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Introduction: The Federal Vision, Levels of Governance, and Legitimacy

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There is little doubt that this new century will witness quite dramatic changes in modes of governance, in and among liberal democratic societies. The painful, uneven, and amorphous globalization of societies and economies, changes in prevailing ideas on the role of state and the place of civil society, as well as shifts in patterns and understandings of loyalty and belonging, are, throughout the world, redefining polities and their boundaries. Already, the functions and authority traditionally assumed by the nation-state are being diffused and fragmented among a wide range of actors, both public and private, and at many different levels, from the global to the local. In the long term, the nation-state may prove to be more resilient than many argue, but only if it is able to adapt, evolving or accepting modes of governance that permit both legitimate and effective accommodations with the many entities, both above and below the state, which increasingly shape the public world in our century. We believe that this challenge calls for a federal vision of governance.

This book seeks to contribute towards articulating such a federal vision in the United States and in the European Union. It is about the complex and changing relationship between levels of governance within both polities at a time when they are revisiting the meaning of divided sovereignty. It was born out of a desire on the part of scholars from both sides of the Atlantic to compare notes about issues of multi-level governance in their respective polities that are the focus of their scholarship. Our starting point

was to juxtapose and contrast what we may broadly refer to as the ‘devolution debates’ in the United States and the ‘subsidiarity debates’ in the European Union. We engaged in this exercise with a keen awareness of all that makes these two political projects terribly hard to compare. Yet, and perhaps not surprisingly to veteran scholars of federalism, we were struck by some of the common themes in the ongoing renegotiation of the federal contract in both polities. Above all, it seemed to us that debates on both sides have often been impeded by implicit and narrow assumptions about what constitutes the ultimate sources of legitimacy and sustainability in times of institutional change. Broadening out from the initial focus, the authors involved in this project came to share the premise that while ‘levels of governance’ in the US and the EU may differ radically, rethinking federalism on either side requires a self-conscious exploration of what we mean by legitimacy and how it can best be achieved.

The Federal Vision, therefore, is a collective attempt at analysing the ramifications of the legitimacy crisis in our multi-layered democracies, drawing from and moving beyond the current policy debates over devolution and subsidiarity. It is a multi-disciplinary project, bringing together historians, political scientists and theorists, legal scholars, sociologists, and political economists. In bringing such a group of scholars together, we have sought not only to bridge the transatlantic divide on the study of federalism and European integration, but also, and perhaps more importantly, the traditional academic divide between technical, legal, or regulatory discussions of federal governance and philosophical debates over questions of belonging, citizenship, and multiple identities.

1. The Challenge of Legitimacy

Federalism is an old idea, yesterday like today a response to the need for multi-centred governance. It is also, as Tocqueville and many others have said, a complex and even ambiguous idea, for it

finesses the question of sovereignty, the question of who ultimately decides, by a myriad of ‘federalist formulas’, all bound to be contested. What shall we make of the notion of divided sovereignty at the heart of federalism? And what is it supposed to mean on a world stage still made of sovereign states? If a political entity is no more than the sum of its parts, it is really just a confederation or league, with each member having a veto over ‘sovereign’ acts of the centre, and acting autonomously on the world stage. If it is more than the sum of its parts, then a majority of the whole may prevail in sovereignty over the will of any of the parts, which makes federalism often seem like central government with administrative decentralization. In this case, the federation is a federal state: in the end, simply another state. When it has not led to their disintegration, this question has plagued federations throughout their history, sometimes to be resolved through civil wars only to arise anew with the ebb and flow of history.

The largely impossible nature of the task of squaring the federal idea with the modern statist conception of sovereignty has led much scholarship about federalism to retreat from an effort to theorize the federal vision, and rather to address the problem and promise of federalism through the apparently more modest and narrower lens of centralization and decentralization.¹ Merely on the assumption that some kind of divided sovereignty is a given, the question is asked concerning which competences, on some relevant theory of governance, should be allocated centrally and which to lower levels of government. Contemporary social science provides a number of well-known conceptual devices or tools with which to argue that question: principal-agent theory, public choice theory, regulatory competition, and so on. Ultimately, however, all such efforts to generate an ideal allocation of competences end up plagued by radical indeterminacy. Whether in the case of social welfare, economic development policy, or culture, there are good arguments that can be made for centralization, and good ones for decentralization too. And whether a given polity at times allocates competences at one

level or another does not in and of itself tell us much about its underlying federal character.

The need to situate the debates about decentralization, devolution, and subsidiarity in a broader theoretical context, transcending the notion of divvying up or slicing ‘sovereignty’, is however perhaps most dramatically illustrated by the empirical reality of essentially all current, viable federal arrangements: the pervasiveness of concurrent or overlapping competences, the coexistence of elements of centralization and decentralization in the same policy field, and the dependence of successful policy outcomes on the ability of different levels of government to interact effectively. Notions of ‘cooperative federalism’ in the US context and ‘pooling of sovereignty’ in the EU context have sought to capture the phenomenon; but they seem only to restate the problem: if there are no ‘benchmarks’ for optimal solutions for distributing sovereignty, how are we to understand and assess change?

For us, in this volume, the broader theoretical context is provided through the optic of legitimacy. The question of legitimacy is more fundamental than that of sovereignty and in fact is presupposed by it. As Daniel Elazar reminds us, federal democracy addresses the fundamental question of jurisdiction and distribution of power by vesting sovereignty in the people who constitute the body politic and requiring them to allocate powers among the governments of their creation. To what level of government is only a secondary question. What matters in a true federal context is that this be done ‘within a non-centralized framework whereby all exercise of power is governed by law and related to the rights of the constituents’. What Kymlyka calls ‘the federalist revolution’ perhaps involves above all recognizing the end of the idea that states, including in their federal guise, could somehow appropriate, once and for all, the sovereignty mantle, albeit in order to delegate it upwards or downwards. Instead, the authority vested in different layers of governance is transitory and derivative and it derives above all, at a given moment in time,

from the more fundamental and amorphous concept of legitimacy: the notion that it is fair or just in some way that a set of actors accept the influence or say of a particular collectivity exercising power.²

Once we see the world of multi-level governance through the optic of legitimacy, the challenge, and promise, of the federal vision come into sharper focus. Surely, the sources of legitimacy are diverse: some are technocratic, and relate to presumed expertise to manage the complexities of policy; others are grounded in conceptions of collective identity and culture; others still in notions of active democratic consent and interest representation. How do we design mechanisms of governance that give all these sources of legitimacy their due, while ensuring that policy outcomes or outputs of governance, which are the product of the action and interaction of multiple levels of governance, themselves enjoy, in the broadest possible sense, legitimacy? This is the key pathos or quandary of public men and women in liberal democracies today: never before have they had to listen, weigh, and attend to so many and varied ‘legitimate’ voices and influences in the making of policy, and yet the results of such policy-making often leave voters with feelings of disappointment, distance, and distrust. It is precisely through the articulation of a federal vision of governance that we can begin to address this quandary, by asking what it means for policy outcomes to be legitimate when they are produced in a world of multi-level governance, and, then, more concretely, what mechanisms and modes of governance lend themselves to creating or sustaining such legitimacy.

2. ‘Thinking Together’

In some very general sense, this exercise can be called ‘comparative’, but it is faithful neither to the methodologies nor the goals of the comparative traditions of scholarship, in either law or political science. This project was framed from the outset as a

transatlantic dialogue between individuals concerned about patterns and modes of governance on either side. None of us was preoccupied with making scholarly judgements about convergence or divergence between fundamentally different kinds of polity, nor with the naïve notion of transplantation of institutions or mechanisms of governance from one polity to the other. The operating premise was that common to both the EU and the US is a set of challenges to governance, which in both polities are connected to the special nature of the problem of legitimacy in the context of multi-level governance, of federalism in the broadest sense of the term. In thinking together about such challenges, in full awareness of both our differences and our commonalities, we sought to learn from one another. And indeed we consider it an important achievement that a number of transatlantic research partnerships were forged in the context of this project.

The notion of a dialogue or confrontation between Europe and America as a consciousness-raising and horizon-expanding exercise is not new; this is the legacy of Tocqueville and of Henry James, among others. The fundamental premise of Tocqueville’s *Democracy in America* was that ‘old Europe’ could learn from ‘young America’. The idea of democratic equality, said Tocqueville, was sweeping the civilized world, and this revolution was farther advanced, better articulated, and more evident in its risks and opportunities in America than in Europe.³

The dialogue we propose in this volume appears to depend, in part, on granting equal status to the reverse proposition: ‘old America’ may also be able to learn something from ‘new Europe’. How could an established federal order like that of the United States have anything to learn from an apparently not-quite-yet federal one like the EU? We believe that if one of the key challenges of this twenty-first century is to conceive forms of governance in a world in which sovereignty and the nation-state have become problematic, if still persistent, categories, ‘new Europe’ may be farther ahead than ‘old America’. For, as Joseph Weiler argues in his contribution to this volume, ‘new Europe’ has

already begun the experiment of emancipating the federal idea from statist categories of sovereignty and constitutional supremacy. Indeed, as will be discussed in this volume, it may be the case that the nation-states in Europe are increasingly using their ‘Union’ to implement a principle of mutuality and horizontal ‘delegation’ of competences or authorities from which the ‘United’ States may have a lot to learn.

That Europe can learn from America’s history, or more accurately, the EU learn from the US, has long been taken for granted. But, if today’s EU is to be compared with yesterday’s US, which US are we talking about? Is it the pre-1787 confederate States engaged in foundational debates pitting federalists and anti-federalists? Or are the Europeans, like the North Americans at the turn of this century, still seeking to implement the lessons of their own great civil war and implement the promise of their own ‘Gettysburg address’, through a Union without a Federal State—let us not forget that the US federal budget was comparable to the current EU’s 2 per cent of GDP at the turn of the twentieth century? Or should today’s EU activists look back to the American New Deal when the realization that States alone could not respond to the demands of their residents—in the face of globalization?—served as a catalyst for the establishment of a federal government with broad-ranging economic powers and complex mechanisms for allocating authority between the executive branch, Congress, and regulatory agency in the management of regulatory federalism?

Most probably, both all and none of the above. We believe that historically grounded analogies, appealing as they are, can only be unsatisfactory given both historical path dependency and the fact that context matters most: from prevailing ideas to technological and economic structures and international constraints and opportunities. At best, historical parallels can serve as metaphors of ‘eternal return’ and ‘paths not taken’.

Instead, for us, there is an important sense in which, more than a century and a half after Tocqueville, Europe can learn from

today’s America about the relationship of federalism to democracy. The new European experiment with a federal vision took flight on the ashes of World War II. The pre-war European record of democracy was highly uneven; political democracy in many European states was unstable and aimless, while the social and cultural estate of democracy provided fertile ground for the mass-mobilization exercise of demagogues and tyrants. As has been abundantly noted, despite an implicit democratic teleology from the start—Jean Monnet’s ‘Nous ne coalisons pas des états, nous unissons des hommes’—the project of a European federal union began as an elite exercise, and still to this day, despite the ‘Citizen’s Europe’ proclaimed in the Amsterdam Treaty, bears the marks of these origins. The project of the common market and ultimate federal union of Europe could not draw on a strong democratic tradition in twentieth-century Europe. So the framers reached back beyond the madness of the 1930s and 1940s to older European traditions: cooperation, tolerance and comity among enlightened rulers; bureaucratic integrity and rationality; the rule of law as a moral and political ideal. The European project did not seek, in the first instance, to modify or challenge the national allegiances and prejudices of the people, but rather to provide a permanent, resilient buffer against their outbreak into zero-sum inter-state competition and conflict. But, for reasons that are well-articulated in a number of contributions to this volume, beginning with that of Mark Pollack and Jack Donahue, the attempt at such a ‘buffer’ turned into a new level of governance—not simply a check or limit on the nation-state—which could not but end up raising new questions about allegiances and democratic accountability. And, here, there is at least a *prima facie* case that Europe can learn from today’s America, first of all because the institutions, practices, and legal controls of American federalism developed in tandem with consciousness of the democratic ideal, and present a range of options for preserving clarity and integrity of democratic accountability, in situations where more than one level of governance is implicated in the same or overlapping

policy fields. Second, and more controversially, America offers a rather different understanding of allegiance and affiliation to the state from that which has predominated in Europe since the nineteenth century, an understanding more congenial to multiple allegiances, mixed identities, and civic forms of patriotism and political commitment—all collective forms of belonging that depend as much on engagement for a common future as on a shared history or, even less, a shared cultural or racial background. Sooner or later, the European polity will have to rise to the challenge of reshaping conceptions of citizenship, allegiance, and identity within Europe, or the majority of Europeans risk becoming alienated, and dangerously so, not just from new realities beyond the nation-state, but from new realities of diversity within it as well.

Hence, our basic proposition that America and Europe, when one considers both where they have come from as federal entities and the challenges of governance they are headed towards, are well situated for learning from one another. We believe that this same kind of proposition underpins a number of important exercises in the parallel or interactive study of European and American federal arrangements over the last few decades. Among the first of these is the two-volume study, *Courts and Free Markets*, which emerged from a meeting of European and American scholars and practitioners of federalism at Bellagio in 1979. In introducing this study, Terrance Sandalow and Eric Stein claim:

The common problems facing the two systems suggest the possibility that, at the appropriate level of analysis, each system may draw on the other's experience. We should not, of course, expect to find that either system has developed 'solutions' to these problems that are readily transferable to the other. But an examination of the manner in which each has responded and the reasons that it has responded as it has may suggest

hitherto unseen opportunities for the other. Whether or not such opportunities emerge, the perspective gained from comparing a system with another facing similar issues is likely to provide students of each system with a new insight into its workings. In this light, similarities and differences between the two systems are of equal interest.⁴

In looking in this volume at common issues from the perspective of the challenge of governance in the twenty-first century, our aims and assumptions are both as bold and as modest as those stated by Sandalow and Stein just over 20 years ago.

3. A Caveat on European 'Federalism'

At this point, however, out of concern for political relevance we need to introduce a caveat. Clearly, the fundamentals have not changed since Sandalow and Stein. Today as 20 years ago, it would be an understatement to say that the US and EU do not relate to the notion of federalism in the same way. Ever since the federalist debates, nation-building in the United States has consisted to a great extent in the self-conscious and systematic refining of the federal formula. The EU, on the other hand, does not have a federal 'founding myth', and although most scholars would agree that it has been a federation in the making since the 1960s, the language of federalism, the very term, continues to be highly contested. We may bemoan the gap between the scholarly—or American—understanding of federalism as a decentralizing concept and its pan-European capture as synonymous with central government. The fact remains: today as in 1979, there is little doubt that the EU will never be called a 'federation' *tout court*. This is neither likely nor desirable.

There is an important way, however, in which developments in the intervening 20 years have a bearing on the way in which we may 'think together' about the US and the EU

experience. That is that not only have both the US and the EU in the last two decades experienced a backlash against centralization or harmonization, if not in practice at least in the prevailing political discourse. It is also that, most recently, the debate in Europe turned, perhaps for the first time on such a scale, from one about subsidiarity in the day-to-day management of the Union to one about the need for a new covenant, a European constitution. Having exhausted most of the potential for policy expansion while contemplating an unprecedented enlargement challenge, the EU polity is rethinking its architecture. Here is the paradox. Most constitution supporters agree on two points: that this should not be the blueprint for a ‘federal state’ of Europe—in other words, to some extent the discourse of constitutionalism must be somehow liberated from its statist origins; and that a constitution is needed, above all, to make clear and explicit to the citizens who does what in the European Union—the hallmark of democratically accountable federalism. We would seem to want European federalism without the word, with its statist resonances and connotations. Perhaps this is right.⁵

Yet we cannot escape the fact that our own formula, ‘Federal Vision’, unavoidably has its own normative resonances. Does it refer to the EU as a *federation* of nation states, as Jacques Delors would have it? This is possible, if we believe Joseph Weiler, whether it gives itself a constitution or not. Is it more appropriate then to see it like Daniel Elazar, as a ‘post-modern confederation’? Or shall we simply speak of a ‘post-federation’, a *sui generis* construction of supranational order, predicated on principles of mutual transparency, mutual recognition, and mutual empowerment? Our ‘federal vision’ is compatible with any of these labels. It is meant as a framework for universal concepts, not as a motto for an ideological crusade. And it is not directly teleological, some vision of an end-state to a socio-political project—although certain substantive norms, such as equality, liberty, the rule of law, and democracy may be inseparable from the realization of the project on its own terms. Instead, and more

humbly, it is simply a vision of good governance, in Europe and in the United States.

Finally on the theoretical front—explaining why the polity has evolved in a certain way and what the main factors driving the process are—we believe, like more and more of our peers, that European studies must now move beyond the stale debate between supranationalism and inter-governmentalism. The study of federalism takes the uneasy relationship between the States, the Union, and the citizens as a starting point. It seeks to understand how conflicts of power and patterns of cooperation between the two evolve over time, in relation to the needs, values, and preferences of citizens. After all, functionalism was the method adopted by the founding fathers precisely to avoid the need for a priori decisions about the type and forms of federal structure Europe should give itself. We hope that this book may contribute in bridging the divide between the study of European integration and comparative federalism.

4. A Roadmap Through the Volume

The book proceeds in five parts. Part I presents two overarching views of what federalism is really about in its US and EU versions. Part II provides an overview of the history and current state of federalism in the US and the EU and a set of diagnoses of devolution and subsidiarity. The rest of the book revisits these developments through a multi-faceted examination of the sources, mechanisms, and challenges of legitimacy in these federal contexts. The contributions in Part III examines the legal and regulatory instruments of mutual control between state and union in each polity. Part IV presents alternative analytical models for understanding the overall relationship between levels of governance and the ways in which legitimacy can be sustained in the US and the EU. Finally, the chapters in Part V discuss the deeper roots of legitimacy in federal systems by asking what determines

allegiance to different levels of governance. Most chapters in the book engage in a symmetric fashion with both the US and the EU. A few are asymmetric, focusing particularly on one or the other side. An appendix by George Bermann and Kalypso Nicolaidis lays out the basic legal principles, and variants thereof, on which the federal organization of governance is founded. In some ways, our book measures the distance between this, the theory, and the *praxis* that inspires our vision.

The two chapters in Part I, by Daniel Elazar—who, very regrettably and sadly, has since passed away—and Joseph Weiler, display, respectively, the problem of integrating the federal vision with the modern conception of state sovereignty, and the promise and possibilities that emerge once one liberates that vision from ‘statist’ conceptions of political organization. They are both interested in the normative values embedded in these polities. Elazar refers to the ‘competition between statism and federalism’, epitomized by the confrontation in the seventeenth century between Althusius and Bodin, which unites the modern and what he calls the ‘post-modern’ epochs. According to Elazar, from the outset federalism in the US was characterized by the choice of a union that would advance comprehensive ends of government—‘liberty, justice, and domestic tranquillity’. The creation of a federal system with a central government directly responsible to the people was a reflection of the need to find means that were consistent with both the ideal of democracy and the requirement of a union to advance such comprehensive ends. This ensuing tension between the State and federal elements in the US system calls for a more adequate ‘partnership’ or cooperation between levels of government, first as a check against the ‘State’ element overwhelming the ‘federal’ element, and most recently as a protective device for the States. While the trajectory in the US from confederation or league to ‘statist’ federalism was already set in motion by the fateful choice for a union with comprehensive political ends, Europeans have, fortunately, not

yet made any such choice—although some of the pro-Europe rhetoric implies this kind of choice, which should be made, however, *en pleine connaissance de cause*, as it were. But the promise for realizing the federal vision in Europe remains strong, because, at least, the idea of union began in terms not of comprehensive, but of limited political ends. Europe is well poised to develop a theory of federalism suitable to its confederal tendency and its greater number of ‘levels’ of governance than any prior federation.

However, according to Elazar, for the EU to remain within the confederative approach that more adequately realizes the federal vision than a statist version of federalism, it actually needs to learn from aspects of the US system that are—ironically, it seems, given what Elazar has already said—less ‘statist’ than some of what has been developing in Europe. In particular, for Elazar, the notion of ‘subsidiarity’ has a hierarchical legacy and tint, suggesting a vertical relationship of delegation from the top down, as it was first intended to by the Catholic Church. In contrast, conceptions of partnership between levels of government in the US, albeit not yet well realized, evoke a more horizontal relationship ‘within multiple-centred systems in which there is no hierarchy’ (p. xx). As perhaps the most influential writer in the study of federalism, Elazar pointedly reminds us that the real ‘federal vision’, whether in its confederal European version or its federal US version, must be based on ‘covenant-based principles that see the proper political organization as a matrix with larger and smaller arenas but not higher and lower’ (p. xx).

In important respects, Joseph Weiler’s essay complements that of Elazar, even if its normative foundations are rather different. Weiler describes the EU equally as a mixture of ‘federal’ and ‘confederal’ principles:

Architecturally, the combination of a ‘confederal’ institutional arrangement and a ‘federal’ legal

arrangement seemed for a time to mark Europe's *Sonderweg*—its special way and identity. It appeared to enable Europe to square a particularly vicious circle: achieving a veritably high level of material integration comparable only to that found in fully fledged federations, while maintaining at the same time—and in contrast with the experience of all such federations—powerful, some would argue strengthened, Member States. (p. xx)

But the great difference between Europe and the US—and for that matter all other federal states—is that the European construct does not presuppose the supreme authority and sovereignty of a single constitutional *demos*. For Weiler what is most humanly valuable about the European federal idea as it has developed so far—despite the ‘messy architecture’ it has produced—is what he calls ‘constitutional tolerance’. Although Europe will always be composed of distinctive peoples and constitutional democracies of which each people is the *pouvoir constituant*, these national states accept to be bound and constrained in their exercise of sovereignty by the claims of others as reflected in the decisions of the Community

For Weiler, then, attempting to transform the European project into one of federal constitutionalism along statist lines is deeply misguided. Instead of providing a healthy self-limit on collective self-determination, the European project would become a competing project of collective self-determination, which would imply, along the lines of statist democratic constitutionalism, the creation of a single European *demos* or people. The parable offered by Weiler may help the reader reflect on the spiritual meaning of Europe's *Sonderweg*. It suggests that constitutional tolerance reflects the European choice for a ‘civilizing strategy’ of dealing with the ‘other’ without seeking to assimilate him, and for making integration an endlessly renewed autonomous, voluntary act of

subordination to this European other. This idea of ‘emancipation’ through internalizing mutual constraints at every level, from the customs duty officer to the prime minister, can be understood as an extreme version of what Elazar and others have called ‘federal liberty’, or as the constitutional translation of the very European norm of ‘mutual recognition’. This idea must be seen in light of some of Weiler's other writings, including those discussed by Denis Lacorne in his contribution to this volume, which suggest the importance of a positive affinity with the European project among European citizens, and therefore that self-identification with the project is required, not simply a sense of the appropriateness of restraint on one's national projects of collective self-realization in recognition of the other. Constitutional tolerance is not a mere grudging toleration: it implies a reaching out across bounded identities ‘in recognition of our essential humanity’ (p. xx). Thus, it implies human identification and affiliation across national boundaries, but the idea of tolerance signifies that such identification and affiliation does not itself destabilize the boundaries. It is a kind of allegiance that is strong enough to mitigate the totalizing tendencies of bounded communities but weak enough not to threaten their boundaries. This is a promising response to those who denigrate the civic sources of European affiliation as providing very little competition for the identity claims on which the national polity can draw: the aim is not to compete with national state identity politics, but rather to constrain these *enough*. We will have more to say about this in discussing the final part of the volume, on belonging and citizenship.

Each in his own way, Elazar and Weiler provide important conceptual and normative reasons why we should not understand the promise of federalism through the lenses of the modern idea of state sovereignty, that is, as a kind of truce between competing sovereignties, through the division of competence or the hierarchical ordering of authorities. The chapters in Part II

explain why, in any event, the day-to-day realities of contemporary democratic politics in the US and the EU preclude any such stable truce between competing sovereignties. These contributions all highlight the dynamic character of federalism, document the process of change, and offer competing diagnosis on trends, past and future. Jack Donahue and Mark Pollack provide a sweeping historical overview of the rhythm of federalism in the US and the EU. They show how, historically in both polities, citizen preferences have tended to fluctuate between centralization and decentralization. There *is* no stable federal bargain, understood as a clear settlement over relative power between the States and the Union.

Citizens perceive more vividly the defects of the recently ascendant theme, and amplify in abstraction the virtues of its opposite. Hence in a reasonably effective democracy—in which popular complaints and yearning have consequences—featuring an ambiguous or unsettled degree of centralization, the norm is fluctuation. Depending on the polity, the issue, and the time, the actors propelling change may include courts, corporations, elected leaders, and appointed officials of central or constituent states, and the electorate itself. The intricate interplay of these actors . . . tends to generate oscillations between the concentration of power in the centre and the reassertion of the individual States in each system. (p. xx)

As a result, as the historical record amply shows, the ‘equilibrium’ is for ever elusive, and the pattern for Donahue and Pollack is one of lively awareness of what’s wrong with the status quo, and a perennial search for ways to accommodate new issues and better resolve old ones.

Since there is no ideal, stable division of sovereignty, or balance of centralization and decentralization, from the

perspective of democratic legitimacy, the implication of this analysis is that we will have to search for stability elsewhere—in various norms, institutions, and mechanisms by which citizens bargain on an ongoing basis, and governments bargain on their behalf, for adjustment and re-adjustment of roles in concurrent policy fields. The legitimacy of multi-level governance will depend on the legitimacy of these norms, institutions, and mechanisms. David Lazer and Viktor Mayer-Schoenberger examine the most recent attempts in both the US and EU to respond to attacks on the legitimacy of ‘federal’ governance by building into the legislative or regulatory processes a federalism or subsidiarity criterion. Not surprisingly, if we believe Donahue and Pollack’s argument on indeterminacy, Lazer and Mayer-Schoenberger show that such criteria, when formulated as guidance on ‘where’ policy should be made, have been largely ineffective and inoperable; ‘federalism’ criteria have been subsumed and assumed away under either purely political decisions over the scope of devolution or broader cost-benefit analysis in the US, and the EU has not abandoned significant policies under its ‘subsidiarity review’. In contrast, we witness the increased use of ‘how’ criteria which increase accountability of central decision-making by requiring a publicized process of justification for the policies. Gráinne de Búrca’s ‘procedural subsidiarity’ is a concept relevant to governance on both sides, as they each have come to focus on how to provide more discretion to lower levels of governance in implementing or administering federal policies—although that has been achieved in very different ways in the US and the EU, as will be discussed later in Daniel Halberstam’s chapter. In short, Lazer and Mayer-Schoenberger make the case that new sources of legitimate governance are not mainly to be found in the recent subsidiarity and devolution pledges appended to the US and EU covenants.

The last two authors in Part II offer somewhat contrarian diagnoses on what has happened to the US and the EU in the last 20 years, highlighting the gap between rhetoric and reality in the devolution and subsidiarity debates. John Kincaid critically examines the fashionable notion that the steady trajectory of US federalism in recent decades has been in the direction of decentralization or devolution, his case resting above all on the pervasiveness of concurrency: ‘All public functions are likely to involve intergovernmental power-sharing in one way or another . . . The centralization that has occurred in the United States has rarely involved wholesale federal occupation of policy fields . . . often in a positive-sum manner in which there is a concomitant expansion of State and/or local government powers’ (pp. xx). In this context, so-called devolution in the US has been far from a wholesale transfer of power but rather a series of half-way measures. More importantly, if legitimacy has not been enhanced through outright devolution—presumably an unachievable first-best in Kincaid’s view—then ‘issues of process’ are vital. That is the legitimacy of the norms, institutions, and mechanisms that allow constant adjustment of roles and responsibilities between levels of government in response to changing circumstances and changing citizen preferences.

In the next chapter, Andrew Moravcsik brings back our attention from issues of process to issues of competence per se. If, according to Kincaid, the US is not really decentralizing, according to Moravcsik the EU is not really centralizing. Moravcsik attacks the view, shared by Euro-enthusiasts and Euro-sceptics alike, that current developments in the EU herald the advent of a European federal state. According to him, the EU lacks and is likely to continue to lack the fundamental competences that would make it federal. To make this point, he emphasizes what the EU does *not* do and is unlikely to take on in the foreseeable future, spelling out how the ‘EU plays almost no role—at most a weak sort of international

coordination—in most of the issue-areas about which European voters care most, such as taxation, social welfare provision, defence, high foreign policy, policing, education, cultural policy, human rights, and small business policy’ (p. xx). This is not surprising, in Moravcsik’s view, since the EU’s built-in ‘constitutional constraints’, from fiscal to legislative and regulatory powers, create a strong bias towards the status quo. His normative conclusion that ‘existing hybrid status quo is sufficiently efficient and adequately legitimate to resist any fundamental institutional reform’ (p. xx) seems to echo Weiler’s conclusion that the EU ‘ain’t broke, so don’t fix it’. But the two authors get there from opposite premises: Weiler thinks that today’s EU founded on constitutional tolerance—bowing to the majority without being one people—is an amazingly ambitious project, while Moravcsik celebrates the EU’s character as ‘a second-best constitutional compromise designed to cope pragmatically with concrete problems’ (p. xx).

Together, the authors in Part II provide a reading of the ‘allocative map’ that goes beyond mere enumeration of competences, highlighting instead underlying principles and trends. They are all cautious about providing predictions, especially with regard to convergence between the US and the EU. Although he predicts that the centralizing impulse is likely to reassert itself in both polities in the century’s early years, Kincaid is careful to point out that political ideology and the relative weight of the moderates in each polity will have a major role to play in this regard. Donahue and Pollack venture a general, law-like argument about what they have identified as the rhythm of federalism, stating that this ‘rhythm tends to slow and cycles to lengthen as a polity matures’ and as ‘first-order ambiguities are settled, and a degree of institutional inertia dampens the effect of discontent with both centralization and decentralization’ (p. xx). As a result, the next period of predominant centralization should be somewhat sharper and

shorter in Europe than in the US. If they are right, the constraints on centralization identified by Moravcsik will turn out only to be features of this current initial cycle of European integration rather than a structural characteristic of the EU.

If, from the perspective of legitimacy, the federal vision is much more about ‘how’ than about ‘where’, to use the Lazer and Mayer-Schoenberger distinction, what are some of the norms, institutions, and mechanisms that allow for legitimate multi-level governance? We explore some of these in Part III and IV.

As we observed at the beginning of this Introduction, in the EU the ideal of the rule of law may historically have been understood as an alternative to democracy among the sources for the Community’s legitimacy—law as ‘higher law’ that *constrains* collective self-determination. And indeed Weiler’s essay points out the permanent vitality of the notion that law’s normative force cannot simply be reduced to its origins in an act of democratic will. Through providing for judicial as well as political policing of the processes of federal governance, law can be a means for assuring that accountability, transparency, and individual rights are respected in such processes. Promoting federal values in this way is consistent with the focus on legitimate multi-level governance as opposed to division of sovereignty. George Bermann explores the various ways in which the courts can, and choose to, enforce the principles of federalism beyond the classical ‘political’ and ‘procedural’ safeguards provided by the institutional structures themselves and the constraints on the deliberative process—including the new ‘federalism assessment’ discussed earlier by Lazer and Mayer-Schoenberger. Bermann describes the reluctance on the part of courts on both sides to police the borders of enumerated competences, assess the ‘necessity’ of federal action, or carve out the ‘core’ of state sovereignty, all of which are ways of ‘second-guessing’ the political process. Instead, he points to the recent emphasis of the US Supreme

Court on what he calls the ‘relational’ aspects of federalism, whereby courts can identify ‘forbidden interfaces’ between State and federal governments, even without specific Constitutional grounds. Bermann uses the examples of sovereign immunity and of anti-commandeering to illustrate the manner in which court-enforced constraints on the manner in which different levels of government interact can protect and promote democratic accountability:

By protecting a State from having to devote its resources to objectives dictated by the federal government, the principle helps ensure that those resources will not be spent in ways that lack the support of that State’s population or that otherwise fail to reflect its political priorities. At the same time, it also allows the State electorate to hold State officials democratically accountable in policy and performance terms. (p. xx)

In contrast, European Union law offers no protection against risks to democracy from commandeering, and more broadly relies almost exclusively on the representation of Member States—and now sub-national units—in the Council as—structural—political safeguards. But what happens as Member States progressively lose their veto? Should the EU not devise new types of political safeguards—for example, through the role of national parliaments and sub-national regions? While the European Court of Justice has thus far shown a preference for relying on structural and procedural safeguards, Bermann believes that the latter can still be strengthened and that relational safeguards in the EU context remain to be invented.

The example of commandeering is developed as a case study in Daniel Halberstam’s chapter. Halberstam uses commandeering as a window into the differences between EU and the US with respect to the relationship of federalism to

democratic accountability. As Halberstam suggests, a directly elected central government in the United States can make law that is directly effective in all the States, and supreme over State law. In the EU, directives which ‘commandeer’ the Member State governments, and regulations which are directly effective, have traditionally *both* required the consent of the constituent Member States. Thus, there is a check in the EU on non-democratic ‘commandeering’—the political community that was being commandeered had to agree. And given that its consent is required, one can understand that a Member State might prefer being commandeered to being directly regulated—since, as Halberstam explains, in the EU context commandeering may well provide greater Member State flexibility to tailor the legislation to local needs and priorities. In any event, commandeering in the EU is the price to pay for refusing to endow the federal level with any resources, administrative or financial. But Halberstam notes two very important reasons why this will not solve the democratic problem in the EU. The first is that, with the innovation of weighted majority voting, each Member State no longer enjoys a veto over being commandeered. We would add that this problem will be greatly exacerbated if the EU is significantly expanded. Second, drawing on Scharpf’s earlier work on the ‘joint decision trap’, Halberstam notes that agreement among elite representatives of polities may well be an inadequate substitute for direct democratic control—an inference that might be mitigated by Moravcsik’s point that the current ‘insulated’ EU process better serves the median voter. While Halberstam is unprepared to draw immediate normative conclusions from his analysis, it does raise the question of whether the problem of supremacy is not intrinsic to the federal vision as such, not merely the statist version of it. Despite the attractive optimism of Elazar and Weiler—to the effect that once federalism is no longer thought in statist terms, it can be conceived as a respectful, non-hierarchical relation between

bounded communities—there is the inevitable challenge of dealing with situations where the application of federal law conflicts strongly with a particular unit’s conception of collective self-determination. Since we have seen that formal bounds on competences are not a solution to the problem—that is, each is supreme in its own sphere—how can this be resolved without hierarchy? Here again, though he is resistant to drawing out the normative implications, Halberstam’s analysis is very rich. He considers the possibility that federal intervention in particular concurrent policy fields could be limited to framework legislation, where the federal level seeks to ensure that the laws and policies reflect a set of legitimate values or norms or do not offend them, but without attempting as it were to fully determine the substance of those laws and policies. The recent trend in the EU towards issuing framework directives, soft laws, and benchmarks for national policies would appear to serve Halberstam’s view of legitimate supremacy. But Halberstam also illuminates the difficulties for judicial control of such limits. Perhaps even more subtly, Halberstam introduces the conception of ‘viscosity’. Reflecting on differences between international law, the US constitutional system of federalism, and the EU, he hypothesizes that the supremacy of the federal level of law may be qualified or balanced by the greater scope that certain systems offer to constituent federal units with respect to the internal implementation of the commands of superior or supreme law. As long as the measure of disobedience or partial obedience does not threaten the legitimacy of the system as such, it may head off a more zero-sum confrontation between the principle of federal supremacy and that of democratic self-determination within a particular federal unit. Especially where the federal law does not itself draw legitimacy from its being an act of the direct democratic will of a larger *demos*, as in the US system, this ‘viscosity’ may be crucial to legitimacy.⁶

Giandomenico Majone's chapter returns to themes sounded by Bermann and Halberstam, elaborating them in the context of regulatory federalism. Bermann pointed out that not only did courts lack the means to ensure the effectiveness of political safeguards to vindicate federal values, but regulators by and large escaped the direct effect of these mechanisms altogether. Here, Majone discusses how regulatory independence may nevertheless be reconciled with accountability, in a context where important policy-making powers are delegated to non-majoritarian institutions: an issue the American polity has grappled with for more than a century. Joint regulatory action, or regulatory cooperation, is a crucial feature of multi-level governance, where powers are not clearly allocated hierarchically. Majone observes:

The intertwining of the national and European strands of regulatory policy-making does not correspond to a precise allocation of powers along the vertical dimension. Rather, it prefigures the emergence of a transnational regulatory branch—a 'fourth branch of government', to use the American expression—comprising national, subnational, European, and in some cases—technical standardization, for example—even international regulators. (p. xx)

The emergence of transnational regulatory networks is the key development that will help Europe find coordinated rather than vertically distinct solutions to regulatory problems. This also entails important dilemmas of legitimacy. On the one hand, in the context of multi-level governance values of technical competence and political independence argue in favour of governments delegating these joint regulatory activities to bodies of regulators from the various jurisdictions. On the other hand, this poses a very serious challenge to democratic legitimacy since there is no comprehensive democratic body or

polity that can apparently effectively control the exercise of these delegated powers. Here, Majone dismisses various philosophies that have been tried in the US and found echoes in the EU, from the traditional 'transmission belt' approach leaving no discretion to regulatory agencies, to the expertise model of the New Deal period or the pluralist proposal to politicize the regulatory process. Instead, he argues that, if one looks imaginatively at some of the control mechanisms that exist in the US system today with respect to delegated federal regulatory powers, the problem may not at all be insuperable:

The long experience of the American regulatory state indicates that independence and accountability can indeed be reconciled by a combination of control mechanisms rather than by direct oversight exercised by one particular institution: clear and limited statutory objectives to provide unambiguous performance standards; reason-giving and transparency requirements to facilitate judicial review and public scrutiny; due process provisions to ensure fairness among the inevitable winners and losers from regulatory decisions; public participation; and a high level of professionalism to withstand external interference and reduce the risks of an arbitrary use of discretion. (p. xx)

In the EU, these procedural safeguards, designed to strengthen democratic legitimacy in general rather than simply State rights, are all the more necessary since delegation to the Commission—and to a lesser extent to outside bodies— involves wide discretionary powers. In short, the EU should continue to strengthen its multi-level networks as well as to adopt the equivalent of the Federal Administrative Procedure Act and emulate the far-reaching judicialization of regulatory decision-making that has occurred since then in the US.

The chapters in Part IV further elaborate the focus on the legitimacy of the processes and mechanisms of multi-level governance as the key to the federal vision on the basis of more systematic models drawn from political science and political economy. Adopting the conceptual tools of agency theory, Cary Coglianese and Kalypso Nicolaidis attempt to rethink the challenge of federal governance under conditions of broad concurrency in the allocation of competences by examining the relations between States and the union as instances of principal-agent relationships and considering the different kinds of ‘mechanisms of control’ available to the agents. These mechanisms, or agency ties—delineation, monitoring, sharing, and reversibility—can be read as generalized versions of Bermann’s ‘political’ and ‘procedural’ safeguards. The principal-agent framework allows us to think of these ties of mutual control as symmetric—both the State and the federal levels can be principals on different issues—and to consider hypothetical trade-offs between them. The importance of these mechanisms to the federal vision is that they offer the possibility of clarifying lines of accountability and, particularly, transparency in the values and interests to which governments are accountable when acting as agents of other governments. At the same time, such agency ties are another way of blunting or finessing the supremacy problem which was put in sharp focus in Halberstam’s chapter; as Coglianese and Nicolaidis suggest, ‘The structural mechanisms that make up agency ties theoretically constrain the agent at the same time as they reserve some power to the principal’(p. xx), but as long as the agent acts consistently with the specified and limited constraints in the ‘contract’, it retains a secure zone of autonomy. Thus, agency ties functionally equivalent to those used in other principal-agent situations offer one kind of answer to the supremacy problem posed by the intractability of concurrent powers and the impossibility of a secure allocation of water-tight competences. One can perhaps avert conflicting

assertions of power in a concurrent jurisdiction through a constitutionalized supremacy rule, subject to a commitment to resort to alternative agency ties if existing ones are failing. The limits of the principal-agent framework, however, lie in its very premise that levels of governance can be sharply distinguished and identified as either principals or agents.

John Peterson and Laurence O’Toole, as well as Vivien Schmidt, provide richer although less parsimonious models for understanding federalism dilemmas by disaggregating the ‘State’ or the ‘federal’ level into the individual or institutional actors that shape their policies. According to Peterson and O’Toole, the characteristic of federalism most relevant to questions of accountability and legitimacy is that it gives rise to ‘less formal and intricate structures within which a large number of actors, each wielding a small slice of power, interact’(p. xx). These authors build on the recognition by others, like Majone, of the importance of trans-national or trans-State networks for federal governance. But they move beyond the positivist statement to an analytical stance, namely, that a ‘network’ perspective is the most effective lens into the strategies, incentives, and constraints of decision-makers in a federal structure. To support a legitimate system of governance, such networks must be open, accessible, and inclusive. Where action in a given policy field does not lend itself to transparent lines of accountability between levels of governance through the kind of mechanisms described by Coglianese and Nicolaidis, ensuring that the network itself is ‘representative’ of the broadest range of interests may be the only solution. And this is also something of an insurance policy against the risk that bargained ‘principal-agent’ structures are themselves a product of a closed ‘executive federalism’-style policy network. In these respects, Peterson and O’Toole suggest that the EU may have something to learn from what they call the ‘hyper-pluralism’ of the US system.

Schmidt's institutional perspective is complementary to that of Peterson and O'Toole in that it stresses the constraining impact of Union-wide networks and institutions on the Member States' national institutional structures and decision-making processes. But these networks did not emerge in a vacuum or through simple aggregation; they also entailed a loss of power and autonomy by the executive and legislative branches at the national level. In contrast to those who argue that the EU has strengthened the state, that is, the national executive, Smith takes a differentiated approach, highlighting the disruptive impact of the EU on national structures, especially in those Member States that are unitary rather than federal in nature. At the same time, Schmidt's institutional analysis brings into focus the peculiar characteristics of the centre in the EU, which exhibits a 'dynamic confusion of powers' in contrast with the United States' clear horizontal separation of power. For her, it is in these combined phenomena that the source of the legitimacy deficit lies. But there is little scope for improvement at the centre. In this regard, Schmidt comes to a more nuanced conclusion about pluralism in the US and the EU than Majone or Peterson and O'Toole: 'the EU is somewhat less open to interest influence in formulation; more cooperative in its interrelationships; more delegatory in implementation; and less political or driven by money than the US' (p.xx). Thus in the end, the greatest crisis of legitimacy is felt in those Member States—France, Britain, Italy—who bear the greatest burden of adjustment to the policy changes engendered by the EU. The onus is on national politicians to engage in 'a new political discourse' that recognizes the limits of any government power, at whatever level.

Fritz Scharpf's analysis builds on that of Schmidt in that for him too the source of the so-called 'democratic deficit' in the EU must be sought at the nation-state level. But Scharpf's analytical lens is political economy rather than institutionalism, which leads him to address the challenge of democratic legitimacy in federal governance from the perspective of

regulatory competition, and to revisit his recent book in a comparative perspective. According to Scharpf, economic integration in the EU is producing regulatory competition with respect to social policies that is constraining Member State responses to the demands of their citizens for a wide range of distributive policies, while in some cases—for example, subsidies—EU law directly constrains the policies. As Scharpf notes, the response to similar pressures in the US was the constitutional revolution of the New Deal, which permitted the creation of a federal-level progressive regulatory and welfare state. He views this as an unrealistic alternative in the EU, where the welfare state has been shaped by its national scale and where, conversely, the democratic legitimacy of the nation-states is much more closely associated with welfare-state achievements than is true for American States. In light of these constraints and imperatives, Scharpf suggests that regulatory competition itself could be policed at the EU-level, where a rule against improper regulatory competition could constrain tax concessions and deregulation intended to attract foreign businesses at the expense of other countries or domestic competitors. Thus, and perhaps contrary to Schmidt, Scharpf believes that the onus for change lies with the EU level itself through its capacity to design the framework in which Member States operate. For him, a democratic deficit needs not translate into a 'legitimacy deficit' if the EU delivers policies that help rescue and modernize the national welfare state. In this regard, the federal government in the United States may well have a leaf to borrow from the European book.

Contributors to Part V take us from policy analysis to political philosophy, since in the end it is at the individual level, in the different conceptions that people have of their place in a community, that we can find the ultimate determinant of legitimate governance. In asking about identity and citizenship in the US and the EU, we can only start with the contrast initially presented by Weiler in this volume between a

European Union wedded to the notion of permanently distinct ‘peoplehood’ and a United States predicated on the emergence of a single people. But each of the contributors in Part V seeks in his or her own way to move beyond this contrast and to highlight those questions common to all attempts to move beyond single political identities.

As Sujit Choudhry points out at the outset of his chapter, it is puzzling that although federalism is central to any account of our contemporary political practice, it has received so little attention in contemporary political theory. Choudhry sets out to remedy this lacuna by offering an overview of the place of citizenship in a federal context according to alternative schools of thought, including a review of the other authors in this part of the volume. He argues convincingly that none of the three main conceptions of citizenship—civic, ethnocultural, and economic—satisfies what he identifies as the two constraints of liberal democracy, namely, the legitimacy constraint and the stability constraint. Legitimacy requires at least hypothetical consent to a system of law which can exercise coercive power over the individual; while stability requires the existence of a sufficiently strong social bond to ensure the survival of a political community. On these grounds, is it possible to argue that the civic conception of citizenship which prevails in the United States could come to prevail in Europe as a whole? Is the civic conception on its own sufficient to generate the kind of social trust necessary for democratic decision-making, redistribution schemes, and ultimately collective response to acute political crisis? Or is the EU bound to rely mainly on an economic conception of citizenship? Ultimately, the legitimacy of governance at the Union or State level depends on the answer to these questions.

In rehearsing the arguments on all sides, Choudhry demonstrates that the debate cannot be reduced to one between those who would believe in universalistic principles of political morality divorced from specific traditions and associative

projects, and those who would simply allow for citizenship in particularistic communities. The key question is that of the relationship between universal values and the particularity of political communities. To be sure, citizenship requires that ‘citizens . . . be able to *identify* with a political community as their own—they must be able to claim ownership in the institutions of a political community, in the issues dealt with by those institutions, in the manner in which those issues are debated, and in the decisions of those institutions’ (p. xx). Individuals need to know on what grounds they are asked to meet the obligations of citizenship of the Community in which they are part. This may even mean embracing the particularity of political communities. But the fundamental point for liberal democrats is that such particularism ought to possess instrumental rather than intrinsic value. At the same time, we would add to Choudhry’s account, or perhaps qualify it, by the observation that exclusionary sub-political bonds, such as ‘race’, ethnicity, and so forth, are not the only kinds of particularity which can create civic bonds: such bonds may be built from common projects informed by universal values, but realized in the context of a singular and distinct political community, whether environmental clean-up or the elimination of child poverty or the building or re-building of a system of public education. Constitution-making itself requires that a people engage in an exercise of self-definition and collective self-realization, albeit *informed* by universal values of liberty and equality. Pierre Trudeau’s constitution-building exercise in Canada and Mandela’s in South Africa have had that quality to them.

What happens, then, when the search for principles that can provide the cement for social and political solidarity moves from a context of heterogeneous polities to one of multi-layered and geographically bounded communities, as is the case in the EU? In discussing the problem of divided or multiple allegiances in federal system, Choudhry astutely blurs the boundaries between apparently distinct positions. He points to the difficulty

of simply relying on differing conceptions of citizenship at the federal and sub-federal levels since the identification claims made by citizens by the State and federal communities ‘compete in the same political space’ (p. xx). It would thus be warranted to remain sceptical of the Habermasian glue at the Union level, namely ‘a shared commitment to liberal democracy.’ At the same time, there is little scope either in the EU or in the US for the federal level competing with the sub-federal ‘communities of identity’. On the middle ground, one can argue with Habermas himself that it is the history of the community itself that gives universal values their force and significance in a particular polity, the kind of collective self-definition through associative projects and constitution-building we refer to above.

The other authors in Part V all explore in greater depth specific points raised by Choudhry. Marc Landy and Steven Teles do so by taking a strong normative stance in favour of decentralization. Choudhry may have argued that federalism may be more democratic than a unitary state—by allowing for the expression of local majorities that would presumably be federation-wide minorities—but he has not told us why a strong federal centre in itself would be more democratic than a weak one. Indeed, if one can demonstrate the latter, then the trade-off between economic efficiency through greater federal integration and democratic legitimacy through State-level autonomy may remain a real one. But Landy and Teles fall back on their feet, as it were, by echoing a point made on economic grounds by Scharpf, namely, that the role of the federal level should be to allow States to function better as democracy. They call this ‘the principle of mutuality.’ Accordingly,

It should be the obligation of each level of government as it participates in joint decision-making to foster the legitimacy and capacity of the other. Local government 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)

This leads Landy and Teles to stress the ways in which EU powers need to be increased precisely and only to the extent to which this facilitative role is called for. In the end, they can see only classic indirect accountability as the way of enhancing ‘The EU needs democratic legitimacy, but that legitimacy 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’ (p. xx).

In her contribution, Elizabeth Meehan directly asks how well the promise of supranational citizenship has been met in the EU. She reminds us that this citizenship is grounded in very diverse notions of ‘nationality’ across Member States and of the link between nationality and entitlements. Moreover, and unlike Scharpf, she feels that the EU has done well on delivering outcomes and thus it is not its ‘social legitimacy’ which is most in question. The key question therefore lies with understanding ‘European civil society’. On the one hand, it can be argued that the key shared principles for such society at the European level are more likely to include protections against exclusion and discrimination than at the national level. On the other hand, in Europe, contrary to the US, such principled bounds came after long period of pre-democratic national bonding. So the key question becomes whether today there is a strong enough civil society in the EU to transcend the defects of national citizenship. Echoing Choudhry’s warning on the trade-offs between democratic practices at different levels of governance, she sees a fundamental problem in the growing mismatches between sets of principled bonds at different levels of governance. Principles of

inclusion in Europe, in particular through acquisition of citizenship, are slow to change and civil society at the European level is still too weak to counterbalance this through action at the European level.

Finally, Denis Lacorne draws an analogy between the threats posed by social heterogeneity in the US and the threats posed by differing national allegiances in the EU. He reminds us that core political identities can vary over time and that early conceptions of citizenship in the US focused almost exclusively on State, not federal, citizenship. In his view, within unitary states communities of identity are fine so long as individuals do not conflate these with their core political identity. In a federal system, the problem or challenge is exactly that of belonging to several *political* communities. Lacorne argues against Habermas that pure constitutional patriotism will not suffice, since individuals require a substantial citizenship. What is needed instead are ‘common and concrete political experiences’ that would give rise to ‘a new European ethics of responsibility’ (p. xx). Again, as with Choudry, we would respond that this may underplay the autopoietic dimension of European citizenship; as at one point Lacorne himself acknowledges, the building of the Union itself can be understood as a common and concrete political experience, a self-creating civic act. What may simply be required is a broadening of the sense of *ownership* in this project among European publics. In this respect, Lacorne himself might want to take a second look at some of the proposals for a European public space, such as those of Joseph Weiler which he tends to view sceptically taken in and of themselves as substitutes for a ‘real’ *demos*. Therein may lie the promise for a federal vision shared and carried through by civil societies across Europe.

In closing, our concluding chapter fleshes out some of the common horizontal themes emerging from this volume.

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So, dear reader, you are about to embark with us on a quest for a ‘federal vision’, a federal vision that may successfully address the present-day challenge to legitimacy in governance. As with any such quest, you are not meant to reach the end of the road, but perhaps simply to pass through some inspiring landscapes reflecting your own insights in a new light. No doubt you will chose to select some angles rather than others. I love the landscape image; do you know Lorenzetti’s landscape allegories, the effects of good and bad government in the country and the city, in the city hall of Sienna? No doubt also you will quickly figure out that our authors all seem to travel different roads towards the proverbial elephant. Some seek legitimacy in the process, others in outcomes; some in the law, others in institutions; some in people’s sense of self, others in peoples’ view of others. And they all also provide a different spin on the essence of ‘federal’ in a federal vision. Some provide definitions, others do not. And when they do, it is on a variety of grounds; on institutional grounds: do the institutions of the Union—‘federal’ in the US, ‘supranational’ in the EU—have enough autonomy and direct sources of democratic legitimacy?; on legal grounds: are the laws from the centre directly enforceable by national courts?; on substantive grounds: are core competences such as internal and external security, justice, and money conducted at the federal level?; or on normative-constitutional grounds: is this a single polity with a single constitutional demos? We cannot deny, then, dear reader, the intellectually plural or—dare we say—federal nature of our federal vision.

Nevertheless, by referring to a ‘federal vision’ the book seeks to move beyond traditional analytical distinctions and exercises in categorization between ‘federalism’, ‘integration’, ‘confederalism’, ‘supranationalism’, and the like. We do not, of course, deny the critical usefulness of these ideal-types, including for our own debates, as reflected in many of the chapters in this book. But in order to provide a broad paradigmatic umbrella, the

kind of federal vision that we refer to can encompass all forms of shared governance which add some degree of legal, institutional, or normative federalism to classical forms of inter-state cooperation. This federal vision may be pluralistic and broad ranging, but it also has a core in that it is grounded on principles of mutual tolerance and empowerment that alone can reconcile our polar political needs, unity of purpose, and diversity of place and belonging. And we believe that, in this broad sense, a federal vision is more necessary than ever, in the US and the EU as well as elsewhere.

¹ There are, of course, many notable exceptions, starting with Daniel Elazar's classic *Exploring Federalism* (Tusculoosa, AL: University of Alabama Press, 1987).

² Most authors in this volume present one definition or other of legitimacy. We have not chosen to impose an all-encompassing definition to be used throughout, precisely because we believe that coming up with one's own is part of the analytical journey. In operating from this stated understanding of legitimacy, we are, of course, well aware of the long-standing debate about whether it is a positive or a normative idea. For purposes of certain kinds of intellectual inquiry or investigation, it can be useful to view legitimacy from either a purely positivistic or a purely normative

angle. But from the perspective from which we are writing, namely, the challenges of governance for public men and women of today, such a *dépeçage* is not helpful: those who govern must both consider and understand what, as a matter of fact, leads those over whom they govern to accept as fair or just their decisions, but those who govern must also weigh the sometimes conflicting claims of other collectivities legitimately to influence the decisions. This entails an inherently normative exercise of considering the relative strength of different sources of legitimacy in as much as they ought to influence or shape a given policy decision.

³ De Tocqueville, 'Introduction', *De la démocratie en Amérique*, 2nd edn (Paris: A. Gain, 1951).

⁴ Terrance Sandalow and Eric Stein, 'Introduction', *Courts and Free Markets—Perspectives from the United States and Europe*, vol. 1, reprinted in E. Stein, *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism* (Ann Arbor: University of Michigan Press, 2000), 115–16. For subsequent comparative studies see also Mauro Cappelletti, Monica Seccombe, and Joseph H. H. Weiler (eds), *Integration Through Law: Europe and the American Federal Experience* (Berlin and New York: Walter de Gruyter, 1986); Koen Lenaerts (ed.), *Two Hundred Years of U.S. Constitution and Thirty Years of EEC Treaty* (Brussels: Kluwer, 1988).

⁵ Most commentators still equate 'federal' and 'state'. Thus for instance, Larry Siedentop, in his recent *Democracy in Europe* (London: Allen Lane, The Penguin Press, 2000) argues that Europeans are trying to imitate the US in building a federal state and that this is right—although they are not ready. On the opposite side, Charles Grant argues that the idea of a 'federal state' in Europe is obsolete: *EU 2010: An Optimistic Vision of the Future* (London: Centre for European Reform, September 2000). See Conclusion for a further discussion on this point.

⁶ See Robert Howse and Kalypso Nicolaidis, ‘Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far’, in Pierre Sauve *et al.*, *Efficiency, Equity and Legitimacy of the WTO* (Washington, DC: Brookings Institution, 2000).