply horizontally between the member-states themselves (the Praesidium even rejected an amendment to this effect).

Obviously the EU's loyalty to loyalty must be assessed far beyond this specific statement of principle. For one, 'liberal democratic federalism' Halberstam argues, 'celebrates [the] dispersion of public attention away form a single majoritarian body politics. Federalism on this view, naturally furthers the project of democracy by constitutionally preserving multiple points of democratic engagement throughout the system' (p.186). Such an understanding of federalism argues *inter alia,* for submitting the problem of subsidiarity to vigorous political interaction among different levels of government—an insight taken up by the Convention as discussed above.

But the Constitution is wanting in stressing the horizontal dimension of loyalty and mutuality, for example, the requirement and specific form of mutual loyalty, fidelity, and cooperation among the member-states themselves rather than simply between them and federal institutions. The Constitution only partially balances the focus on a vertical paradigm of *multi-level governance* toward one on a horizontal one of *multi-centerd* governance.

If we are to explore the normative implications of such a focus on horizontal subsidiarity, I have argued elsewhere that we need to revisit the principle of mutuality as a horizontal commitment between states or peoples rather than primarily between levels of governance. To be sure, the principle of mutual recognition of laws and regulations is embedded in the unchanged articles on the single market, which at this stage means endorsing the approach by the ECJ of a managed for of recognition, most cautious about impinging on states' regulatory authority in the name of free trade (Part III. Title 3. Chapter 1). In the same spirit, the revised articles serving as a basis for cooperation in the areas of justice, security, and freedom have put mutual recognition of judgments and penal practices at the center of cooperation among policemen and judges. Only minimum common standards are called for, and only to the extent that they are necessary to ensure mutual trust. The Constitution leaves open approaches to finding the right balance between harmonization and recognition. But at least it does not adopt a conservative version of fidelity in the third pillar as many Conventioneers had called for.

These clauses speak to the role of 'managed' policy competition in enhancing the legitimacy of governance by allowing voters of each constituent unit to witness and take part in the contestation of their national approach to policymaking through demonstration effects and

the institutionalization of such demonstration effect, negatively—naming and shaming approaches—or positively—policy transfers. Accountability and thus legitimacy are enhanced as it becomes easier for citizens to 'vote in a comparative mode' rather than 'vote with their feet'. But, as we stressed in *The Federal Vision,* legitimacy is not necessarily enhanced by regulatory or policy competition if the feedback mechanism from policy competition to policy reform itself is not mediated through some sort of democratic process. Policy competition can act as a *constraint* on democracy. In that sense, mutual empowerment must be conceived as an antidote to the notion of a 'federal state' where local democratic processes are bypassed and subsumed under unified democratic and market dynamics.

Unfortunately, as discussed earlier, the draft fails to institutionalize the so-called Open Method of Coordination as a general approach to cooperation in the EU, perhaps most faithful to such a philosophy of democratically managed policy competition, by replacing common policies by cooperation, mutual learning, and shaming. To be sure the OMC is mentioned in specific areas—social, industrial, and environmental cooperation—where it had been adopted in the 1990s and the method will continue to be used with or without constitutional blessing. But it is telling that the Conventioneers did not find it important enough that the OMC be spelled out in black and white for symbolic reasons. Notwithstanding cries from supranational purists, when the public opinions of Europe can help adjudicate how their countries learn from the rest of the Union, it enhances rather than subverts the Community method and certainly enhances the spirit of mutual loyalty among European publics.

Perhaps even more telling is the fact that the draft contains little new about EU citizenship, which may be the most symbolically potent expression of the EU's character as an expression of Kant's cosmopolitan law, that is the constraints put on states in their treatment of citizens from other states (while domestic law constrains their treatment of their own citizens and international law their treatment of each other). Citizenship rights in the EU involve mostly rights connected with freedom of movement and nondiscrimination when borders are crossed and people live and work in member-states other than their own. Unfortunately, sovereignists killed early on in the Convention the idea of expanding mutual political rights in other countries beyond the existing right to vote in local elections—that is to the right to vote in the national elections of a country where one resides. Ancient Greeks called this principle isopolity: cities would

reciprocally grant equal rights to citizens residing within their walls. At least the Constitution strengthens the vertical aspect of rights—sympolity for the Greeks—by incorporating the Charter of Fundamental Rights. But the Charter's reach should not be exaggerated: despite ambiguities, it is supposedly meant to guard against abuses in EU law, not to supersede national practices. Empowering citizens against their state, the Charter is in any case part of the universal trend initiated after the World War II to decouple the notion of rights from that of belonging to a particular polity; noncitizen residents in the EU are also beneficiaries. Beyond the Charter, the Constitution regrettably fails to politically recognize not only EU citizens living outside their states but also these non-EU citizens by giving them a greater voice in European affairs. Demoicracy calls for consistency if not equality in the way we treat other Europeans and non-European others.

And yet in fact, many of the debates spurred by the Constitution in the various member-states have turned on the notion of 'acceptable differences' between member-states. While the EU may be a far cry from the teleological view of the European Union as the 'Universal and Homogeneous State' *en herbe* heralded by prophets of the end of history (Kojève 2000), these are perhaps what he had in mind with the end of history. It is predicated upon a similar assumption, namely, that those that join in such a union have come to a tacit or explicit agreement over what constitutes acceptable differences among themselves and have developed enough mutual trust to believe that they will all continue to act within these parameters (see Robert Howse's introduction to Kojève 2000). But how far then can we stretch the notion of acceptable differences? Is not subsidiarity also about being able to renegotiate the scope of such allowance? More radically, does it not imply that different parties to the federal covenant might interpret such allowance differently? Europe's version of asymmetric federalism under the label of 'enhanced cooperation'—as discussed above—simply follows from this presumption. Such flexibility in turn implies that, in different areas of actions and at different times, the 'center' of Union action will change location.

4.3 Conclusion

In the end, the diagnosis might boil down to this: the draft Constitution for the EU confirms most of the shifts we indentified as characterizing the kind of *The Federal Vision* which eschews the most traditional features of

federal states. In this sense, the advent of constitutional politics in the EU does not announce a new convergence toward the EU. Nevertheless, the account given above focuses mainly on the vertical dimension of federalism, namely that between the states and the Union, as was explored in *The Federal Vision*.

The Constitution, however, does not explore the horizontal dimension of federalism, that of the relationship between the member-states themselves. The balance of power between states was clearly a main dimension in the United States initial bargain as discussed with Magnette in this volume. As to be expected, it also became one of the very core disputes at the heart of the Convention debates. On this count, I have argued elsewhere (Magnette and Nicolaidis 2004) that one of the constitution's greatest failings is to have upset the horizontal balance among member-states in spite of its formal provision asserting their equality. Throughout the negotiations, the bigger states apparently forgot that the EU was founded on a rejection of the hegemonic power politics that had plagued the continent for much of the previous four centuries. The nineteen smaller member-states desperately sought to protect their access to the upper echelons of union leadership against the big players' attempts to marginalize them. They did accept the introduction of the so-called double-majority system, which supplements the one country—one vote rule by weighting the relative voting power of states in the council according to the size of their populations. They had always conceded that some proportionality granting greater power to bigger states (which also applies to representation in the EP) was fair and realistic. But they warned that the principle should not be pushed too far, for without a single European *demos*, a 'European majority' could be undemocratic if it overrode the will of a large number of national majorities.

Most spectacularly, small and medium-sized states fought hard—but in vain—against the creation of a permanent chair for the European Council (which has wrongly been called the 'EU presidency'), fearing that the new job could enshrine the preeminence of the Council of European heads of state, an intergovernmental institution dominated by big states, which is often pitted against the small state-friendly commission. Most important, the position will abolish the rotating presidency of the European Council, the most visible symbol of the EU's shared leadership and a feature dear to the Irish, the Finns, and the Portuguese, among others. Rotation gives European citizens a sense that EU policy is not made only in Brussels, but also in Madrid, Athens, and Vienna. But with an indirectly elected

president also heading the commission, the EU system will move closer to leadership *à la française*, torn between a head of state and a prime minister. In some respects, the Constitution has fallen prey to the nation-state model after all (see *Whose Europe? National Models and the EU Constitution* Oxford University, 2003).

Whatever its failings however, we must now take the Constitution as it is, and argue over its interpretation. Like its US counterpart then, although less elegantly written, the new European Constitution should be seen as mainly an institutional vessel, a means not an end in itself, which will allow for continued deliberation and political battles in Europe over competing policies, ideologies, and visions.

If and when it comes into force, let us hope the Constitution will be interpreted in the spirit of a federal union, of a federal vision compatible with the kind of transnational pluralism we can expect from a demoicracy. EU commissioners, ministers, and parliamentarians will continue to pass EU laws alongside national ones. The ECJ will issue judgments on constitutional conformity. Political parties and civil society will give opinions and make proposals. Eventually, constitutional amendments will be proposed, including through the *passerelle* clause which allows doing it without summoning a new Convention. It will be through these continued processes that we will be able to assess whether indeed paradise has been lost, whether the Conventioneers have crossed the rubicon by drafting a Constitution, and whether the provisions therein can serve as the basis for the progressive emergence of a federal state. There are reasons however, embedded in the blueprint itself, to think not.

It would be far fetched to argue that Constitution genuinely pluralist constitution in Europe embodying the spirit of constitutional tolerance, divesting sovereignty from nation-states without thereby falling into the trap of having to relocate 'it'. It would be far fetched to see it as the *constitution of shared identities*—explicitly aimed at managing differences, not engineering convergence. And yet surely, 'true partisans of liberty' since the beginning of the modern epoch have consistently emphasized federal liberty, that is to say, the liberty to enter into covenants and to live by them: a European Constitution's ultimate goal was to be both to limit power in order to protect individual freedom and to establish a polity (Maduro 2001). If Europeans in discovering it understand that, however imperfectly, it delivers a story about their polity as well as how it should be governed, if they hear this story as but one chapter in a never ending sequel, they might, by nodding it through after a great deal of contestation, contribute to making it so.

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[AQ1] Baechler 1994 is not listed.
[AQ2] Forsyth 1981 is not listed.
[AQ3] Goldwin and Schambra 1986 is not listed.
[AQ4] Grodzins 1966 is not listed.
[AQ5] Weiler 2003 is not listed
[AQ6] Donahue and Pollack 2001 is not listed.
[AQ7] Magnette and Nicolaidis 2003 is not listed.
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[AQ23] Pl. provide complete information for Shaw, J.
[AQ24] Weiler, J. (1999) is not cited in text.
[AQ25] Weiler and Wind (2001) is not cited in text.
[AQ26] Wessels, W. (1997) is not cited in text.