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Constitutional Lessons from Europe

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ESSAY

CONSTITUTIONAL LESSONS FROM EUROPE

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Given his range of interests, a tribute to Francis Jacobs could appropriately address just about any area of contemporary legal concern. But Francis Jacobs is one whose writings on and off the bench have, for an American, been especially illuminating, due to his unique capacity to translate fundamental issues of European constitutional law into terms that we can grasp. And so, notwithstanding the quantity of writing on the recent constitutional adventure of the European Union ("EU") that has already accumulated, I add yet one more set of reflections on this theme in Francis Jacobs' honor, this time on the possible lessons of that adventure for others.

All legal transplants are problematic, constitutional transplants especially so. And constitutional transplants for federal systems are among the most problematic of all. Still, especially in light of the apparent derailing of the EU's Draft Constitutional Treaty, the question of the relevance of EU constitution-making for constitution-making in federal-style systems elsewhere seems nothing less than compelling.

In the interest of ease and brevity, I bypass the problem of defining even some of the most essential terms, such as federal or federal-style system, or even constitution. I also assume an affirmative answer to some fairly fundamental questions. Do all genuine federal systems require a constitution? And must a constitution (whether or not the document calls itself by that name) be written?

Two problematic themes emerge most forcefully from the EU constitutional adventure we have just witnessed. One is the utter importance of a sense of identity, and the other is the profound challenge of satisfactorily organizing the processes of democratic participation. The two are, of course, linked.

But we should begin by asking what it is, after all, that a

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constitution, and more particularly a constitution for a federal system, is supposed to do. I posit that a constitution—whether written or unwritten and, if written, whether denominated a constitution or not—expresses a consensus about what I call fundamental governance ground rules for a given polity.

The ground that basic governance rules cover in a federal constitution is not altogether different from the ground covered by the basic governance rules found in the constitutions of unitary Nation-States. They deal with: (a) the institutions, including their composition and their powers; (b) the procedures for enacting authoritative norms, including legislation and constitutional amendment; (c) fundamental substantive principles, such as democracy or secularism; and (d) paramount among these fundamental principles, basic civil, political, and human rights that are meant to be removed from the everyday political process.

But there are certain additional ground rules that the constitutions of federal systems either express or will simply be deemed to express. What are the subjects of these additional "federalism" ground rules? One set of ground rules specific to federalism has to do with competences. What is to be done at what level? What criteria are to be consulted in deciding what is to be done at what level? And who is it who decides what is to be done at what level in case of dispute as to that? Where competences are, in a sense, concurrent, does some notion of federal self-restraint (let us call it subsidiarity,[1] for convenience) prevail? A second set of ground rules has to do with primacy. Whose policies, within their limits of competence, trump whose policies, and again, who decides in the event of dispute? A third set of ground rules has to do with membership. Are new "memberships" in the federal or federal-style system to be entertained, and on what conditions and according to what procedures? May

1. The Treaty of Maastricht introduced the principle of subsidiarity into the Treaty Establishing the European Community ("EC Treaty") through Article 5 (initially Article 3b). *See* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741). The TEU was signed at Maastricht, the Netherlands, on February 7, 1992, and entered into force on November 1, 1993. A brief description of the principle of subsidiarity can be found in George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332 (1994).

existing members secede (or, in the EU Constitution's parlance, "withdraw"), and, if so, on what terms? A fourth set of ground rules concerns specifically the question of whether and how the constituent States, qua States, are to be represented in institutions at the federal level. Finally, a further set of ground rules relate to a variety of "transversal" issues. Is there to be at the federal level a bill of rights? If so, shall it apply only to "federal" actors (as well, possibly, as to State actors implementing federal law), or instead to all "State actors"? Or will the protections enshrined in the constitutions of the Member States suffice? Is the conduct of external relations (including foreign relations) to be entrusted exclusively to the federal level, or do the members retain some prerogatives in that domain?

Interesting though these various sets of federalism ground rules are—and they are—they all, in my judgment, proved more or less tractable within the Convention for the Establishment of a Constitution for Europe.[2] The Convention resolved all of these issues, though in many respects, admittedly, it did not work on a clean slate, but rather borrowed prior treaty rules and prior understandings and conventions. Moreover, the intergovernmental conference ("IGC"), which approved the constitutional text, which was then eventually put before national parliaments and national populaces for approval, largely ratified the solutions that the Convention had reached.[3] Indeed, none of the issues that most roiled the delegates during the course of the Convention's debates and deliberations—namely, the allocation of competences between the EU and the Member States, the composition of the Commission, the voting rules in the Council, the relationship among Commission President, President of the Council of Ministers and President of the European Council, or

2. *See* Roger J. Goebel, *The European Union in Transition: The Treaty of Nice in Effect; Enlargement in Sight, A Constitution in Doubt*, 27 FORDHAM INT'L L.J. 455, 485-88 (2004) (describing the role and work of the Convention).

3. Among many valuable articles on the Draft Treaty Establishing a Constitution for Europe, Dec. 16, O.J. C 310/1 (2004) (not yet ratified), are Alan Dashwood & Angus Johnston, *The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty*, 41 COMMON MKT L. REV. 1481 (2004); Gráinne de Búrca, *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?*, 61 WASH. & LEE L. REV. 555 (2004); Koen Lenaerts & Damien Gerard, *The Structure of the Union According to the Constitution for Europe: The Emperor is Getting Dressed*, 29 EUR. L. REV. 289 (2004); and Elisabeth Zoller, *The Treaty Establishing a Constitution for Europe and the Democratic Legitimacy of the European Union*, 12 IND. J. GLOBAL LEGAL STUD. 391 (2005).

the prerogatives of the Minister of Foreign Affairs—seems to have had anything to do with causing the Draft Constitution to falter in the national referenda.

In short, to those of us who naively thought that the acceptance or rejection of a constitution would have something to do with the content of the Constitution, the drama associated with the referenda comes as something of a wake-up call, or at least a sober reminder that things are not always as they seem.

I. *THE UNDERLYING POLITY: A QUESTION OF IDENTITY*

In the end, what caused the Draft Constitution to falter—to the extent that the EU, as distinct from purely domestic national politics, had anything to do with it—were doubts, confusion and disquiet about the nature of the Union itself and its relationship to the people.[4] The referenda seem to have functioned, and at any rate came to be viewed, more as a referendum on the enterprise with which the constitutional text was associated than on the terms of the Constitution itself. The EU experience reminds us, perhaps more powerfully than any other recent federalism experience has done, that the footings of a constitution for a federal system are only as firm as the relational premises on which they are placed.

To state the proposition differently, the writing of a constitution for most unitary Nation States typically takes place only *after* a political consensus has been reached that an area and its peoples are ripe for nationhood. Thus, in the usual course of things, the making of the constitution follows the emergence of a sense of nationhood. The best, but by no means only, example is the creation of a State following a war of liberation from the previously dominant power. This is not to say that the very process of drafting of a constitution will not itself further deepen a people's sense of nationhood, but that same process can also reveal fractures not before seen, or seen so clearly, and thus actually weaken the sense of nationhood.

As if by definition, the constituting of a federal system is a more delicate, and possibly even treacherous, exercise. Consider some of the reasons why a federal system may be set up. It

4. *See* Richard Bernstein, *Europe is Still Europe*, N.Y. TIMES, June 7, 2005, at A10; *see also* John Thornhill, *How Consensus in Favour of Yes Began to Drift Away*, FINANCIAL TIMES (London), May 30, 2005, at 6.

may be a case, like the EU, of preexisting sovereignties willing, but only to a degree, to join their political and economic fates. It may be a case of a previously unitary State whose people consists of such sufficiently distinct religions, ethnicities, or linguistic heritages that a federal-type system appears to more faithfully map the demographics of the population. Settings such as these cause one to ask, even as the constitutive process unfolds, just how deep are the convictions fueling the act of federation and how substantial the reservations. The entire exercise may be suffused with ambivalence.

In short, it is by no means uncommon for the construction of a federal or federal-type system to actually *precede*, rather than *follow*, the achievement of a consensus among the affected populations as to the type of association that is being created. It may not even be obvious to the populace whether they are building a "federal State" (*Bundesstaat*, in the German terminology),[5] a confederation of States (*Staatenbund*),[6] or something in between (*Staatenverbund*, or loose federation).[7] It is a small wonder that

5. *See* Giorgio Malinverni, *The Classical Notions of a Confederation and of a Federal State*, *in* SCIENCE AND TECHNIQUE OF DEMOCRACY, No.11, THE MODERN CONCEPT OF CONFEDERATION 39, 41 (1994) ("In contrast [to a confederation], a federal state is not a mere union of states, since the constituent communities are not sovereign states from the standpoint of international law. Only the federal state itself . . . takes the form of a state. The federated entities are not states, as their powers are derived from the federal constitution rather than from international law. This situation gives rise to a process in which the member states lose their identity as states and the federation acquires statehood. This crucial distinction is found in the terminology of the German literature, which contrasts the ideas of *Staatenbund* and *Bundesstaat*.").

6. *See* Malinverni, *supra* note 5, at 40-41; *see also* DANIEL ELAZAR, FEDERAL SYSTEMS OF THE WORLD: A HANDBOOK OF FEDERAL, CONFEDERAL AND AUTONOMY ARRANGEMENTS xvi (2d ed. 1994) (defining confederation as several pre-existing polities joined together to form a common government for strictly limited purposes, usually foreign affairs and defense, and more recently economics, that remains dependent on constituent polities in critical ways and must work through them); LISTER, *supra* note 5, at 22-26 ("A confederation may be defined as a lasting union, based on public international law agreement, between two or more states which retain their sovereignty and their legal equality and which propose to achieve common internal and external goals by means of their union.").

7. *See* Larry Cata Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 201-02 (2001) ("We are presented with a vision of the meaning of federalism within the European Union quite different from that being constructed by the institutions of the European Union. It is a vision of the EU as an association of Member States which retain their separate national identity (Staatenverbund), not as a Federal State having its own identity (Bundesstaat)."); *see also* Karl M. Meessen, *Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany*, 17 FORDHAM INT'L L.J. 511, 525-26 (1994).

constitution-making on uncertain attitudinal premises such as these sometimes falters, especially when it is not at all clear that the pre-constitutional status quo is itself an untenable or unviable one. (We know that the pre-constitutional status quo was not an untenable or unviable one precisely because we know that now, even *after* the constitutional defeat, the EU will continue to function adequately into the future on the same treaty-style basis it has always known).

To be sure, a variety of factors compete in helping to explain the derailment of the European Constitution: punishment of national politicians; an unfavorable economic moment; misgivings over past and imminent enlargements (a consideration which is not, of course, unrelated to the underlying identity question); the prospect of the Turkish accession and xenophobia more generally (again, not unrelated to questions of identity); not to mention a gargantuan and poorly articulated constitutional text. But the identity question—what is it exactly that is being created and how fully does it entail a commingling of destinies—was fundamental.

The question naturally arises whether the Convention could have produced a Constitution for Europe that, by virtue of its very terms, might have sufficiently appeased the fears—rational and irrational alike—of the peoples of Europe that it would have passed muster with the people in all the national referenda that were to be held. Even if it were possible to do so, would the terms have to have been such as to do violence to certain of the core values on which the Union was built? These are open questions. But, in my judgment, the architects of the Treaty Establishing a Constitution for Europe did not really even try.

A fair rejoinder to my claim would be that the problem was neither the Constitution nor the larger identity issues I have been alluding to, but the simple fact that the Draft Constitution was put to a popular referendum in France and the Netherlands when it did not need to have been. In a sense, that is correct. Had the Constitution not been submitted to referenda in those countries (and in neither was a referendum constitutionally re-

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Staatenverbund emphasizes constituent elements rather than the organization as a whole. "The term Staatenverbund apparently has to be credited to Paul Kirchhof, the judge rapporteur of the Maastricht proceedings, who declared his preference for that term as opposed to the term 'supranational organization,' which in his view, implies an erosion of the statehood of its members." *Id.*

quired), the identity question would not have been allowed to loom so large. The decision in those States, as in so many of the other Member States, would have been made by national parliamentarians, probably with a quite different outcome. Indeed, while the Draft Constitution did go down to defeat in popular referenda in these two core and original Member States (although not in Spain or Luxembourg),[8] it had not as of then failed ratification in any system in which ratification required parliamentary action only.

This brings me to the second problematic aspect of constitution-building in federal systems.

II. *DEMOCRATIC PARTICIPATION: IS IT A REQUISITE?*

When one thinks of national constitutions in modern unitary States, one tends to assume direct popular participation—if not, of course, in the drafting of the constitution, then at least in its approval and entry into force. Recent constitution-making in Afghanistan and Iraq come conspicuously to mind.[9] That has not, of course, always been the situation. National constitutions have often in the past been approved without direct popular referendum; even some of today's most robust and stable constitutions—the Constitution of the United States, for example—not only came into force without direct popular referendum, but can be and are amended without direct popular referendum.

But if an original constitution for a unitary State would, today at least, most likely require direct popular approval, this is by no means the case for the constitution of a federal system. Yes, it seems very likely—though not certain—that popular approval would be needed today in order for a previously unitary State to be transformed, constitutionally, into a federal State. But as in the case of so many other regional-type federalisms being contemplated in the contemporary world, the EU has been put in

8. *See* Europa, Procedures Planned for the Ratification of the European Constitution tbl. [hereinafter Ratification Table], http://europa.eu.int/constitution/ratification_en.htm (last visited Mar. 31, 2006) (noting that the Netherlands rejected ratification by both parliamentary vote and consultative referendum and that France rejected it by referendum).

9. *See generally* Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. U. J. INT'L HUM. RTS. 4 (2005) (analyzing legal developments in Afghanistan and Iraq, with a particular focus on Afghanistan's new constitution, while "drawing parallels between the Afghan constitutional process and the ongoing process of transitioning Iraq").

place by and among previously sovereign States. And it is on that same model that the EU was to have acquired for itself a constitution. It is by no means obvious that arrangements of this sort necessarily require the direct popular approval of the several populations involved.

Federal arrangements run an enormously wide gamut in the extent to which they require direct popular approval. Arrangements that lie at the purely intergovernmental end of the spectrum rarely require direct popular approval. The North American Free Trade Agreement,[10] for example, was not subjected to popular approval, by referendum or otherwise, in the United States. The EU itself presents an uneven picture. If I am not mistaken, none of the six original Member States subjected membership in the EU to a national referendum, though some have subjected certain sets of amendments to the founding treaties to such a referendum.[11] The only State ever to negotiate accession and then reject it (Norway) did so—twice—on account of a national referendum. To be sure, some of the newer Member States decided to put the question of accession to the EU to a referendum. But, as we know, only in a minority of States was it thought that, either as a legal or as a political matter, ratification of the Draft Constitutional Treaty required a popular referendum.[12]

If I am correct that what failed to be accomplished by referendum in France and the Netherlands could have been accomplished in those same two countries by parliamentary ratification (and if no insurmountable obstacles to ratification were to surface in any of the remaining States), then "process" would indeed have proven to have been a pivotally outcome-determinative consideration.

This prospect raises a question of the margin of freedom that the architects of federal systems have in determining the

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10. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); *see also* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1890 n.25 (2005) (noting that the constitutionality of the North American Free Trade Agreement's approval process was subject to heated scholarly debate).

11. *See* Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092, 1174-75 (1995).

12. *See* Ratification Table, *supra* note 8 (showing that of the twenty-five Nations set to ratify the Constitution, only eight planned to use a referendum in place of, or in addition to, a parliamentary vote).

process by which, and venues in which, the critical deliberations and decisions over constitutional ratification will take place. If the identity stakes within a federal or federal-style system are great enough, direct democratic legitimation may be required, even if that may eventually cause the constitutional enterprise to falter. Political leaders in other parts of the world who entertain the idea of establishing some form of federal or federal-style regime composed of previously sovereign States need to carefully determine whether the programmatic gains from federating are sufficient to justify as apparent a commingling of national popular interests as the EU and its Constitutional Treaty conjured, because doing so may imply precisely the need for direct popular approval that will not be forthcoming.