Conclusion: The Federal Vision Beyond the Federal State

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Federal rhythms and federal safeguards, democratic deficits and democratized networks, constitutional tolerance and constitutional constraints, mutuality and multiple loyalties. We have travelled a varied landscape, often familiar, but hopefully with a renewed sense of excitement. Excitement from the creation of new transatlantic bonds of collaboration without guarantees of mutual relevance, excitement from prescriptive relevance without concerns for sects and labels, excitement from trans-disciplinary scope without pretensions of multidisciplinary theorizing. The road has been travelled before us and the most we can hope is to be read as a renewed invitation au voyage. We will never, like the poet, see the land of order and beauty, but we continue to be fascinated with ours, the lands of compromises, cross-purposes, and contradictions.

Taking the contributions in this volume as a whole, then, can one discern the broad outlines of what we have boldly labelled ‘the federal vision’? Not if what is meant by ‘vision’ is a collective blueprint: a set of recommendations about specific lessons the EU and US must learn from each other. We did not seek to create an artificial scholarly consensus, when we believe in fact that the main contribution of this volume is to demonstrate once again the kaleidoscopic nature of the federal lens and the multiple ways in which it throws light on the question of legitimacy. Nevertheless, there has emerged from this collective enquiry a number of cross-cutting themes from the thinking together of the EU and US experiences with federal governance and, perhaps surprisingly, a degree of normative consistency. We have not sought to agree on a definition of legitimate governance beyond the common-sense notion that ‘it’ is whatever it takes for individuals in a polity to consent to being ruled in a certain way. But these cross-cutting themes reflect a widely shared belief among us about the types of institutional designs and practices that are most likely to lead to sustained legitimacy.

The ‘federal vision’ is part analysis, part prediction, and part utopia. The features that we highlight are sometimes incipient, sometimes dominant, sometimes yet to come in either or both polities. When they exist, they can be harnessed or subverted. Although they are often variations on features of federalism that have long been identified and debated by scholars and political figures, we did not seek to revisit the perennial debate on the essence of
federalism in the US and around the world. Nevertheless, the contested nature of what ‘federalism’ actually means both as an ideal type and as a reality provides the backdrop for our analysis.

Of course, the federal ideal-type is itself but one solution to the dilemma, inherent in most forms of social organizations, of reaching an equilibrium between, ‘on the one hand, a respect for the autonomy of the individual unit, freedom of choice, pluralism, and diversity of action, and, on the other hand, the societal need for cooperation, integration, harmony, and, at times, unity’ (Cappelletti, Seccombe, and Weiler 1986: 4). But should it not have pride of place? Some sociologists would argue that federalism is such a resilient and universal structure that it characterized the organization of human life in clans and hordes for a hundred thousand years before the advent of empires (Baechler 1994). That is perhaps because its distinguishing feature lies precisely in not resolving 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—or 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 in its essence does not mean bringing together different polities as one—however decentralized—polity. It means instead retaining what is separate in spite of all that is common.

Not surprisingly, the practice of federal or quasi-federal polities in the modern epoch has greatly diverged from this ideal type. As Daniel Elazar has long been at pains to remind us, Johannes Althusius developed his model of republican federalism against Jean Bodin’s vision of the state. In doing so, he was advocating a much more radical departure from the authoritarian rule of kings in favour of power sharing in communities of different composition and function to accommodate a European reality of four or five arenas of territorial governance, not all territorially defined. The history of federalism is that of the progressive demise of the Althusian vision of federalism and its subversion by Bodin’s paradigm of the state; the latter became so dominant that when it did not prevail outright it turned would-be federations into ‘federal states’. In the United States, the essence of ‘the federal principle’ has been the subject of countless accounts and debates since the foundation. To be sure, 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 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’
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’ 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 anti-progressive bent of ‘State rights’ advocacy of 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 US 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. This does not mean seeking to retrieve the federal ideal type from the vagaries of history. It simply means, in Europe, that our vision is of a federation of nation-states, not a federal state; and, in the United States, that the federal state is only one contemporary element of a more lasting federal vision. This also means that such a federal vision is relevant to governance at the world level, albeit in a muted form. This is, in other words, a federal vision beyond the state.

When we come to selling our ideas beyond academia in Europe, we may, however, have to be shamefully inconsistent, disloyal to our scholarly premise. Perhaps Jacques Delors and Joseph Nye are right to say in their Foreword to this volume that ‘federalism is no longer taboo in Europe’. Still, whether for or against many in Europe do not view the notion of a federal state as an oxymoron. Let us hope of course that, in time, the federal vision may be reframed and reconstructed beyond the state. In the meanwhile, we may need to refer to our vision as a ‘post-federal’ vision, one that builds on the insights of comparative federalism and on the concerns of ‘federalists’, but ‘post’ nevertheless. If ‘federalism’ has irrevocably been subverted by its nation-state era incarnation, then perhaps a ‘post-federal vision’ is called for.
In this conclusion, I will present what I take to be the broad elements of our federal vision. As summarized in Table C.1, such a vision calls for five concurrent shifts in focus in our understanding of what matters about federal contracts. Each is central to fashioning a ‘federal’ response to the challenge of legitimacy. In each case, we have revisited old themes with fresh insights in light of what we see as some of the most significant recent developments in the worlds that we investigate. In particular, I suggest how the notion of ‘subsidiarity’ as commonly understood—that political decisions should be made and policies conducted at the lowest, or most appropriate, level—needs to be fined-tuned, reinterpreted and even relabelled. Needless to say, in doing so we raise more questions than we can start to answer.

1. From Allocative Outcomes to the Process of Change: Legitimacy and Flexibility

I start, echoing many of the chapters in this volume, with ‘the conventional view’. In a formal legal understanding of federalism, we need to distinguish between three types of enquiry: where or at which level should competences lie; to the extent that competences are indeed possessed by one or several levels, whether they should be exercised at all and what principles should help in deciding this; and to the extent that competences are exercised, how should they be exercised. While these ought in principle to refer to (1) constitutional or quasi-constitutional decisions, (2) the principles of subsidiarity or devolution ‘formulas’, and (3) the principle of proportionality, ‘better lawmaking’, and ‘better policy-making’, in practice these three dimensions are very much intertwined (see Bermann and Nicolaidis in this volume; see also De Búrca, 1999). Nevertheless, for many constituencies, from German Länder to British Tories, advocates of ‘State rights’ in the US, as well as much of public opinion on both sides, legitimacy follows from a clear and transparent allocation of competences across levels of governance. The corollary belief is that legitimacy calls for mechanisms for accountability at each of those levels commensurate with its respective task. As the Appendix to this volume amply demonstrates, even in its own terms, allocating competences among levels of governance is a much more complex legal and political exercise that merely drawing ‘lists’ that can be posted on walls and webs for the good people of the agora.

But what if, beyond this, there is no general principle out there for allocating competences in a legitimate way, even at any given time? What if, on substantive grounds, the issue of competence is fundamentally indeterminate? What if most responsibilities are shared anyway? And what if, therefore, it is impossible clearly to determine targets of accountability? If legitimacy is bound up with the collective achievement of widely shared objectives that may change over time, why should the focus be on fixing competences?
Should we not ask instead how to make it more likely that our governance systems will deliver on the many expectations that people project upon it?

Recognizing the fundamental indeterminacy of competences, legal scholars have struggled with the first-order legal-normative question of who decides ‘who decides’, and who ought to decide, between courts and States or between States collectively and individually, courts at the national or Union level, or indeed electorates through referendums and elections. Our interwoven stories certainly illustrate how different actors have played, and will at different times play, a key role in framing the debate over change as well as managing change. In particular, like many before us, we take on board the complex interaction between the judicial and political spheres in driving competence upward or downwards. But our key interest here has been one step removed, namely, to suggest that what matters is to allow for multiple avenues for change, and to ask how change is negotiated, how it ought to be managed, and how different instruments can be used as alternatives to one another over time in regulating the relationship between the State and the Union. In other words legitimacy requires a certain type of flexibility.

Thus, the first set of lessons we draw in this book is that our quest for legitimacy should focus less on places or loci of governance and more on processes of governance. This is true first and foremost for the process of change in levels of governance itself. The real question before us is how can changes in levels of governance be conducted so as to enhance the legitimacy of the system? We are not alone in calling for the need to reassert the importance of process over substance, the need to move beyond comparative statics, in the study of competence and federalism. Yet many scholars or politicians still frame the question as one of optimal allocation of powers between levels of government—if only we could agree on how to define such an ‘optimum’ and do away with the imperfections in our political system that lead to the gap between such optimal and actual allocations of tasks!

In contrast, the federal vision does not describe an end-state, or even a series of equilibria, but a process. 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 of time. Instead, political communities will oscillate endlessly between the poles of unity and autonomy as they search for the appropriate scale of their collective endeavour. 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 these endogenous dynamics and the responses to exogenous ones ought to be constrained by the design of our federal systems. The first order answer is: not very much 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, p. xx) a well-functioning federal system is one 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. This is a view inspired by a cyclical account of the history of US federalism. It may be at odds with traditional integration theories developed in the European context to the extent that they point to cumulative sources of centralization over time, albeit with institutional fits and starts. Yet, in Braudelian terms, these few decades ‘at the beginning’ may not be the relevant time frame. Most importantly, the kind of changes that we discuss and call for, reflecting as they do shifting notions of subsidiarity and legitimacy, can happen against a backdrop of continued integration—if by ‘integration’ we mean the creation of increasingly dense ties between societies and individuals across borders. 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 goals.

In spite of these arguments, the debate over governance and subsidiarity in the EU has come to feed into, and been partially overtaken by, the constitutional debate over competences and their formal allocation. Has the EU reached a critical juncture when it needs to behave like a ‘mature’ polity? Or is there greater value in an ongoing process of legitimization of policy processes and practices? Some would argue that precisely in order to allow for sustainable change, a federal vision calls for embedding flexible adjustment within a context of ‘constitutional’ stability, whether or not this implies a formal constitution—whether one values constitutional stability like Hamilton because of the ‘reverence that time bestows upon all things’ or because it provides for credible pre-commitments 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. The real question, as Joseph Weiler argues in his chapter, is whether the EU’s existing quasi-
constitution is not only sufficient but also a normatively superior approach to traditional constitution making. I will revisit the issue at the end of this chapter.

As an alternative or intermediary step to a full-blown constitution, one option put forward is that of a formal Kompetenzkatolog, or ‘charter of competence’, both as a means of providing greater clarity for citizens and as a break on expanding Union competence. Would a non-binding non-justiciable indicative list describing in clear language the overlapping spheres of competence of EU actors and why and how they may change do the trick? In any event, even while embodying a commitment to flexibility, such a charter could not in any way be considered as a panacea. In the EU as in the US, the spirit of federalism and subsidiarity lies elsewhere. Concern about over-zealous action on the part of the federal level must be addressed in other ways. What then are the alternatives to formal assignment or reassignment of competences?

2. From Distributed to Shared Competences: Networked Cooperation, Proportionality, and Changing Forms of Governance

Consideration of these alternatives needs to be predicated on a second shift that has long been at play both in the workings and in the understanding of federalism, namely, that federal dynamics are increasingly about the management of shared rather than distributed competences between levels of governance. This is not new. It is a little disputed fact—illustrated by many of the authors in this volume—that in the US as in most other federations, and indeed in the EU, ‘dual federalism’, in which most powers and competences tend to be divided neatly between federal and local governments, has given way to ‘cooperative federalism’, in which most powers and competences are treated as, in principle, shared by the various levels of government. This on the assumption not just 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 (Capelletti, Seccombe, and Weiler 1986); but, furthermore, that even then most tasks will need to be undertaken jointly, through an increasingly fine-tuned division of labour 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 US as well as in the EU, needs to be analyzed as a multi-level phenomenon (Hooghe and Marks, 2001).

A first, obvious legitimacy problem arises from concurrency. How is it possible, in this context, to draw up meaningful lists of competences? Of course, historically, shared competences have been spelled out in federal constitutions either directly or 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 and ad hoc encroachment on States’ residual power (Hesse and Wright 1996; Bermann and Nicolaidis, this volume). But codifying such practices in the EU would be akin to political reverse engineering. Would a competence list in the EU need to recognize and present the existing gradation from reserved State competences, to conditionally reserved competences, to national but coordinated competences, to partially or mostly transferred competences? Or could it simply indicate the kind of issues which might a priori be addressed predominantly at the European level, at the state level or at the substate level? At a minimum, an accurate listing of competences would require statements as to when various components of ‘shared competence’ are activated and under what conditions—for example, in the EU: welfare provision at the state level except for regulation related to trans-boundary movement of workers. But this approach in turn would, if anything, risk exacerbating popular perception of centralization. Thus, if we refer to the issue-areas listed by Moravcsik where the EU is generally not involved—such as taxation, social welfare provision, defence, foreign policy, policing, education, cultural policy, human rights, and small business policy—most of these nevertheless appear one way or another to have been partially ‘federated’ as shared competence. We need to develop a public language of shared competence.

More broadly, coming to grips with the implications of shared competences implies a normative commitment to shared authority in the broadest sense and an acceptance that powers held by different levels of government are often implied, tacit, or contested, and not plainly granted by explicit contracts—constitution or treaty. This may of course have different implications as to how levels of government relate to one another. There are those like Albert Breton who extol the virtues of competitive government and prefer to see ‘levels’ compete in the exercise of these shared competences as to who can best serve the citizen in a given policy field, with a set of background rules to manage spillovers and externalities between their respective actions. In practice however, the sharing of competences has usually led to active cooperation between levels of governance. As Peterson and O’Toole, remark ‘legislation at any level is unlikely to achieve its stated goals unless it is shaped, moulded, and scrutinized by actors interacting across different levels (p. xx). Accordingly, ‘federalism usually gives rise to less formal and intricate structures within which a large number of actors, each yielding a small slice of power, interact’ (p. xx). Network modes of governance arise when policy-making depends fundamentally on the concerted action of multiple layers of governance and when policy outcomes need to be the products of negotiation and mutual adjustment between different levels of government.
But such an ‘organic’ fusion of power can be perceived as much a threat to democratic legitimacy as unwarranted transfers of power to the centre (Wessels, 1997). 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? If it is true that networks are most powerful ‘during the least visible, transparent, and rules-based stages of the policy process [for example, agenda setting and implementation]’ (Peterson and O’Toole, p. xx), the stakeholders who are not direct participants in network deliberation have little way of knowing when and by whom important decisions are made. When considering the implication of shared competences on democratic legitimacy, therefore, 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.

So when we ask what subsidiarity means under shared competences we must not only ask how lower levels may protect themselves from overreach by higher levels but we must also explore ways in which to guard against potential collusion of diverse levels of government and the dilution of accountability this implies. I will come back to this twin concern in the next section.

Finally, I argued above that the ‘federal’ legitimacy challenge is first and foremost to establish political arrangements to better manage change in the locus of power and policymaking. But isn’t there a tension between this emphasis on change and cycles and the assumption that federal dynamics are increasingly about the minutiae of dividing tasks? How can we 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? Indeed, Grodzins (1966) introduced his famous analogy of the federal form of government as a marble cake whose layers interpenetrate rather than dominate one another in part as a reaction to the understanding of federalism as a cyclical phenomenon; if the ‘marble cake’ was a better reflection of the nature of the beast than the simplistic ‘layer cake’ metaphor, then it was also plausible to predict a gradual evolution towards a unitary state, albeit with complex sets of interactions and modes of division of labour within it. Can one accept the premise without endorsing the conclusion? Isn’t this reasoning bound up with interpretations through statist lenses, where a trend to concerted action gets immediately interpreted as the creation of some kind of new—statist—centre? If indeed polities develop increasingly subtle and finely tuned allocation of tasks among various levels of governance, does this mean that the degree of ‘separatedness’ between these levels itself is fading away?—in which cases we may speak of centralization or decentralization along the French meaning of
'déconcentration': delegation to the periphery, diffusion of responsibility but under a single political authority. Indeed, Donahue and Pollack conclude their analysis of federal rhythms by positing that ‘the rhythm tends to slow and cycles to lengthen as a polity matures; first-order ambiguities are settled, and a degree of institutional inertia dampens the effect of discontent with both centralization and decentralization’ (p. xx). With time, there are bound to be less revolutionary swings in respective roles.

This does not make change less relevant, however: only 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. In this light, 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, 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. In the end, if most competences are shared, the principle of proportionality is the operational core of subsidiarity. And proportionality can be a powerful source of legitimacy if it can be translated in straightforward notions. Be it under shared or exclusive competence, the question is: are policy means proportional to the ends pursued? To what extent is power to act and make policy exercised? How extensively? Proportionality brings with it an in-built open-endedness and opens up spaces, margins where the democratic process can take place. When, in the name of proportionality, the European Court of Justice (ECJ) requires the states to restrict their market intervention to labelling requirements, it is effectively handing back responsibility to the consumer and consumer associations. The question is whether and how citizens realize that these spaces have been opened. Schmidt and Peterson and O’Toole discuss how this possibility to ‘enter’ the policy process varies with stages of policy-making—agenda setting, decision, implementation—as well as across states.

It is through these lenses that we need to interpret recent developments in the US and the EU invoking subsidiarity and devolution, from the rediscovery of the original spirit of the ‘directive’ in the EU—rebaptized ‘framework directive’—to the ‘open method of coordination’ (OMC) to deal with European labour market reform and unemployment to the reliance on state
innovation under broad federal guidelines for welfare reform in the US. As explored further in sections 4 and 5, taking subsidiarity seriously in these contexts means rethinking the role of the Union as enabling rather than constraining for all levels of governance.

In the end, there may be an inescapable paradox in promoting subsidiarity in a context of reigning shared competences both in the US and in the EU. On one hand, in the current political climate, subsidiarity and devolution are generally interpreted as the Union level ‘doing less better’ to the extent that if and when it acts it should do so in ways deferential to lower levels of government, whether early at the policy formulation stage or late at the implementation stage. At the same time, however, it could be argued that ‘softer’ methods of intervention are precisely 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.

3. From Separation of Powers to Power Checks: Governance Structures, Procedural Subsidiarity, and the Safeguards of Federalism

If both the need for flexible governance and the reality of shared competences render the exercise of competence delineation largely pointless, if at the same time subsidiarity is to be found in developing new forms of shared governance, then we need to ask how a system can best be designed to safeguard the interests of all levels of governance. This question brings us back to the very foundation of federalist thinking: that, however powers are allocated between levels and branches of government, the real issue is whether these powers are checked, how to prevent their perennial abuse, and, in doing so, how to ensure accountability in their use. The constitutions of all polities consist to a great extent in setting out limits to the exercise of public and private power. But neither the US nor the EU has been impervious to the Jacobin’s impatience with self-restraint, including through the exclusive resort to short-term majorities.

The broad principle espoused here is 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. The sharing of competence renders checks on respective powers both more necessary and more difficult. This was Elazar’s insight when he pointed out that a rigid dual federalism never existed in the United States and that cooperation has been the hallmark of national-State relations since the early days (Elazar 1962). What mattered was not the fact of
cooperation but the degree of coercion involved in the relationship, one which changed significantly in the US in the 1960s. Normatively, the question raised ever since in the US has been how to constrain such coercive tendencies. In spite of the relatively much greater weakness of the Union, the EU is no longer immune to this fundamental question.

Thus, a federal vision calls for further revisiting the role of ‘power checks’, constitutional constraints or ‘mechanisms of control’ in limiting the import of transfers in competence, vertically or horizontally. Here the shift is from examining change simply in the locus of power to assessing how such various modes of control may themselves be the markers and measures of change and how they can and have been refined over time; or, as Coglianese and I ask in this volume, rather than being simply curbed, how can allocational shifts be designed in such a way to ensure that the transfer of authority from one unit to another will be used in the way it was intended?

The safeguards embedded in federal designs exist precisely in order to prevent any level of governance from being absolutely empowered or disempowered over time. We could invoke yet again Calhoun’s sophisticated defence of his federal vision almost two centuries ago as one which ruled out allowing any level of government to be the judge of its own competence. Instead, what was needed for Calhoun was a ‘mutual negative power’ consisting of a right both to nullify the acts of the other and to interpose one’s power to arrest such acts. In Calhoun’s view, nothing short of this would possibly preserve the division of power on which rested the equilibrium of the whole system (Forsyth 1981). Is it not worth asking whether such balanced deterrence obtains in our respective polities? To be sure, 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 US—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 (Cappeletti, Seccombe, and Weiler 1986; Weiler 1999).

What one may find fascinating here is that lessons continuously need to be relearned. We need continuously to relearn to think our way 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. Most importantly, beyond the issue of ‘State rights’ per se, power checks include 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.
This is not the place to provide an exhaustive catalogue of the safeguards of federalism—what Bermann and Nicolaidis in this volume call ‘the core “guarantee” of the values of federalism’ (p. xx)—but rather to suggest our bias and our method through some examples picked in this volume. The bias shared by most authors in this volume is to ask critically how the prerogatives of lower levels of governance can be, and have been, safeguarded. The method is functionalist: to systematically analyze how these safeguards can act as substitutes for one another. In asking how principals retain some degree of control over agents to which they delegate authority, Coglianese and Nicolaidis seek to highlight the functional equivalence between various sorts of ‘agency ties’, and the chapters by Bermann, Halberstam, Moravcsik, Majone, and Schmidt all analyze alternative power checks and institutional constraints, suggesting in particular how the potential for substitution between them is key to the adaptability of the systems. We can recognize such tradeoffs in the original institutional designs or in the way they have evolved over time. We can also recognize such tradeoffs by contrasting the US and the EU and assessing whether apparently different power checks actually have similar functions.

If we combine the responses provided throughout this volume, we find that although the US and the EU have leaned towards a very different balance between mutual oversight and autonomy across levels of governance, both have used changing combinations of safeguards in doing so over time. In both sides, the delineation of competences per se and the judicial policing of general principles of allocation—for example, enumerated and residual powers, supremacy, pre-emption—could simply not suffice in establishing operational rules of the game.

Do we need to recall, echoing the US Supreme Court, that in both polities the principal means chosen by the framers to uphold the authority of the States was the structure of federal/Union governance itself? The form and intensity of representation at the centre surely serves as the starting point for debates over legitimacy across a whole range of institutional contexts—from the United Nations to the United Kingdom. And it can certainly serve as a crude test of a polity’s federal credentials. The US presidential election in the autumn of 2000 has dramatically reminded us that even there State delegates to the electoral college—or for that matter members of the House of Representatives—are still, to some extent, delegates of the States in their sovereign character, not delegates from the States considered as mere electoral districts. It is striking that at the very same time, at the Nice Summit in December 2000, EU leaders endorsed for the first time the validity of EU-wide popular majorities as a democratic criterion. Not withstanding this interesting contrast, the distance between the two polities on this count is vast.
As Bermann points out, in the US, as in most mature federations, the constraints on the exercise of power at the federal level itself—structural and to a lesser extent procedural safeguards—have considerably weakened over time. Governors usually need to change hat to be heard in Washington. There may be interesting trends to watch, such as the emerging State representation in external trade negotiations covering areas where they continue to be the primary regulators of standards and services. Nevertheless, in the US legitimacy through safeguards must be found elsewhere.

This is of course in marked contrast with the EU, where state representation is, to a great extent, the centre. This fact is familiar terrain but the authors in this volume disagree on its implications for legitimacy. Indeed, Moravcsik believes that it is precisely the EU’s stringent ‘constitutional constraints’ that are responsible for what he sees as a normatively desirable outcome: the limited scope of EU action. Member State veto or the requirement of super-majorities in the Council of Ministers combine with the states’ quasi-fiscal monopoly and various kinds of opt-out options in curbing expansionary impulses. The ways in which the extent and forms of such constraints vary according to issue-areas testifies to the EU’s sophisticated ‘evolutionary pragmatism’ (Moravcsik and Nicolaidis 1998) or the organic development in Europe of a hybrid form of customized federalism. On the other hand, Pollack and Donahue highlight the importance of other centralizing or decentralizing factors which in turn will determine how constraining these various constraints might be across issues.

In the pure federal logic, then, one could contend that sustained legitimacy in the EU crucially depends on a ‘principled defence’ of the national veto in issue areas still seen as ‘belonging’ to the states even while the Union intervenes—taxation, immigration, welfare state provisions. 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’ (vetoers) should not always prevail over ‘the fear of the many’ (majorities). Legitimacy in this context crucially depends on adequate indirect accountability. Alternatively, the resort to ‘enhanced cooperation’ can serve to provide a political safety valve in cases where states can only agree to disagree. Provided ways are found to minimize its union-wide impact, asymmetric federalism, as testified by the US experience is the safeguard of last resort.

And yet ‘sharing’ in central power 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 centre 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.

For one, the Union level needs to design and sustain institutional mechanisms to ensure the participation at the centre of levels of governance lower than the states. And although the call for participation at the centre of the regions, municipalities, and other local or functional authorities has now become the hallmark of EU politics, this is a theme the US needed to revisit as it embarked into decentralized welfare reform. If devolution or subsidiarity means emphasizing decentralized implementation, then participation at the centre of the lower levels of governance is itself a means of increasing efficiency as these levels can indicate what can or cannot properly be implemented. This is where input and output legitimacy converge. If the implementers participate in the central decision making process they are likely to indicate the boundary of the possible—what is sustainable on the ground. As a quid pro quo and in order to alleviate fears of cheating, the Union has the responsibility of ensuring transparency among the actors involved on their respective implementation approaches. In short, there is little doubt that the multiplication of ‘veto-points’ is the price to pay for shifting from diplomatic politics to politics tout court.

Perhaps the most fundamental alternative focus to representation at the centre is to emphasize the procedural dimension of subsidiarity, the question of ‘how’ powers are exercised beyond the formal structures through which they are exercised. This theme is developed by Kinkaid, Lazer and Mayer-Shoenerberger, Bermann, Halberstam, Majone, and Peterson and O’Toole. Procedural safeguards imply that the checks on the actor concerned—the federal government, agencies, states—consist not only in limiting its sphere of action but, within this sphere of action, limiting its freedom of action. Rules of due process, transparency, and openness require neither cumbersome oversight on the part of the principals nor rigid delineation of competence ex ante. Instead, they require that whatever takes place in the exercise of competence, and change thereof, does so through procedures that ensure that all stakeholders’ viewpoints be considered and extant principles be respected. And crucially it means requiring decision-makers to ‘give reasons’ for their action and to reflect publicly on the intensity of the actions needed (De Búrca 1999).

The drafting of devolution or subsidiarity ‘criteria’ in the US and in the EU has raised once again the question of what the explicit benchmarks for giving such reasons ought to be.
It may be argued that as they exist, or as they are read, these criteria exhibit a centralizing bias as a result of their economistic inspiration—federal intervention is justified by economies of scale, the existence of ‘public goods’ or generic efficiency criteria. But there is little explicit basis for considering the more fundamental issue of whether the inherent democratic value of lower-level decision-making may in and of itself justify losses of efficiency. Be that as it may, similar ‘federalism’ or ‘subsidiarity’ criteria can in any case lead to radically different allocation decisions. If the prescriptive implications of the relevant texts cannot but be under-determined, stress must be put beyond the formulas on the evaluation procedures themselves. What matters is that the political sphere be pledged to ground decisions about levels of governance in rational argumentation rather than political expediency—and to demonstrate this through public debate.

One may ask whether legitimacy on this count rests with technical or political credentials, whether assessments need to be made \textit{ex post} as well as \textit{ex ante} or whether such exercises need to be conducted in dedicated institutions or not. At a minimum all options need to be considered and weighted. In the US, the emphasis (under the executive orders on federalism) on assessing the cost and benefits of regulation rather than on the federal question per se may reflect the lack of strictly \textit{political} input in the process. In the EU, there may be some scope for enhancing \textit{ex ante} political control over the subsidiarity question, including through the direct involvement of national parliamentarians—beyond those belonging to ‘European committees’ as in the existing parliamentary network. At a minimum, the EU needs to take the 1997 Amsterdam protocol on subsidiarity and proportionality seriously. The exercise of giving reasons should become an iterated exercise in collective governance instead of the current issuance by the Commission of perfunctory explanatory memoranda. More ambitiously, to supplement the vetting role of the subsidiarity Committee, the EU could follow the US example and grant its own accounting office or a network of national accounting offices the task of evaluating efficiency claims related to subsidiarity through US-style ‘regulatory impact analysis’. More research needs to be done on how to adapt to the EU some of the technocratic review procedures in the US legislative processes, as conducted in particular through the Office of Management and Budget (OMB) and the General Accounting Office (GAO).

Ultimately, however, procedural subsidiarity concerns the modes of involvement of societal and public interests at large, especially in the regulatory sphere. In the US, as Majone demonstrates in his chapter, the norms of transparency, inclusiveness, public justification, and judicial review have become the instrument of choice of regulatory agencies through a long learning process of federal governance in regulatory matters. Why not design a European version of the Administrative Procedures Act (APA), which in the last decade has fostered
countless procedural innovations simply through elaborating on the general and apparently innocuous imperative of giving-reasons? Experimentation along these lines in the US has been sustained by the belief that procedural safeguards obviously contribute not only to ‘input legitimacy’ or democratic legitimacy in the classic sense but to the effectiveness of governance ‘services’, thus promoting ‘output legitimacy’.

The apparent success of the APA testifies to the fact that the agents of governance themselves cannot always reliably enforce upon each other such procedural safeguards. We are led once again to the ultimate enforcers of the rule of law: the courts, standing in particular for all affected non-governmental interests. Of course, the rule of law as a source of legitimacy is not self-sustaining if it is not embedded in institutions of governance that are a direct expression of democratic self-determination (Habermas 1996). But the enforcement of the law itself can contribute to creating more optimal conditions for such self-determination. Indeed, US courts have increasingly reasoned that if structural constraints are insufficient to uphold the core values of federalism then they, the courts, must police the boundary between the Union and the States by protecting core sovereign competences or scrutinizing the use of the ‘necessary and proper’ clause for congressional action. And while the ECJ has been reluctant to directly pronounce on competence issues, some of its recent ‘proportionality’ judgements come very close. In this regard, the *Tobacco Advertizing* judgement of September 2000 will likely be considered as a landmark—ruling as it did against the opinion of a majority of Member States that the Union cannot give itself the right to ban all tobacco advertising in the name of the single market.

The US Supreme Court has gone a step further by crafting what Bermann refers to as relational safeguards, that is, principles which identify certain ‘forbidden interfaces’ between levels of governance, such as granting States immunity to suit or prohibiting the federal level from telling the States what to do or what to spend—that is, anti-commandeering. Here, the contrast between the two polities may be most enlightening; but we should not overlook common concerns. Why is anti-commandeering or the prohibition of unfunded mandates considered an important ‘safeguard’ in the US but not in the EU? As Halberstam makes amply clear, there are two sides to the commandeering coin. On the one hand, ruling it out reduces the margin of manoeuvre of the centre: it must put its money behind its edits. On the other hand, requiring it—as opposed to direct action—allows for appropriation or customization on the part of the commandeered. In the EU this mediation reflects states’ capacity to retain control over policies applied on their territory and ultimately to retain the monopoly of ‘legitimate governance’: no representative of the EU—policemen, judges, custom officers, or ministers—exists in the lives of EU citizens. In other words, the EU’s version of a relational safeguard is precisely to require, as Halberstam puts it, that ‘the central
government work through component States rather than around them’ (p. xx); this is true both for the implementation of norms or laws—directives and now increasingly ‘soft law’—and for the provision of resources—human, financial, and administrative—necessary to enforce EU actions and policies. Thus in the US commandeering takes away the resources jealously guarded by the States. In the EU, on the other hand, it is a reflection of state’s dominant endowment: as the French would say, their incontournabilité. Control is asserted in one case by disallowing, in the other case by requiring, that one’s own resources be used on behalf of another level of governance.

While these alternative views reflect different assumptions about preferred channels of accountability in federal systems, it is worth asking how they overlap. The EU’s reliance on structural safeguards has led it to underplay relational safeguards. Could this change? It may be, for instance, that EMU’s ‘stability and growth pact’ could be amended to allow states to better control expenditure cycles and the ‘broad economic guidelines’ read as not to impinge on the social tradeoffs made through fiscal decisions at the domestic level. As important in the current European climate of domestic decentralization, ‘unfunded mandates’ are the object of increased concerns on the part of those actors of governance who are neither as well endowed nor as ‘plugged in’ as the Member States: regional and municipal authorities. Procedural subsidiarity for them would require systematic ‘financial impact assessment’ of EU laws, regulations’ and policies perhaps accompanied by corresponding redistribution of resources. Here, better representation at the centre is considered more as a means to strengthen ‘relational safeguard’ than as an end in itself, whereby consultation at the top can be systematically related to such impact assessments.

In the US, the prohibition of unfunded mandates is certainly considered as one of the main trophies of the devolution camp. But, as Kinkaid sceptically underscores, this has little significance in and of itself in a system of widely shared competences. In some areas, it may be desirable to increase the ‘viscosity’ of the system and let States be asked to do the work, provided lines of accountability are fine-tuned and proportionality is applied. Moreover, it may be that in the US, too, a greater say could be given to sub-State level authorities in the formulation of policies affecting their own mandate. Education policy may increasingly evolve in this direction.

The ultimate relational safeguards is the clear assignment of responsibility. Could we not envisage the adoption in either systems of formal or informal codes of conduct regarding standards of accountability in order to prevent agents from ‘passing the buck’ in multi-level governance system? Citizens are concerned with assignment of responsibilities rather that authority per se. They need to see contracts between the different actors involved about who is publicly responsible for what result irrespective of who does what. Responsibility here
means that certain actors be accountable for outcomes as well as for certain procedural obligations, and motivated therefore to mobilize others towards the task. It is facilitated by diffuse reciprocity within governance systems and the existence of political parties responsible across issues and levels of governance. It also rests on broad-based societal involvement in governance. Thus, when we are told of the participatory processes in US or EU policy networks, we need to ask whether such participation succeeds in creating a sense of ownership among non-governmental participants; and we must ask whether there are ‘participatory externalities’, that is, whether such participation changes the debate externally in the broader polity rather than simply within the networks themselves. In the end, if shared competence means shared responsibility, the ultimate responsibility must also rest with citizens. For legitimacy to be sustained, people must ‘own’ policy failures as well as success—\textit{in sickness and in health}.

4. From Containment to Empowerment: Proactive Subsidiarity, Managed Competition, and Mutuality

The fourth shift emerging from this volume constitutes as it were the positive counterpart of federal safeguards, namely, 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, defined here by Landy and Teles as ‘the obligation of each level of government as it participates in joint decision-making to foster the legitimacy and capacity of the other’ (p. xx). 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 (Howse 1995).

Subsidiarity takes these conditions as exogenous: levels of governance are determined by the scale and boundaries of the problems. Mutuality endogenizes 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 supra-national issue’, we need to ask ‘What conditions are necessary to enable state or local government to effectively
contribute to the effective overall management of this task?’ And ‘how can the ‘Union’ foster those conditions?: a kind of qualitative interpretation of the principle of proportionality.

Here again, we draw on a core extant insight of most theories of political and economic integration. Institutions of all sorts have always be understood to be potentially both constraining and enabling. Functional theories of state-building, whether of the liberal state as the agent of individual liberty or of the capitalist state as the instrument of capital accumulation, do not view centralization through the state as an end in itself. And beyond the debate over what has historically fuelled the creation of federations lies the firm belief that with the *tous pour un* comes the *un pour tous*: *we are each* more powerful, more wealthy, and so forth, when we pool our resources than by standing alone (Hesse and Wright 1996).

The question remains, however, as always, at what (democratic) price? How much agency needs to be given up to the whole in order to strive from taking part in it? Genuine empowerment is not mainly about distributed benefits: it is about distributing means of action. And in doing so, the question is not only ‘to do what?’ but ‘against whom’? If empowerment applies both to lower levels of governance, including the state, and to people or societal groups *within* the state a coherent strategy of ‘proactive subsidiarity’ needs to take into account the many connections, synergies, and contradictions between these two dimensions.

The need for empowerment of the first kind arises in the EU context from the general *malaise* felt in consequence of the challenge to the democratic welfare state from economic integration at the regional and global levels. Here, the positive argument that the EU has ‘strengthened the state’ or parts thereof (Milward 1992; Moravcsik 1998) even if *historically* correct need to be expanded into a *normative* argument as to how it can continue to do so *across the board*, especially in the context of monetary union. Analysts may disagree over the extent to which national problem-solving capacities have been affected by the economic and legal constraints of economic integration and by conflict between states with regards to precisely those instruments of market correcting policy that have been of critical importance for the legitimization of the welfare state, such as social policy. Whatever its magnitude, the fact is that effective loss of control of economic outcomes at the national level has not been compensated by a concurrent shift of resources to the federal level. As Sharpf argues in his chapter, this means that other compensating mechanisms need to be found. Since Europe is part of the problem, European policies can also help to alleviate it—provided that measures can be identified that will not be blocked by massive conflicts of interest among member governments. But the challenge to the democratic welfare state cannot be simply addressed by some kind of assignment of greater power to the level of the federal sub-unit, much less the local community; limits on beggar-thy-neighbour competition at the federal level may be needed to (re)-empower these democratic communities to respond to demands for social
justice. In the spirit of mutuality, the Union should only provide a space within which states can choose to adopt their own idiosyncratic tradeoffs between social and economic values. And indeed, there are ways in Europe to address such problem-solving gaps, albeit imperfectly: from coordinated policy reform and ‘shaming’ methods to the monitoring by the Commission of ‘unfair regulatory competition’, to the policing of competitive subsidies. But as Vivien Schmidt shows persuasively, it is the very characteristics of different Member States that will determine the extent to which they can be strengthened or empowered by the federal level. Here, studies of federal systems may do well to borrow from some of the nascent insights of globalization scholarship regarding the ‘mutual constitution’ of the global system and those ‘globalized states’ which are agents rather than object of global transformations (Clark 1999).

While this last point is also applicable to the US context, the US has of course had a very different trajectory from Europe in this regard. As Kinkaid points out, ‘After World War II . . . the federal government engaged in many capacity-building exercises to help State and local governments become stronger intergovernmental partners’ (p. xx). To this day, fiscal redistribution plays a crucial role in capacity-building across States in the US. And the welfare-state devolution experiment reflects in part a broad commitment to ‘mutuality’ as the federal level distributes resources accordingly. In the field of health and safety regulation, States with approved Implementation Plans retain primary regulatory responsibilities, while the Union’s main task is to assist and supplement their action. In all these dimensions, empowerment from the top is all the more prevalent that the power, authority, and resources in the US have been vested at the centre before being channelled back down.

When it comes to empowerment ‘of the people’ the contrast between the two polities may be less stark. One of the foremost values of federalism on both sides is to provide individuals with rights, claims, and opportunities at least partially lacking within the confines of their own polities. There is no greater symbol of citizen empowerment by the federation in the US than the subjugation of an Alabama school in 1963. And while the EU has no federal guards to send, its has empowered unions, women, gays, and children through its rights and programmes—under the general rule that the higher level of protection applies. In empowering individuals, the role of ‘standards beyond’ as empowerment is a basic feature of international relations, not just federal unions; and there is of course a thin line between empowerment and co-optation. The question here is whether ‘proactive subsidiarity’ can mean more than that, whether it also ought to mean that the centre of gravity where claims are aired and resolved and action taken should not itself be kept at as low a level as possible. In this sense, perhaps the need for empowerment also stems from a rather pessimistic assessment of the capacity of societal agents for spontaneous organization and the possibility to rely on a bottom-up solving of democratic deficits. If subsidiarity is defined in terms of ‘closeness to
the people’, then the question should be raised not just as to the role of civil society in EU governance—as ‘participative constraints’—but to the role of EU governance in fostering vibrant civil societies in Member States.

In this light, a focus on the empowerment imperative can lead to more radical brands of devolution advocacy. This is definitely the line taken by Landy and Teles when they argue that local communities may actually need to draw from the centre to build or rebuild the social capital and public infrastructure needed to fulfil the ideal of grass-roots public empowerment. ‘Local government’, they argue, ‘contributes to central government by taking the brunt of the burden of citizen-demands and of providing a coherent and properly constrained voice for citizen grievances. To do so adequately it must be both responsive and capable. Central government has the responsibility to facilitate and encourage the ability of lower-level governments to act as sites for deliberation and administration’ (p. xx). The implication for the US is radical devolution with support from the centre: not even ‘funded mandates’ but ‘funded self-mandating capacity’. Local authorities should be able to experiment freely, and to do so with federal moneys. The implication for the EU is perhaps even more radical but also more sobering. Here, support for local democracy is not just a necessary supplement to but the only option for pursuing legitimacy-enhancing strategies. The legitimacy that the EU so much covets ‘should derive from its ability to protect the possibility for democratic government in its Member States, not from the largely fruitless mission of democratizing itself’. Therefore, the best way to strengthen the democratic legitimacy of the EU is through ‘indirection’, using the policy tools and subsidies available to the EU to strengthen democracy at the grass roots and help resuscitate local government, ‘the true seed-bed of democracy’ (p. xx). In this sense, the argument by Moravcsik and Majone that democratic outcomes may result from non-democratic processes, by empowering the median voter, fails to take into account the intrinsic value of fostering democratic cultures.

Localism is the reading of mutuality which is the closest to what people understand subsidiarity to mean. But top-down empowerment should not necessarily imply that those thus empowered are meant to limit the scope of their action to a given bounded space. Landy and Teles may be right that many public goods and infrastructures are local, but others—the environment, transnational railway networks, or the ability to control crime—are definitely of a greater scale. Different communities are characterized by different configurations of ‘conjoined self-interest’. Moreover, in order to provide citizens with the political skills and understanding necessary to fully take part in complex multi-layered polities like the US and the EU, it is not clear that the purely local space is the only relevant one. There are, for instance, democratic gains from centralization as groups with dispersed interests benefit from economies of scale or groups previously disenfranchised are given access previously denied
to them. These gains can in turn trickle down at the local level. If it is seen as a virtue for the existence of the wider community to empower certain groups or interests that have hitherto been marginalized at the local level, then strategies of empowerment may call for creating channels of access to the centre rather than simply protecting local political space. Negotiations over the Convention on Human Rights, Commission transparency programmes, entrepreneurship projects supporting the unemployed, proactive moves from the EU Commission and Parliament to empower consumers against business all fall in this category.

There is no denying, of course, the tensions that do or may arise from these different targets of proactive subsidiarity. ‘Multi-tier empowerment’ of states, executives within states, regions, cities, citizens, and NGOs may be another way of enhancing checks and balance in a federal system. 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, proactive subsidiarity should consist above in creating process obligations at the national and sub-national 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 labour 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.

There are undoubtedly powerful counter-forces 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 inter-issue tradeoffs at the centre—the balancing of priorities, and thus 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 are 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 are themselves still highly fragmented in comparison with the US. Perhaps this will continue to be the price to pay for adopting a strict ‘empowerment’ approach to EU competence. But if integrated governance continues over time to exercise its centripetal force, there may be a need for an even more radical re-writing of the federal game.
5. Beyond Hierarchy: The Shift to Horizontal Subsidiarity and Multi-centred Governance

In the end, the most fundamental challenge that we face is to engage with Joseph Weiler’s call for thinking federalism outside the state-centric paradigm which informs all constitutional enterprises and with Daniel Elazar's vision of a ‘post-modern’ version of federalism that would somehow come back to its origins and eschew hierarchical models of federalism altogether. Rethinking federalism means thinking beyond the traditional Weberian hierarchy of the state. Accordingly, the federal project must shed its image as a device for vertical division of labour, focusing instead on horizontal division of labour, cooperation and competition among states, regions, and peoples—and so recover a concept of horizontal rather than vertical subsidiarity. In doing so, the EU needs to take on board the notion that permeates the US system that government is perceived to be illegitimate if its image or reality suggests that one ‘people’ is ruling over another; and the US needs to take on board the notion of mutual recognition that permeates the European Union.

The fifth and last shift underpinning our federal vision is therefore from a vertical paradigm of multi-level governance to a horizontal one of multi-centred governance. In this vision, no sphere of competence dominates another and the Union becomes the warrant of coherence, the benign arbiter, the facilitator of horizontal transfers of sovereignty rather than the apex of a pyramid. This is not to say, of course, that notions of vertically ordered jurisdictions and the hierarchy of norms that follows—Weiler’s ‘legal’ federation—are irrelevant to the reconstruction of the federal vision. When it comes to the fundamental constitutive question of pronouncing about competences, however, only a polycentric understanding of the EU—and, we would argue, the US—can allow for the sustained legitimacy of the system. If such legal pluralism implies that the issue of ‘who decides who decides’ should be left open (MacCormick 1993), then ‘the constitutional discourse in Europe must be conceived as a conversation of many actors in a constitutional interpretative community, rather than a hierarchical structure with the ECJ at the top’ (Weiler 1999: 322). Of course, such a conversation must be punctuated with resolutions of potentially conflicting viewpoints. But why necessarily fear cacophony if law can acquire the ‘counterpunctual’ character that allows melodies to be heard at the same time in a harmonic manner (Maduro 2001)? In fact, the conversation needs to extend beyond judicial networks to the many political communities that constitute multi-centred governance systems.

Paradoxically, this is perhaps where the US of today may have most to learn from the evolving EU. Paradoxically, of course, because, as we stressed in the introduction to this
volume, historically and ideologically the defining feature of the US has been a collective avoidance for strong centralized power. Non-centralization is the very essence of American federalism. At the foundation, to the extent that the power of both the States and the union was seen to be delegated by the peoples of the various States—the only holders of sovereignty as an indivisible attribute—the putting in trust jointly by all of the member States of certain powers had precisely the same quality as the putting in trust separately, by each member State, of its own powers: each sovereign people created two equal governance structures (Forsyth 1981). Up to the 1960s, ‘political leaders and federal administrators alike viewed the role of the federal government as one of assistor to the states not as their superior . . . they understood the federal system to be a matrix of larger and smaller arenas instead of being a pyramid of lower and higher levels’ (Elazar 1984). The choice was not between one centre and none but between one and many, with different ones taking precedence in different situations. And the notion of partnership implied the distribution of real power among several centres needing to negotiate cooperative arrangements with one another in order to achieve common goals. For Elazar, in such a non-centralized system power was so diffused that it could not legitimately be centralized or concentrated without breaking the structure and spirit of the constitution. But as States increasingly came to serve as administrative arms of Washington, US federalism turned from the traditional non-centralized system to a decentralized regime. And the devolution era of the 1980s and 1990s, if not entirely rhetoric, has been but a very partial attempt to recover the former spirit of federalism: ‘federalism without Washington’.

‘Thinking federal’ certainly comes less naturally to Europeans with their history of centralized national governments, unmediated state-society relationships, and strong entrenched social hierarchies. And yet the EU has evolved organically, as it were, towards a federal model that is much less state-centric than that of the US at the end of the twentieth century. Most recently, the new forms of governance mentioned earlier in this chapter have come to resemble a new ‘federalism without Brussels’, or at least federalism without Brussels’ supranational institutions, à la US, albeit institutionalized à la Europe. The ‘open method of coordination’ refined from the Luxemburg to the Lisbon Summits - the flagship of this proclaimed new era - is pervading areas other than socio-economic policy, from culture to education. The new credo of policy experimentation, national action plans, mutual learning processes, benchmarking, and transfer of best practices is reminiscent of the ‘states as laboratories’ so familiar to the US policy landscape. Today, Europeans might like to think that the US could borrow a leaf from its own books on how to orchestrate such non-centralized processes of governance . . . with little danger of being heeded!
The question remains: is it the narrower character of European ends that saves the EU from its statist demons, as Elazar would have it? Or is it simply that a federal ‘state’ is less likely to emerge from a federation of nation-states than from a federation of States tout court?

In both polities, nevertheless, ‘non-centralization’ has both micro-foundations and macro-manifestations. At the micro-level, analysts concern themselves with the lack of hierarchy within the policy structures themselves. For Peterson and O’Toole, ‘what most distinguishes networks from more traditional forms of governance is their lack of hierarchy across nodes’ (p. xx). Nevertheless, networks are not neutral horizontal structures within which interests simply converge through generalized mutual accommodation. Instead, they are constituted by hubs and spokes, where the hubs serve as temporary repositories of information and focal points of authority. There are indeed centres in a multi-centred governance system, but many centres with no pre-ordained hierarchical ordering among them. It is worth noting that the term ‘horizontal subsidiarity’ is sometimes used to refer to the transfer of competence from public to private actors or from governmental actors to independent para-statal agencies. While I use the notion here to refer mainly to horizontal transfers between states or equivalent levels of governance, it is also true that in a world of networks the two are often intertwined.

These micro-foundations make possible and to some extent require the macro-level shift, that is, the understanding that what ought to ultimately matter in a federal construct is the mutual relationship between the constituent units, between the states themselves, as well as that between other actors forming horizontal bonds across borders; and that increasingly this mutual relationship is one of mutual transformation and penetration. This is what Keohane and Hoffmann (1991) were pointing out when they observed that the EU itself was constructed as a kind of network. The shift can be seen as part of a broader change taking place in the international system, which has been described as the emergence of a ‘post-modern state’ where transnationalism trumps both nationalism and supranationalism (Cooper 1996; Slaughter 1997). It echoes the notion that has been around for some time of a Europe at the forefront of a world-wide trend towards a ‘new medievalism’—the prevalence of increasingly complex and fluid systems of overlapping jurisdictions and multiple loyalties (Bull 1977; Ruggie 1993)—and in many ways harks back to Deutsch’s early functionalist understanding of the European project. But the federal vision precisely also seeks to draw out what makes certain kinds of political communities special in this global trend towards transnationalism. It stresses that the trend is embedded in a state system of great resilience and that the constituent units are strongly territorially bounded communities. In this light, what is relevant is not just common transnational structures and rules but, perhaps more importantly,
extraterritorial governance patterns, which constitute a much greater challenge to traditional notions of sovereignty. In short, our vision is one of transnational federalism.

This vision is a far cry from the teleological view of the European Union as the ‘Universal and Homogenous State’ en herbe heralded by prophets of the end of history (Kojève 2000). At the same time 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? Isn’t 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’ simply follows from this presumption. Such flexibility in turn implies that, in different areas of actions and at different times, the ‘centre’ of Union action will change location. In the US, interestingly, external pressure to negotiate agreements pertaining to the domains of individual States—for example, financial or professional standards—might revive the virtue of ‘flexibility’ there.

‘Mutuality’ Revisited: Mutual Tolerance, Recognition, Inclusiveness, and Empowerment

If we are to explore the normative implications of such a focus on horizontal subsidiarity, I believe that we need to revisit the principle of mutuality as a horizontal commitment between states or peoples rather than primarily between levels of governance. I will do so primarily in the EU context.

First, and at the foundation, is what Joseph Weiler refers to as ‘constitutional tolerance’. Weiler celebrates the unique brand of European constitutional federalism—or Europe’s federalism without a constitution—as embodying Europe’s deepest set of values, namely, that kind of tolerance which leads one to embrace the other without trying to change him, which leads European political systems to interact without necessarily converging. The fact that Europeans, through their institutions, practices, and habits, need to continually re-elect to submit themselves to their mutual obligation without questioning the legitimacy of these obligations is a testimony to the profoundly pluralistic nature of their Union’s covenant. National constitutions in Europe may be far from paragons of virtue but they have become the symbolic signposts of the continued survival of the peoples of Europe. Most importantly, European constitutionalization has profoundly contributed to the reformulation of national constitutitionalism. Not only is there no need for an overarching legitimizing framework—a
European constitution—but if such a framework aimed at the emergence of one people of Europe it would be normatively flawed. In effect, Weiler bypasses the intense but often fruitless debate as to whether European law and regulation is sufficiently direct an expression of democratic will to possess a legitimately constitutional status. Instead he calls for a deeper engagement with the real philosophical meaning of the constitutional status quo.

To be sure, we may disagree with the prescriptive implications drawn by Weiler. In the early days in the US, many followed Calhoun’s vision in which the Constitution did not stand over the States but was a compact between them, which meant that a State, in its sovereign capacity, could be guilty of violating it as a compact but not as a fundamental law. Can we not recover a minimalist version of a European constitution against maximalist versions anathema to constitutional tolerance? I will come back to this point below. In any event, the premise, and the basic precept of mutual tolerance, I would argue, matters more than the prescription. The European Union cannot but continue to be one of ‘peoples’ and its constitutional order must continue to reflect this imperative.

Second, if mutual tolerance is the ontological feature of multi-centred governance, mutual recognition is its constitutive principle. Mutual recognition has not only been the hallmark of the EU single market since the early 1980s but has arguably become the modus operandi in the EU as a whole (Nicolaidis 1993, 1997). It calls for participating states or jurisdictions to recognize their respective norms, rules, and standards as valid in each other’s territory. In this vein the prevalence of shared competences discussed earlier is as much about sharing competence horizontally across states as it is across levels of governance. What is, in effect, mutual recognition if not the search for a more effective division of labour between regulators and lawmakers across countries through optimal combinations of home- and host-country control? We need to be better able to account for the fact that the US brand of federalism is much less prone than the EU to implement mutual recognition between its Member States’ regulations or to engage into a mutual recognition logic externally (Nicolaidis and Egan 2001). Perhaps the tolerance for extraterritoriality is greatest in places which have a long tradition of mutual invasion and takeover—mutual recognition as the reciprocal and peaceful version of conquest.

Overall, mutual recognition is the legal and political impetus for and the expression of extraterritorialization. It reflects not a force outside states to which they have become subject but a proactive political choice to institutionalize and ‘mutualize’ extraterritoriality. When applied to the recognition of education, skills, and professional qualifications it means that we are no longer prisoners of our original polity and can choose to live among a variety of polities. While relying on the passport of our home laws and regulations, we are also granted a new form of social contract that includes the—still limited—right to choose among those
different national polities in the European space. Mutual recognition ultimately means being at home abroad.

Third, mutuality implies an injunction of mutual inclusiveness. In the spirit of power checks the key corollary to mutual recognition is horizontal mutual control, or ‘horizontal’ federalism safeguards. This means setting up a system of reciprocal droit de regard, mutual control between the states themselves. If states increasingly become each other’s agents—agreeing to yield jurisdiction over their nationals by virtue of their consumption patterns—then it follows that states are increasingly in the business of monitoring each other, mutually spying on one another to ensure residual control over extraterritorial dynamics. Héritier (1999) refers to these as processes for ‘managing distrust’, the underpinning of the EU’s governance structure. Yet constitutional tolerance and mutual recognition are not sustainable without some degree of trust as lack of trust eventually leads to pressures for harmonization or joint enforcement.

It is against this backdrop that emphasizing the need for mutual inclusiveness is key to the sustainability of a non-hierarchical system. Mutual inclusiveness implies not just a droit de regard but a right of voice in each other’s polities so as to legitimize the different decision-making processes that affect our lives. A horizontal approach to subsidiarity calls for obligations of inclusiveness in political processes, not simply of citizens or groups at the centre but, perhaps more radically, of citizens and groups in each other’s polities. Such obligations need to rest on express rights of multiple membership horizontally across communities—I am Italian and British or Welsh and Catalan—as well as the more classical vertical multiple membership—I am a Parisian, French, European. Already, as Maduro (1998) has argued, EU economic law can be conceived as providing the European citizen not only with economic rights but with political rights to have their interests taken into account in non-domestic national political processes. The EU needs to build on this legacy. In this volume, Weiler foresees that in the kind of Europe that he calls for ‘every norm will be subject to an unofficial European impact study’ (p. xx). The interests and practices of the other as other become part of the decision-making matrix in all arenas of power. While the traditional hallmark of functioning federal systems is to provide opportunities for access at each level of governance, we need to reframe this question of access in horizontal terms. To what extent do citizens benefit from ‘horizontal’ access, upheld by obligations of transparency and participation, in order to hold accountable loci of governance in which even their own governments do not partake? Hence, obligations of inclusiveness could be applied in certain areas to earlier stages of law and regulation making, whereby calls for input would have to be issued in areas of extraterritorial effect. The EU has pioneered this to some extent in the field
of environmental law. This process can be onerous and unwieldy but can be revolutionized through the Internet.

In this context, we need to think more systematically about the connection between the ‘outside-in’ and the ‘inside-out’ dimensions of inclusiveness. The demand that one takes into account the other when acting at home—outside-in—and the incorporation of such acts into the common body of reference—inside-out—are mutually reinforcing. The same logic applies to the legal as well as the political sphere. Under a non-hierarchical vision of legal pluralism, national deviations from Community law can be sustainable only if argued in universal terms, destined to become themselves part of the Community’s legal corpus. Henceforth, national courts will be more prone to internalize the views developed beyond their jurisdiction. Similarly, if a group of states decides to ‘deviate’ from common EU or federal practice or action through enhanced cooperation, it is more likely to internalize the interests of the ‘outs’ if its own initiatives are likely to become building blocks of future Union-wide action.

Fourth, mutuality ultimately calls for mutual empowerment between states and citizens of these states while minimizing mediation by the centre. To be sure, if there is to be horizontal empowerment it is often through the role played by the centre. When asked ‘what is Europe for’ politicians ought to respond ‘to help us help each other’. In this light, Choudhry’s final point opens up a critical debate for our volume as a whole by relating the economic conception of federal citizenship to the type of democracy citizens may expect from different levels of governance. The traditional view that federalism can produce a higher fit between citizens’ preferences and public policy by creating a market for mobile citizens shopping around for their preferred jurisdiction clearly fits the US much better than the EU. But it becomes relevant in the EU if we stress the role of voice, and not only exit, as a mechanism for expressing preferences at the state level: in that sense, mutual inclusiveness and mutual empowerment feed on each other. This is true if we consider that not only output legitimacy but also input legitimacy has to do with 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 policy-making through demonstration effects and the institutionalization of such demonstration effect, negatively—namely 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 it must be clear that 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. As Scharpf’s essay vividly demonstrates, 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.

**Shared Projects, Shared Identities**

Ultimately, legitimacy in a federal systems depends on the possibility of citizens’ allegiance to several political communities. The federal management of power needs to reflect extant democratic support -based on notions of citizenship which have not only economic but also political and social dimensions. Unquestionably, we must relate the relevant conception of community allegiance or belonging to the kind of legitimate power that the community in question seeks to exercise. This is not the place to adjudicate between the many competing claims as to whether this is possible and, if so, how—see Choudhry as well as Meehan and Lacorne in this volume. Simply, I would like to suggest that the principle of mutuality can help us imagine a federal citizenship compatible with multiple extant loyalties by opening up not only the possibility but also indeed the desirability of moving away from polities based on a single common identity without denying the importance of the link between identity and community altogether.

There are those who believe that the building of political communities demands such high levels of solidarity and allegiance that such communities can be rooted only in a common identity, be it civic or ethnic in nature. In the US, they question the sustainability of the nineteenth century melting-pot ideal and prefer to rely on radical versions of multiculturalism. In Europe, and in response to the need for democratic legitimacy, they confront us with an impossible dilemma: limiting our ambitions to those compatible with the scale of national démoi—the ‘no demos’ thesis articulated by the German Constitutional Court in its 1994 Maastricht judgement, or pursuing the chimera of a ‘European identity’ predicated on the progressive emergence of a European démos. The first school encompasses pure nationalists from the Sun to Haider as well as the sophisticated French nationalist left or nationaux républicains—Regis Debray, Paul Thibaut—the European version of US communitarians (Lacroix 2000). Its exponents view the federation a merely a composite of communities of identity, be it l’Europe des patries or the hyphenated American type (Howse 1998). Consequently, the federal project must be reduced to its bare bones of functional cooperation. The second school of so-called Euro-federalists, supranationalists or cosmopolitans, believes that it is possible to construct a community of identity at the federal level, competing or coexisting with national or other local identities. New constructed identities can be layered on top of older, equally constructed ones through the crafting of new
symbols and histories of common identity in school curricula and the media, and henceforth the projection in the past of a ‘common destiny’.

It should be no surprise that the federal vision we have sketched in this book should chime with neither of these ‘nation-state’-centric views but rather with an alternative conception of what a polity is about, that is, the ‘post-national’ view of political community most famously expounded in Habermas’s theory of ‘constitutional patriotism’ (Habermas 1996). In a post-national view, federalist principles of community create an alternative to, not a replica of, the nation-state; citizenship needs to be conceptually severed from nationality; a common citizenship can be grounded in shared principles of justice and morality rather than territorially defined histories; and a political community should result from rather than precede the constitution of common political institutions. Accordingly, the question of whether a demos is possible at all beyond the confines of a community defined in terms of sub-political ties such as race, language, or cultural heritage depends on what we mean by demos. If a demos is understood to be a group of people or peoples sharing a common political space and modes of political communication, then it need not be reduced to the territorial confines of the nation. Political communities at the federal level can be ‘communities of association’ rather than ‘communities of identity’ (Howse 1998). Moreover, if the power of the federal community does not involve political supremacy, then the federal level of community need not necessarily have to draw on a strong sense of allegiance that can compete with the kind of identity-based allegiance that many nation-states can draw on. To be sure, polls have shown that variation in support for policy integration depends on the personal salience of the policies in question—identity issues and welfare state issues—and cost-benefit analysis rather than overarching notions of commonness and shared identity. If the federal community can rely on the sharing of common projects and goals—from a clean environment to eradication of world poverty—this will provide the necessary bind. In this vein, it is worth reminding ourselves that, while the goal of market integration may not in and of itself be enough to legitimize the profound reach of EU law in national legal orders, it is still the most legitimate shared project, as polls show in both the US and the EU. In short, the Europeanization of national citizenship through the instrumental benefits or opportunities for empowerment that the Union creates does not necessary require or lead to Europeanness. Deutsch was half right. The Union can draw enough support from the functional logic without significant shifts of loyalty upward at least before generations (Deutsch 1953).

Replacing a common identity with common projects developed in a common or emerging public sphere is not all there is, however, to a post-national agenda. The liberal post-national response to the ‘identity focus’ needs to be understood more broadly to encompass the deep implication of the principle of mutuality as calling for a mutual
involvement in fashioning not only each other’s structures and actions but also each other’s identities. The European project, just like a truly multicultural American project, requires first and foremost the mutual recognition of the various political sub-cultures that constitute it, leading in time to a progressive opening up of national public opinions to one another through political debate and confrontation. In the process, belonging to a federal community cannot but transform the way in which individuals understand themselves as members of their identity-based polities, precisely because, at a deep theoretical level and perhaps emotional level as well, the possibility of voluntaristic and plural affiliation puts in doubt some of the foundational principles of strong identity politics (Howse 1998). By sharing in a community of project, individuals identify with their social counterparts in other polities and start to acquire the capacity to renegotiate their relative attachment for and endorsement of parts of their own national or state history. After all, constitutional patriotism was first developed to provide a grounding for a self-critical appraisal of German national identity; a post-national federal community requires that states and the peoples of these states move away from their self-centred national memory in a self-critical stance which consists in recognizing the other by recognizing the crimes committed against him (Ferry 2000). It may not be the sole privilege of a union to be founded on the memory of crimes committed within it—civil wars are often part of national founding myths—but its distinguishing feature may be that such a memory can function as a radical empowering mechanism (Nicolaïdis 1996). Thus, ‘Europeanization’ might lead in time to a greater capacity on the part of the nationals of each European country to distance themselves, to enter, as it were, into a dialogue with their separate national pasts by integrating the viewpoint of those ‘others’ that have become part of their family. The very existence of the intermittently common project may empower individuals or communities within Europe to renegotiate the contours of their own ‘group’ or ‘national’ histories, to select and weed out elements of their national identity as well as to appropriate elements of the other’s histories with the blessing of Europe, as it were. Perhaps the most radical sign of becoming European is to allow or even promote such mutual appropriation. After all, as Siedentop rightly points out, the complexity of a federal or federation-like system can be sustained only if it is matched by a new complexity of personal identity (Siedentop 2000: 51).

The sharing of identities within a federal community can then serve as the communitarian input into an eminently liberal outcome. Beyond a certain degree of integration, mutual tolerance leads to mutual identification; and mutual identification makes it possible to reconcile diversity with deep integration. We do not need to develop a ‘common’ identity if we become utterly comfortable borrowing each others’. In that sense, American multiculturalism can serve as a starting point for the rethinking of ‘European citizenship’,
short of its perversion in hyphenated ghettos. Think of the European travelling abroad who now has access to the services of consulates from any of the member countries—not to some ‘European consulate’—and who is literally invited to ‘identify’ himself as Greek when he is Swede or as Dane when he is Portuguese. Mutual tolerance demands that I neither ask you to be me nor demand to be you; our Greek or Dane does not have to stay the ‘other’ European for ever. At the same time, the kind of mutual tolerance that we mean here, the reaching out and mutual engagement, involves, in the end, being part of each other, being at home abroad. My ‘European citizenship’ means that I am a bit British and a bit Italian—or whatever I wish to be. I have little to gain in spinning the rainbow white. The sharing of separate identities transcends a common identity.

Let us be inspired by Frank Thompson’s enthusiastic acclaim of the prospect of a union of western Europe just before his death in 1944: ‘How wonderful it would be to call Europe one’s fatherland and think of Krakow, Munich, Rome, Arles, Madrid as one’s own cities . . . Differences between European peoples, though great, are not fundamental. What differences there are serve only to make the peoples mutually attractive’ (quoted in Passerini 1999: 348, emphasis added). A half-century of peace later, let us celebrate with him the pleasure that can be drawn from the multiplicity of Europe, its nations, folklores, languages, and cities, and from the mutual attraction between its utterly separate peoples.

Towards a New European Contract? Exploring Proactive Constitutional Tolerance

Perhaps then is it possible to explore a more proactive notion of constitutional tolerance for the EU inspired by the overarching framework of polycentric federalism. That I would call the constitution of shared identities. Could there not be a genuinely pluralist constitution in Europe that would embody the spirit of constitutional tolerance, divesting sovereignty from nation-states without thereby falling into the trap of having to relocate ‘it’? 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 can be to limit power and protect individual freedom (Maduro 2001). The habits of tolerance heralded by Weiler have had to be ‘artificially’ constructed in Europe, except perhaps for the peoples of the frontiers. Could such a contract not contribute to this continued construction?

In this vision one starts from Weiler’s premise that there ought not to be in Europe an overarching and explicit constitutional framework denying the EU’s paradoxically greater ambition to pursue deep integration without a hierarchy of authority. Instead, a non-statal logic could lead us to a post-modern constitution—a new ‘European Contract’ that would
explicitly be aimed at managing differences, not engineering convergence. It would have at least two distinguishing features. First, this contract would be primarily about fostering other-regarding practices within the nation-states, radical obligations of mutual inclusiveness, and entrenched rights of multiple political belongings across polities. Second, this contract would need to capture the open-ended experimental nature of the European construct and thus would need to be much more deeply contestable than what we have ever known constitutions to be. It would self-reflectively be the signpost of a contractual process, the frame for a never-ending constitutional moment rather than a final say than ought to be sparingly revisited. It could include the flagging of agreements to disagree between constitutive states, the facilitation and encouragement of amendment processes, the explicit acknowledgement of the legitimacy of contestation, the institutionalization of opt-outs, and the spelling out of conditions for reversibility. In the end, this is after all the essence of ‘Unions’: a union is a contract, not a structure; a process, not an end point. It connotes equality between its participants—in principle at least—and at least some reciprocity in their commitments. And not all participants in a Union need to be of the same type: that is, here, not all states.

Perhaps one day, perhaps a century from now, there will be a need in the US itself to revisit its constitutional contract. Perhaps if such a day was to come, Europe may provide an inspiration.

6. Conclusion: Towards a Model of Global Subsidiarity?

At its core this book has been about the complex and changing relationship and tensions between levels of governance within the United States and in the European Union. We started our journey by asking a simple question: how can subsidiarity and devolution contribute to more legitimate governance on both sides of the Atlantic? We have no coherent answer to offer, but rather, perhaps, a different way of formulating the question: what could be the core elements of a federal vision beyond the nation-state at the beginning of the twenty-first century?

The federal vision around which many of our insights converge calls for recovering some of the early historical views on federalism and on traditional sources of legitimacy in multi-level governance systems while recasting them in terms of today’s understanding of what democratic processes and legitimate authority entail. Instead of concentrating on boundaries between spheres of power, the federal vision concentrates on their relationship. This implies inter alia a shift in focus in the competence debate away from allocation of competences per se towards granting centre stage to the processes of change themselves and the mechanisms that make them sustainable, including governance structures and the many
mechanisms of control among the actors involved at different levels, democratic input in the joint management of shared competences, and strategies of mutual empowerment between levels and actors involved in governance. In the end, it calls for a move ‘beyond hierarchy’ from vertical paradigms of multi-layered governance to more horizontal ones of multi-centred governance where the legitimacy of the system as a whole is grounded in mutual tolerance, mutual recognition, and mutual empowerment rather than in the design of common structures and the pursuit of homogenous practices.

Under such a vision, it makes less sense to speak of ‘pro-’ or ‘anti-Europeans’ or ‘pro’ and ‘anti-federalists’. Integration can be more about sustainable decentralization than centralization, horizontal mutual inclusiveness rather than vertical delegation of authority, and managing differences rather than engineering convergence; and federalism about exploring the boundaries of sustainable differences between individuals, communities, polities under a profound commitment to living together.

We hope to see future research investigate further the implications of these shifts and their relevance. It will be worth exploring, for instance, the connection between the ways in which authorities and identities interact internally and the ways in which the federation as a whole interacts with the rest of the world.

It will also be worth exploring further whether the features of the federal vision that we espouse can be transposed to the level of global governance. Certainly one of the crucial question faced by policy-makers in the post-Seattle era is how to inject legitimacy into global economic governance. This question will likely be at the forefront of many debates to come and deserves to be explored through dedicated projects. This book can inspire some starting points.

To some extent, the legitimacy problem faced at the global level is more acute than in the US and the EU context. The autonomy of the constituent parts is arguably more threatened by global forces than by federal or quasi-federal encroachments, if only because they have more say over the latter than the former. Globalization may have an unequal impact around the world but it is leading everywhere to the end of the illusion of a symmetric relationship between national political decision-makers and the recipients of political decisions (Held 1995). The worldwide crisis of ‘embedded liberalism’ has led some to argue that global institutions such as the international financial institutions, the WTO, or United Nations agencies now need to occupy this ‘governance gap’, but that doing so requires that they recover or establish anew their legitimacy by democratizing their procedures while endorsing and enforcing cosmopolitan norms.

In assessing these claims, we need to be acutely aware of the limits of the analogy and incommensurability between, for instance, the EU and WTO governance debates (Howse and
The conditions for constitutional legitimacy in the EU accepted even by those on the pro-European constitutionalist side of this debate, to say nothing of those on the intergovernmentalist or nationalist sides, include integrative institutions that can be accountable for the policy and value tradeoffs that they make; a commitment to flexible structures and procedures that can respond to ideological, technological, or economic shifts by allowing reallocation of power through bargaining or other agreed procedures short of constitutional ‘revolution;’ and mechanisms for co-opting and compensating potential losers. None of these conditions is likely to be present at the global level any time soon.

Nevertheless, the federal vision is relevant, if not applicable, to the global level; the principles discussed in this book in the US and EU contexts can inspire a ‘global subsidiarity’ model adapted to the more limited and functional nature of international institutions (Howse and Nicolaidis 2001). Such a model would rest on three core principles. The first stems from the fact that power checks are weak at the international level and certainly lack the symmetry that we find in federal contexts. US or Western hegemony is also greater in some institutions than others. And governance is institutionally fragmented among a host of functional international regimes. Global subsidiarity thus requires, first and foremost, radical institutional sensitivity both vertically—state and local governance—and horizontally—other international institutions. This means systematic deference to other, more legitimate institutions—say, the WTO or Multilateral Environmental Agreements—and/or superior norms, such as human rights, rather than letting institutions with the greatest hegemonic influence assess for themselves the necessary tradeoffs between competing values.

Second, traditional concepts of territoriality need to be unbundled not only with regard to issues of jurisdiction but also with regard to political processes. At the global level as with the federal level, requirements of mutual political inclusiveness are the necessary counterpart to requirements of deference. Within international institutions, however, inclusiveness does not mean the systematic granting of representational rights to NGOs, which belong to the realm of deliberative, not representative, democracy. Nor should all the onus of inclusiveness be put on the supra-national level. Procedural obligations need to include more systematically obligations of domestic participation and indirect accountability. And they can include requirements of mutual transnational inclusiveness in domestic legal or regulatory processes.

Finally, global subsidiarity need not be interpreted as shifting functions away from the centre but instead as conceiving of those functions as means of empowerment of the sub-units including, but not exclusively, the state. The long-held permissive interpretation of embedded liberalism needs to be progressively supplemented by a proactive interpretation that lays some of the responsibility on the global community not only to help states fulfil their functions but
to help individuals and groups within these states exercise their voice option before considering exit.

* *

Whether in the US or in the EU, whether for polities known as federations, quasi-federations, or confederations, we need a federal vision beyond the state, a vision of transnational federalism compatible with the continued preeminence of individual nation-states in the foreseeable future. Its mission? To provide a space for genuine democracy in an era when politics risks becoming at once too global and too local; a space whose scale is compatible both with good economic management and with people’s desire to ‘do politics’ together; a space, in short, reconciling unity of purpose and diversity of belongings. Its mission is also about means: to offer a political form eschewing hierarchical, state-centric modes of governance that have characterized the modern epoch, turning instead to horizontal, multi-centred models based on the principles of mutuality and tolerance. And to offer a political form amenable to multiple permutations at a time when changes in ideas, norms, and technologies have never been so fluid and unpredictable. The ‘federal vision’ has been in the making since the beginning of modernity. At the beginning of the twenty-first century, we need to reassert its currency and imagine anew its potential.

References


Table C.1. Paradigm shift and the Federal Vision

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<tr>
<th>Shift</th>
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<tr>
<td>From allocative outcomes to the process of change</td>
<td>Flexibility, open-ended dynamics</td>
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<td>From distributed to shared competences</td>
<td>Networked cooperation, proportionality, forms of governance,</td>
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<td>From separation of powers to power checks</td>
<td><em>Procedural subsidiarity</em>, structures of governance, mutual control,</td>
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<td>constitutional constraints, federalism safeguards, agency ties,</td>
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<td>forbidden interfaces, asymmetric federalism</td>
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<td>From transfers of power to empowerment</td>
<td><em>Proactive subsidiarity</em>, mutuality, capacity building, positive sum</td>
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<td>allocation, managed competition</td>
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<td>From multi-level to multi-centred governance</td>
<td><em>Horizontal subsidiarity</em>, transnational federalism, non-hierarchical</td>
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<td>models of governance, constitutional tolerance, mutual recognition,</td>
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1 Fractals are defined in chaos theory as the separate constitutive elements of universal patterns repeated on different scales.
2 This shift in emphasis is palatable on both sides of the Atlantic. A simple overview of the content of *Publius*, the foremost journal in the field, is exemplary in this vein.