Networked Governance and Pragmatic Constitutionalism:
The New Transformation of Europe

CFS-JZ

Revised Text 2/23/03

Introduction

The EU is—as ever—a crossroads, unsure of where to turn in familiar debates about the legitimate and effective distribution of powers among citizens, member states and the union. But connected changes in the political, administrative, and intellectual setting of these debates are increasing chances for a new institutional and constitutional compromise which may transform, again, the meaning of law and democracy in the EU.

To build an integrated continental market the member states sacrificed some of their power to veto Union regulation. In return they got assurance that the regulatory choices submitted for their final approval would be shaped by a public-regarding process that filtered out proposals chiefly motivated by narrow political or economic self interest. The organization and prerogatives of the Commission and its adjuncts in relation to the Parliament, Council and ECJ—the community method—provided that assurance. This compromise transformed the EU from an association of states into a single legal community whose integrity was ensured by the ECJ. Until now this community has worked well enough to assuage many of the most pressing concerns about its democratic legitimacy.

The potential new compromise regards the social dimension of the single market. Faced with the urgent task of reconstructing, separately but harmoniously, their welfare states, the member states would relax the power accorded them by the treaties and Community Method to block EU intrusion into "social Europe." Again they would insist on institutionalization of a public-regarding process of agenda setting. This time that process would be embodied in new forms of networked governance: the commitment to proportionality or framework legislation; comitology; new administrative agencies; and the open method of coordination. These permit exploratory learning within and among member states by respectfully contrasting different problem-solving strategies, each informed with a particular idea of the good, with the aim of

both improving local performance and creating frameworks for joint action at the Union level. Through the ramifications of network governance, this compromise could transform EU lawmaking again, integrating it more fully into civil society. At the limit, officialized in the constitution—perhaps as the result of the Convention on the Future of Europe now convened in Brussels—the compromise would help establish the EU as a directly deliberative polyarchy: a form of pragmatist democracy that sees agonistic conflict over ideals of the good and problem solving as so indissolubly connected that effective learning becomes institutionalized in the continuing exploration of justice.

Broad political changes motivate the search for the new compromise. Mutually reinforcing constitutional and administrative innovations make it feasible. A redirection of constitutional theory explores its legitimacy. We consider these developments in turn.

I. Rethinking the European Welfare State

Through the 1980s and much of the 90s, the right and the left had sharply different views of the construction of Europe in relation to developments at the national level. On the right, Europe, the single market, and the single currency were seen in two ways. In the British view, they bolstered deregulation and privatization. In the Franco-German view they created a peaceful *Grossraumwirtschaft*. Combined, the several national economies each became more competitive. The member states regained in pooled form sovereign capacities that were under threat when exercised separately. (). Either way, the European project could be seen as extending and reinforcing the mainstream right' national programs.

Not so on the left. For social democrats, the single market exacerbated the mounting domestic threats to national welfare states. The single currency was the emblem of their fears. It deprived the national state of the macroeconomic steering capacity upon which Keynesian full employment policies had depended and replaced it with a rule-driven, politically unaccountable regime that was obligated to favor stability over growth. So the social-democratic project for Europe was to domesticate or socialize the EU by making its institutions as mindful of solidarity as the national welfare state had been. Put another way, the task was to assure that the boundaries of the market-correcting regulatory authority corresponded to the new boundaries of the market itself. The name for this EU analog to the national welfare state was Social Europe.

In the last few years there has been movement on both sides of the traditional ideological divide, Surprisingly, the left and the right are beginning to converge on the idea of using Europe as an instrument by which the member states may learn jointly to reconstruct in compatible ways their systems of social protection—not as a tool for dismantling those systems or generalizing some combination of their features.

The Left: Beyond Social Europe

[Key development on the left is the more or less explicit abandonment of the dream of Social Europe, and acceptance of continuing diversity among national welfare/employment regimes.

These changes were manifest in the Lisbon Summit (March 2000) where four currents of though formed during 1990s came together:

1) Reorganization of national welfare states to improve effectiveness/adapt to new distributions of risk without compromising solidarity (Denmark/Netherlands/Ireland etc.).

2) New approaches to social and employment policy developed within the European Commission:

   - combine solidarity and competitiveness (1993 Delors White Paper, 'social protection as a productive factor');
   - coordinate national policies rather than seek further harmonization at EU level (EES – from 1997; concerted strategy for social protection, 1999);
   - emergent conceptualization within DG EMPL of the EES as the basis for a new mode of EU policy making based on benchmarking, monitoring, and mutual learning.

3) Reinventing Social Democracy:

   - the search for a 'real Third Way' beyond neo-liberalism and traditional Social Democracy;

- dissatisfaction with Blairite formulations as well as with French dirigisme (Jospin) and German neo-Keynesianism (Lafontaine);
- reconciling growth, competitiveness, and social cohesion in a 'new knowledge economy' (Rodrigues and the Portuguese Presidency);
- reconciling social solidarity and individual responsibility in an 'active welfare state' (Vandenbroucke and the Belgian Presidency);
- invention of the OMC as the method for advancing common European objectives while respecting national diversity, thereby redefining the idea of a distinctive European social model;
- ongoing efforts to redefine the constitutional ambitions of European social democrats through the Party of European Socialists (PES): Vandenbroucke, Rodrigues, and others.]

4) The New Academic View

Academic debate about Social Europe for most of the 1990s assumed a constitutional disparity between the strong protection of negative or market-making rights and the neglect of positive, market-correcting rights. The result was thought be a race to the regulatory bottom. The solution seen from the left was the creation of 'Social Europe', for example through inclusion in the Treaty of market-correcting rights to restore the balance between free trade and social protection achieved in the national welfare state. During the mid-1990s, the terms of the debate began to shift as three findings called into question the background assumption of a structural or constitutional disparity, at least in its initial form First, in a few cases there was evidence of races to the *top*, while in very few was there evidence of a race to the bottom.. This outcome was linked to the emergence of the new approaches to social and economic policies discussed above, which in turn proved part of a broader constellation of regulatory innovations in areas such as environmental and health and safety (see Héritier, Eichner). Even in labor relations, where the race-to-the-bottom view might have seemed most plausible, the EU made modest regulatory advances: for example, in the protection of atypical employment and information and consultation rights for workers: Despite massive decline in union influence in many countries, moreover, there has been no comprehensive labor-market deregulation (cf.

Marginson/Sisson, Traxler). The upshot is that even in the absence of formal parity for social concerns, the EU is somehow less constitutionally adverse to, or more permissive of market-correcting regulation than first feared.

Second and simultaneously, came the discovery that there is not one welfare state in Europe, but three, if not four, broad welfare-state *families*. This was one lesson of the sharply different reactions of national welfare states to the new distributions of risk: Denmark, Ireland, and the Netherlands were adjusting well, raising the question of why apparently similar welfare states were not. But, third, this line of inquiry immediately joined a body of research on the historical origins and political trajectories of the European welfare states dating to the late 1980s and early 90s. The key work here was Esping-Andersen's *The Three Worlds of Welfare Capitalism* (1990), which distinguished continental (Bismarckian or corporatist), Anglo-American (liberal or quasi-private) and Nordic (social democratic or universal) models. Until the mid-1990s the development of these regimes seemed path-dependent, a direct consequence of the accidents of their creation. Thereafter, some members of some families began to learn from the others. How? Why?

Taken together, all this prompted a reconsideration of Social Europe. If the European constitution was less inimical to social protection than initially feared, there was a less urgent need to create a constitutional counterweight to the four freedoms of the single market. Moreover, if each of the families of European welfare states were adjusting in their own way to changes in their environments – including the deepening integration of the EU itself – then it would be plainly misguided to create a uniform substitute for the national welfare state at the European level.

But these same developments opened the possibility that the European level might serve in a new way to enhance social protection in a period of increasing uncertainty and diversity. Instead of being the place from which a uniform solution was imposed, the EU would create a forum for the discussion and elaboration of the different national strategies of adjustment; as some of these proved themselves, the EU acting through the mechanism of the OMC could incorporate general features of the emergent solutions into its own regulatory/legal framework.

This shift from Social Europe conceived as a transposition of the national welfare state to the EU level, to Social Europe as a mechanism for encouraging adjustment of different national

welfare states and generalizing their successes, has been conceptualized in two ways. (Keep in mind that most writers combine elements of both, but for expositional purposes we will elide some of the subtleties of individual positions in order to highlight the differences between them)

The first, which hews most closely to the original concern with constitutional disparities, sees the Social Europe of the new governance as a way-station on the road to overcoming the EU's legal bias in favor of negative integration. Scharpf is the key author here. In its most pointed version, his view is that the institutional constitutional disparity actually exacerbated the differences among families of welfare states, by failing to harmonize national systems of social protection within the EEC early on, when it would have been comparatively easy to do so. Embedded in institutions, small, initial differences were enlarged by the self-reinforcing mechanisms path-dependent development. The resulting divergences now preclude one-size-fits-all lawmaking at the European level. But network governance can, the argument continues, allow development of innovative solutions that could not otherwise be explored at the national level or in the formal EU decision-making process. Once articulated 'informally' through the novel institutions, these solutions could then be formally incorporated into EU law. In the long term their accumulation would redress the EU's constitutional disparity.[1] The second view takes the differentiation of the welfare-state families as a historical given – the result of struggles between social movements with different political ideologies in specific national contexts. It sees all of these welfare states, despite their differences, as fundamentally challenged by the increasing volatility and diversity of the environment. Unlike the formative episodes of the welfare state, where social divisions and ideological clashes were salient both to contemporary actors and in historical retrospect, the origins of the new situation are not, in this view, traceable to conflicts between labor and capital, or even the powerful and the weak more generally. Rather, the new volatility is conceived almost as a natural catastrophe: an uprising of nature against (the hubris of?) human striving, manifesting itself as an explosive increase in the riskiness of social life. The only possible answer to the general increase in risk is, from this point of view, concerted social effort to control the new sources of danger.

[1] Ideally, in Scharpf's view, the OMC would be constructed in such a way as to allow the most intense exchanges within families of welfare states, whose similarity in his view is the condition for heightened possibilities of mutual learning. The learning thus occasioned could then be rendered into law and made mutually binding by invoking the Treaty provisions allowing for 'enhanced cooperation' among like-minded Member States.

Although the origins of the current situation are not intelligible in terms of 'class', the outcome of the reorganization underway will be a more or less inclusive, egalitarian society Hence the upshot of the crisis will be cognizable in light of the traditional ideologies, even if the latter have lost their explanatory power. The emphasis in this school is thus broadly speaking on helping to create through policy a process of adjustment or 'recalibration' of the welfare state that favors just outcomes in the absence of an explanation of the roots of the current travails, let alone a well-articulated program for addressing them.

This leads on the one hand to a tendency to moralize politics: The work of John Rawls or Amartya Sen, for example, is seen as a source for the very general principles of justice or fairness that need to be considered in reconstructing the institutions that powerfully shape citizens' life-chances. On the other hand, it leads to a heightened attention to institutional learning, and especially learning from and through the comparison of difference. This is a radical break from traditional thinking in these policy areas, given that policy learning has typically been conceived as looking backwards (to closing the gap between one's own expectations and the outcome), not looking sideward (to what others are doing).

A further consequence is an increased emphasis on the need for an effective public administration able to help citizens manage the new risks to which they will be exposed at work, in family life, or simply as living beings afoot on the planet. It follows from this emphasis on learning and institutional reorganization that this school is less inclined to see the new governance as a way-station towards a normalized Europe in which positive and negative rights are equally respected, and more as an enduring feature of a new kind of polity that needs to learn through coordinated but decentralized experimentation how to cope with the new risks to which it is exposed. But such reflection typically runs into the worry that diffuse institutional learning is not easily translated into law of any kind, let alone EU law. A more fundamental concern is that the new governance encourages a dispersion of authority that subverts the rule of law, and with it the constitutional democracy as the natural habitat of the welfare state. As we will see in a moment, the Convention on the Future of Europe is elaborating the working definition of constitution to take account of just these possibilities for learning. And we will see later that this

practical work echoes and substantially advances a reconceptualization of constitutionalism underway among the constitutional theorists themselves.[2]

The Right: Reforming Rather than Rolling Back the Welfare State

The right too is in turmoil. The Christian Democratic right turned out to be too closely implicated in the compromises and clientelism of the traditional welfare state to survive its transformation. The hard-edged neo-liberal right turned out only to have a project so long as the welfare state persisted in its familiar ways. Once the question was not whether, but how to reform the welfare state, the free-market right had little compelling to say. Indeed, the limitations of the deregulatory right were already presaged in the emergence of something approximating Social Europe despite the constitutional disparity in favor of market freedoms. It's hard to imagine more favorable circumstance for the triumph of neo-liberalism as an economic constitution for Europe those of the 1980s and early 90s.

In many ways the right thus faces a crisis of reconceptionalization comparable to the left's. Crucially for our argument, many of the roads forward for right, as for the left, lead to increased emphasis on the provision of effective services to address new social risks, and with this, a new attention to learning. Indeed within the right itself, it may well be that the emphasis on reconfiguring services links populist criticism of the existing system as an automat for privileged insiders with a renewed Christian Democratic emphasis on local solidarity and values, while connecting both to the EU of open coordination and learning from difference.

The New Populist Challenge

It is an understatement to say that the situation is in flux. Categorizations of types of populist parties and generalizations about their underlying support and programs seldom outlast a single electoral cycle. For our purposes it is sufficient to note three successive and overlapping waves of protest, which insofar as they exhibit any tendency at all mark a progression from a protest against concentration of power in a self-serving political elite towards a demand for better

[2] Emergent conceptualization embodied in two key reports: Ferrera, Hemerijck, Rhodes, *The Future of Social Europe: Recasting Work and Welfare in the New Economy*: commissioned by the Portuguese Presidency in the spring of 2000, and published as a book in Portugal that year; Esping-Andersen with Gallie, Hemerijck, and Myles, report on "A New Welfare Architecture for Europe?", commissioned by the Belgian Presidency for the fall of 2001, and published by Oxford in 2002 as *Why We Need a New Welfare State* with a foreword by Vandenbroucke).

access to and improved service from such key institutions of a functioning democracy as schools, the police, and the health care system.

- [Le Pen: traditional populist protest
- Haider, Lega Nord, Vlams Blok, SVP: protest against the institutionalized cartel and government by clientelism
- Pim Fortuyn/LPF (Netherlands), Danish People's Party: mixes elements of the first two with calls for a popular renewal of the welfare state and a post-modern conception of nationalism that has a place for immigrants to integrate themselves into the nation and the nation to integrate itself into Europe.]

The New Center-Right Response

The effect of these new populist movements is vastly increased by their gravitational pull on the mainstream right, who transform their own strategies in co-opting parts of the programs and appeal of these new competitors.

France and Italy are cases where these old and new rights coexist between hodgepodge and hybrid. One view is that the realignment of governing party strategy is but an orgy of expediency; the other is that it represents a genuine effort to learn from past mistakes. The truth is probably some of both, and there is an open struggle within the governing coalitions about which it should be, whose outcome remains as yet undetermined.

[France: Chirac's populist turn in the 1995 elections, followed by a return to managerialism once elected and confrontation over technocratic public-sector reforms that brought down the government; relative caution of Chirac/Raffarin, who seek to avoid a rerun of the 1995 'hiver de colère'; center-right intellectuals split between traditional neo-liberal recipes (free the entrepreneur and the economy) and new thinking about how to combine inclusive solidarity, local initiative, and individualization of services (employment/activation, health care): cf. Claude Bébéar (ed.), *Le courage de réformer*, Paris: Odile Jacob, 2002.

Italy (Berlusconi): attack on unions over article 18 gives way to Patto per l'Italia (July 2002) with CISL/UIL (but not CGIL) and reform of *amortizzatori sociali*: return to broader vision of labor market and industrial relations reform outlined in Biagi *Libro bianco sul mercato*

del lavoro (Fall 2001) after successful general strikes and mass demonstrations (EIROnline article).

Balkenende (Netherlands), Rasmussen (Denmark): accept solidaristic welfare state, but seek to reform it in the direction of greater individual choice/personalization of services. New approach goes together in some countries with provocative attempts to rewrite the rules of the political game for partisan advantage: breaking with unwritten rules of consensual decision-making, attacking organizational base of trade unions, etc.]

The Right at European Level

- [Blair-Berlusconi-Aznar axis: no new social legislation at EU level; Blair Berlusconi joint declaration before Barcelona summit in March 2002 (I have the document at home)
- views of PPE in EP: Christian Democracy and support for European integration tempered by neo-liberalism, or something more?]

II. The New Governance Consolidates

Intro

These broad political changes reflect and reinforce the emergence of a new system of governance that puts national administrations in a mutual discussion with one another by linking them through a complex web of novel European institutions. These interrelated institutional innovations include a Treaty addition favoring open-ended, framework regulation (the Amsterdam protocol on subsidiarity and proportionality); expert advisory committees (comitology); public regulatory agencies of a new type; and iterative processes for benchmarking member-state practices in complex policy domains (the open method of coordination or OMC). Together they provide the instruments for the incremental, but cumulatively transformative, reconstruction of national welfare states and EU social regulation towards which political convergence is pointing.

Very broadly speaking, this emergent system of governance is networked, not hierarchical: framework objectives established at high levels are routinely amended in the light of diverse experience gathered in their implementation. Similarly, the new system is, at least

potentially, open, not closed: it incorporates, especially in its most recent additions and re-elaborations commitments to extend the circle of participants in decision-making. In this sense, too, it is not hierarchical. But this commitment to openness or contestability has not led, at least so far, anything like broad civic participation in EU governance.

Because the individual elements emerged piecemeal; the connections between them are not conspicuous; and because each taken separately operates by unconventional or even counter-intuitive principles, it has been easy to underestimate the depth and breadth of the transformation in progress. Indeed, commentators have tended to focus on one of the components of this new system to the exclusion of the others, evaluating its potential as a foundation of EU governance by the standards of conventional forms of administration.

The Amersterdam Protocol on Subsidarity and Proportionality

The Protocol, added to the EC Treaty by the Treaty of Amsterdam (ratified in 1999), marks and helps officialize the long transition from the old governance to the new. Indeed, its own internal ambiguity embodies and exemplifies the very change that it would help channel.

The Protocol's original purpose was to clarify and limit the role of the EU by establishing subsidiarity as constitutional principle: Where it shares competence with the member states, the Union may regulate only if it can show that the latter are not capable of doing so adequately on their own. But the Protocol offered no criteria that would make this principle an effective discipline on Union power. Perhaps the the Union should act only if there are 'transnational" aspects to an issue that the member states cannot address alone? But how could it ever be conclusively demonstrated that such aspects are utterly absent? On the contrary: Merely stating such inevitably elastic criteria invites an abusive extension of authority rather than limiting it.

Implicitly recognizing this danger, the Protocol tries to maximize the possibility for "subsidiary" units to solve their own problems in a second and more fecund way. In addition to specifying (unsuccessfully) *what* the Union may regulate, the Protocol imposes requirements on *how* all regulation is to be accomplished: It takes the principle of proportionality ("the union will legislate only to the extent necessary") to mean that subsidiarity must be a pervasive requirement of EU regulation. Thus whenever the union acts, it must give member states the greatest possible autonomy in the implementation of the EU measure. In particular the Protocol requires that the

Union use directive and other framework devices in preference to "detailed measures," leaving the member states as free as possible to interpret the outlines of joint action. The Protocol moreover requires the Commission to explain how its proposals, and the expenditures they entail, meet the obligation of subsidiarity, and to report annually to the European Council, the European Parliament and the Council of Ministers on its application of the relevant principles. Taken as a whole, then, the Protocol not only creates a constitutional commitment to the new governance and the values of extended self determination they embody, but also provides the rudiments of a transparency-based accountability system (of a form to be refined greatly in the following years) for ensuring that it be respected.

Comitology

This is the awkward name for the system of expert and political committees, appointed by the Member States, to work with the Commission in drafting regulatory proposals for policy areas such as food safety, occupational health and safety, and telecommunications. Decision-making in these committees is, in most cases, by qualified majority vote.

At one extreme, comitology has been interpreted as the European version of regulatory capture, where self-seeking interests hide behind claims to scientific and technological expertise. BSE is the horrific proof that there is something important in this view. At the opposite extreme, comitology has been described as a European version of US Congressional police patrols ensuring on behalf of the member states that the Commission does not exceed its delegated powers. This is most likely what the member states originally intended the institution to be.

The dominant interpretation, however, based on close observation of their actual practice, rejects the notion that the committees operate as mere agents in favor of the view that they operate through deliberation — (self-) reflective debate by which participants reason about proposals and are open to changing their own initial preferences — aimed at consensus. Hence members individually and committees as a whole cannot be said at the end of the decision process to be advancing any fixed interest with which they entered it. On the contrary: committee deliberations are driven by the comparison of differences among current regulatory systems in the Member States. Such comparisons permit identification of best practices that serve as the starting point for a detailed, harmonized regime.

But despite its impressive and by now well-documented problem-solving capacities, comitology according to this third dominant interpretation remains limited in two key ways. First, it is confined to those policy areas where Treaty powers and Council decisions have given the committees authority to enact uniform regulations. Second, comitology is said to suppose a degree of technical expertise that de facto limits participation to a small club of adepts, formal commitments to imposed by the ECJ notwithstanding.

[Where the first interpretation turns comitology into a quasi-criminal conspiracy, and the second makes it as politically legitimate as apple pie, the third preserves, the appearance of democratic orthodoxy, though just barely, because a sovereign lawgiver — the EU in the guise of the Commission and the Council—is setting the rules because the Commission is formally implementing decisions of the Council, and the committees are formally assisting the Commission, and reporting back where necessary to the Council] (Joerges et al. (eds.) 1997; Joerges and Vos (eds.) 1999; Van Schendelen 1998; Christiansen and Kirchner (eds.) 2001).

Networked Agencies

In the first half of the 1990s, the EU created a series of free-standing agencies in policy areas such as occupational health and safety, environmental protection, drug abuse, pharmaceuticals, and immigration/xenophobia. Recently, it has been decided to create a European Food Safety Authority to help police the integrity of the food supply chain.

These agencies, particularly the first ones, were said to be modeled on American independent regulatory bodies. Whatever they are in reality, they are not faithful copies or even close approximations of these ostensible transatlantic models. Interpretation of their actual operation has fractured as much and along the same lines as that of comitology.

At one extreme, the agencies are seen as misbegotten because they perpetuate comitological-style networks of deliberative decision-making rather than exercising independent executive powers of their own. Whether the agencies are nefarious (as committees are in the *sottogoverno* reading of comitology) or simply ineffectual is left open; either way, they are part of the administrative problem facing the EU, not part of the solution.

At the other extreme, behind the façade of networking and openness, the agencies are seen as a Trojan horse for unauthorized centralization of decision-making at the EU level. It is

true that most modern federal states have encouraged centralization of power at the federal level, and that administrative agencies of one sort or another have often served as vehicles for this purpose. The interpretation of the agencies as façade is premised on such historical precedents, and supported, so far at least, by little else.

The third interpretation is based on extensive empirical research. It neither dismisses the agencies as a failed attempt to Americanize EU administration nor as an infernal device for achieving this very result by cloaking central power in the humble garb of advisory networking. In this view the agencies, despite significant differences in their own authoritative capacity to intervene in regulatory processes, systematize and extend comitology in three ways. First, they consolidate and streamline the existing committees while creating new ones where that is judged opportune. Second, in at least some high-profile cases, the agency with its corresponding committees jointly orchestrates a process by which regulatory decisions can be contested and the contestations adjudicated. In these cases, the exact division of labor between agencies and committees differs from one policy domain and stage of the process to another, but information gathering, deliberation, and decision making are so closely imbricated that it seems reasonable to think of the two institutions as comprising a single system. Third, the agencies extend "comitological" exchanges among national administrations even when such mutual learning is not immediately required to inform EU regulatory processes. A natural by-product of this member state to member state networking, however, is to broaden the circle of participation in the kinds of practical deliberations upon which comitology draws, and so at least potentially to extend the circle of participation in the latter.

Open Coordination

The Open Method of Coordination had its roots in the macroeconomic and employment policy coordination processes initiated by the EU during the 1990s (BEPGs and EES). It was given explicit form at the extraordinary Lisbon European Council of March 2000, which also authorized the extension of this method to a wide range of domains such as social inclusion, structural economic reforms, education, R&D, enterprise promotion, and information society. Since then, OMC processes have been initiated in a number of other areas, notably pensions, health care/care for the elderly, and immigration/asylum. These are all domestically sensitive policy areas, where the Treaty bases for Community action are weak; where inaction is

politically unacceptable; where diversity among member states precludes harmonization; and where widespread strategic uncertainty recommends mutual learning at the national as well as the European level.

Although the method varies widely from one policy domain to another, it is defined by four common elements:

1) Joint definition by the member states of initial objectives (general and specific), indicators, and in some cases guidelines.[3]

2) National reports or action plans which assess performance in light of the objectives and metrics, and propose reforms accordingly.

3) Peer review of these plans, including mutual criticism and exchange of good practices, backed up by recommendations in some cases.

4) Re-elaboration of the individual plans and, at less frequent intervals, of the broader objectives and metrics in light of the experience gained in their implementation.

Within this iterative redefinition of ends and means in relation to one another, common objectives play a pivotal role in linking OMC processes upwards to the fundamental values and goals of the Union (as set out in the Treaties and the Charter of Fundamental Rights) on the one hand, and downwards to more specific policy approaches to be pursued by the Member States in advancing them on the other. Thus, for example, in defining accessibility along with quality and financial viability as long-term of objectives of EU policy coordination in health care, the Commission and the Council referred explicitly to the "right of access to preventative health care and…medical treatment" proclaimed by the Charter of Fundamental Rights (article 33). [Other examples to follow from social inclusion, employment, and pensions.]

[3] Examples of these objectives and indicators in the different OMC processes include:

- employment: first five years: employability, adaptability, entrepreneurship, and equal gender opportunities – a characteristic indicator is the employment rate (number of people in employment/potentially active population) disaggregated by age and gender; new objectives: full employment; quality and productivity at work; cohesion and an inclusive labor market.
- social inclusion: participation in employment and access by all to resources, rights, goods, and services; prevent risks of exclusion; help the most vulnerable; mobilize all relevant bodies.
- in pensions: adequacy, sustainability, and modernization to meet new distributions of social risk).
- health care: accessibility, quality, financial sustainability.

Here, too, it is convenient to trichotomize reactions, although developments here are so fresh that opinions are even more in flux than elsewhere and individual authors often straddle multiple positions.

At one pole are those who see the OMC as potentially freeing the deliberative kernel of comitology and the new agencies from the constraining apparatus of power which currently deforms it. This view concedes that as currently organized at least some OMC processes favor bureaucratic insiders and discourage broad participation by civil society. But its proponents argue that the OMCs can be reformed, for example by increased participation of national parliaments and local authorities. The hope here is that the OMC could eventually create a new European public sphere: a real-world approximation to the Habermasian "power-free" discursive space that gives free rein to the public interest precisely because it is not directly entangled in the strategic games of legally enforceable rule-making. From this point of view, it is precisely the fact that OMC issues in soft rather than binding law that obligates participants to engage in mutual persuasion by reason-giving rather than strategic bargaining.

At the opposite pole, the soft law outcomes of OMC are taken as evidence that this new form of governance is at best a handmaiden to establish hard forms of Community lawmaking, and at worst a deceptive sham by which, once again, a variety of familiar interests achieve by stealth what they cannot gain through open action. From this perspective, the OMC creates an opportunity, albeit a limited one, for member states to explore informally their preferences and learn of new possibilities in unfamiliar policy domains before entering into more formalized rulemaking procedures. Put another way, OMC makes it possible to reduce the coordination costs of policy making by eliminating misunderstandings among those actors whose underlying interests are fundamentally aligned. The danger of soft law, on this view, is that it turns out not to be soft law at all. Under cover of an apparently innocent information exchange, the Commission, member states, and/or various particular interests use the OMC to conspire to bring about through EU pressure changes both in national law and the scope of European action nowhere authorized by the Treaties. In another mood, observers at this pole consider OMC so soft as to amount to nothing more than a form of symbolic politics, in which national governments repackage their existing policies to demonstrate compliance with European commitments.

The third perspective looks at OMC not in terms of the hardness or softness of the law to which it might lead, but rather in the light of the principles that it declares and embodies, especially as these relate to the first two sets of innovations in European governance, comitology and networked agencies. From this third point of view, the OMC breaks with the fiction, stillk barely maintained in Protocol on Subsidiarity and Proporionality, that deliberation and mutual learning are appropriate first and foremost in the implementation of pre-established and unitary Community goals. OMC openly acknowledges, rather that the goals of regulation are provisional and need to be corrected by experience as diverse as that underpinning their initial formulation. It thus proclaims and institutionalizes directly what comitology and the networked agencies say and practice more obliquely. In so doing, the OMC provides in this view an institutional armature for linking and the rudiments of a conceptual language for explaining and perhaps legitimating through broader engagement with civil society the apparently disjoint pieces of the EU's emergent system of governance. This view, like the first, concedes that there is much that needs to be reformed before the OMC can fulfill such promise. A first intuition here is that the OMC procedures for ensuring full and open participation can be reformed by applying to them the same techniques of benchmarking and peer review that inform substantive policy judgments. If such reforms succeed, the OMC will enlarge the deliberative possibilities of civil society as envisaged in the first view, but connect them more directly to practical decision-making than the Habermasian interpretation would allow. If the OMC does integrate the governance along these lines, furthermore, it is likely that the forms of decision that result will blur the distinction between hard and soft law from which the both of the preceding views depart. Indeed, this blurring is already foreshadowed in hard-law hazardous waste and occupational health and safety directives that anticipate the revision or completion of standard-setting by soft-law OMC procedures.

In representative democracy traditionally understood, the people acting through its representatives in the legislature are the principal and the administrative bodies that implement the laws are their agents. The constitution fixes the principles and procedures by which the laws are made and interpreted. The more explicitly and consistently EU lawmaking announces its own provisionality and corrigibility through diverse implementation, the more consistently its institutions governance act accordingly, the more clearly the Union departs from the familiar model of principal-agent democracy. The more profoundly and extensively this novel lawmaking

redefines the core meanings of principles such as solidarity, fairness, and civic participation, the more it trenches on the constitution of the EU, raising indeed fundamental questions about what a constitution is and could be. It is at this point that the long-term transformation of EU governance intersects with current developments in constitutional theory on the one hand and the ongoing deliberation of the constitutional Convention on the future of the EU on the other.

III. Constitutionalism

The Contemporary Crisis of Constitutionalism

Contemporary constitutionalism in the EU and generally is in crisis for two interrelated reasons.

First, constitutions traditionally since the French and American revolutions have supposed a *demos*, an historically given sovereign people which as the *pouvoir constituant* endows itself through and in the constitution with the institutional *pouvoir constitué* that is to regulate its subsequent exercise of sovereignty. The EU famously has no *demos*, and the idea of endowing it with a constitution therefore seems a denigration of such popular sovereignty as does undeniably continue to exist at the level of the member states.

Second, under the conditions of reasonable diversity that characterize modern societies, including especially those such as the United States with long consolidated constitutional traditions, it is far from clear that it is possible to practice anything resembling traditional constitutionalism. Even supposing that the citizens of these polities continue to agree on the most fundamental principles, they almost surely disagree, and sharply, as to their application in controversial cases. They disagree, furthermore, about the principles to be applied for selecting procedures to resolve substantive disputes. Under these conditions, "adjudication" of important disputes by constitutional courts will appear more an exercise in caprice and a usurpation of democracy than like the correction of unruly practice by the consensual application of fundamental principle. In the light of this second problem, the want of a *demos* just spares the EU the constitutional disappointment of having one.

Constitutional theory in Europe and North America – the transatlantic community from which republican democracy emerged – has not, however, been paralyzed by the challenges it

identifies. As usual in such moments of general confusion, responses come in various combinations of two basic forms. The first is the rediscovery of historical alternatives to current arrangements. Swept away by the march of progress, some of these suddenly seem pertinent again in a changed world. The second is philosophical speculation. Faced with the aporias of contemporary constitutionalism, some theorists almost in desperation try to think their way out of a box by imagining less confining containers. Some of these prove wholly imaginary; others help explain and are clarified by emerging elements of current practice and the re-evocations of alternative historical possibility. Drawing on both the historically informed and the speculative responses, with no pretense to fully surveying contemporary constitutionalism, we stylize the relevant discussion as the response to three linked questions regarding diversity, democracy, and institutional means for advancing each of these while respecting the other.

Three Linked Questions

The first question has bedeviled European theorists of sovereignty from the French revolution through Carl Schmitt and others in the 1920s down to the present. Is there a conception of the polity and of sovereignty more generally in which originally separate states can form an ever closer association that allows them to sustain their distinctiveness while cooperating on common objectives?

The second question has animated discussion among Canadian and other writers on multiculturalism. Is there a conception of self-determination by which culturally distinct groups with legitimate claims to autonomy can renew themselves within a common democratic polity?

The third question emerges both from US reflection on the aporias of constitutional democracy and from efforts in the EU to understand the theoretical underpinnings and implications of the Community method of decision making since it has evolved from the time of Jean Monnet. Is there an institutional structure that obligates key decision makers to take account of social diversity and the mutual learning that it may enable in defining the public good?

In what follows we will show how an incomplete answer to the first question can be remedied by a partial answer to the second, whose limits can in turn be addressed by the responses to the third question regarding the institutionalization of respect for diversity.

Federative Pacts

In contemporary European constitutional law, Olivier Beaud has tackled most directly the traditional problem of finding a third way between a purely contractual confederation and the unitary federal state which slowly crushes the individuality of its constituent members behind the screen of a formal association.

Beaud's solution is both logical and historical. He argues first that that contractual agreements can in principle give rise to non-contractual arrangements from which the parties cannot unilaterally disentangle themselves. Marriage and collective bargaining are two obvious contemporary examples where rights and obligations created by an initial agreement can survive its destruction. Following Carl Schmitt's *Verfassungslehre* (1928), Beaud calls these agreements that go beyond mere confederation without creating a unitary state federative pacts. The theoretical contours and practical viability of these federative pacts, Beaud further contends, has been obscured by historical experience, especially that of the French Revolution, the US Civil War, and German unification. The nineteenth-century victory of the nation-state as a sovereign form claiming exclusive authority within its jurisdiction enshrined the doctrinal opposition between sovereignty and contract. Either parties contracted, thereby preserving their separate identities, but severely limiting their capacity for joint action because dissidents could defect from common projects. Or the participants fused into a single sovereign entity, the nation-state, foregoing their separate identities in return for a vastly enhanced power of common action.

Under what conditions, then, can this constituent nations find their way past this dichotomy and enter federative pacts? Beaud argues that this possibility can only be realized under certain social and political conditions. The necessary condition, Beaud asserts, again following Schmitt, is that the constituent members have to affirm compatible principles of politics (e.g. democracy). More precisely, their democracies have to be associated with an intermediate level of social diversity. They cannot be so similar that they are driven by the centripetal force of sameness towards a unitary state, nor so different that the centrifugal force of difference pushes them back into a mere contractual confederation. But democracy, Beaud thinks, is inherently centralizing and therefore destructive of diversity. From this an apparently fatal choice follows: the member states of the EU can preserve their distinctiveness while

preserving their capacity for joint action through a federative pact, but only on condition that they forswear collective self-government by any means that smacks of contemporary democracy.

The flaw in this argument derives from the same uncritical reliance on a historically formed concept – here democracy -- which Beaud criticized in relation to the idea of federation. Just as the nation-state narrowed our understanding of the latter, so it constricted our understanding of the former, leading us to suppose an association between democracy and homogeneity that is as contingent as the relation between sovereignty and centralization. A major thrust of an innovative group of political theorists is to recapture earlier understandings of democracy as accommodating, even requiring difference, and using these as a way to make sense of contemporary developments in the EU and elsewhere.

Difference Democracy

This current of thought radicalizes and applies to democracy itself the key theme of the federative pact: the notion that diversity can survive the foundation of a unified polity. The guiding assumption is that democracy and constitutionalism are essentially contested concepts, meaning roughly that any one moment they are defined with respect to many aspects or dimensions, and new elements can always be added to the existing ones. No single interpretation of such terms dominates the others on all the currently relevant dimensions, let along those that may be eventually introduced. Given this irreducible (or continuously renewed) ambiguity, to affirm constitutional democracy is less a declaration of principle than an orientation: a commitment to engage with similarly oriented others in coming to terms with rival conceptions of democracy and constitutionalism. From this follows a shift in the idea of a constitution as a foundational document embodying those values and commitments from which a people elaborates and disciplines its subsequent decisions to the idea of a constitution as a device permitting, even encouraging the continuing articulation of differences. "The democratic practices of disputation and contestation that were previously assumed to rest on permanent constitutional arrangements, to which the people were supposed to have agreed once and for all, are now seen to apply to those arrangements as well, and thus 'agonism' (the Greek word for contest) is seen to be a defining feature of democratic constitutionalism, one which partly explains and also reinforces the co-equal status of the two principles." (Tully)

The arguments in this school of thought form a continuum, defined at one end by an emphasis on institutions as the instigators and guardians of deliberation about difference, and at the other by an anti-institutional insistence on an ethical or even spiritual inclination to tolerance on the part of the citizenry as the guarantor of mutual accommodation.[4]

We focus here on the institutional end of the spectrum, especially Bellamy's work on republican constitutionalism as it relates to contemporary debates in the EU. Bellamy regards the conventional nineteenth-century view of sovereignty and contemporary post-sovereignty – cosmopolitan governance entrenched through international law of human rights – as two sides of the same coin, insofar as each can be seen as the expression of a unitary will. To these he contrasts the early modern republican idea of 'mixed government' or constitutionalism. In mixed government, state authority is distributed among various institutions, each responsive to a different component of the polity. Hence no organ of government can act effectively without taking the views of the others into account. As mutual regard is a precondition for action, difference and the continuing disposition to come to grips with it is constitutive of a distinctive form of 'mixed sovereignty'. Like Beaud, Bellamy sees current developments in the EU as closing a parenthesis in the world history of constitutionalism, and marking a return to understandings of governance widespread before the nineteenth-century apotheosis of the unitary nation-state. But where Beaud limits this return to constitutionalism and sees a tension between the latter and the centripetal tendencies of democracy, Bellamy and other agonistic democrats see

[4] This is defined by Weiler. In his view, the notion of constitutionalism has been contaminated by its association with the sovereigntist parenthesis. Attempts to redefine this notion it are unlikely to purge it of all the elements that it acquired between the French and American revolutions and the present. Efforts to apply an enlarged or more plastic concept of constitutionalism are therefore likely to be self-defeating as they import formative elements of the old order into the new. And this connection to the past, disruptive in itself, is likely to be especially so given that it is both unwanted and unconscious. It would therefore be impossible, in Weiler's view, to endow the European Union with a constitution without subverting it as a functioning polity. But he goes on to argue that constitutionalizing the EU is not only impossible but also thankfully unnecessary for two different but ultimately complementary reasons. The first is that citizens of the EU already demonstrate in their daily life the mutual toleration to which a new constitution should ideally conduce them. Seen this way, a constitutionalism capable of truly respecting difference, assuming it to be contra factum possible, would be superfluous. But Weiler argues as well that the toleration that must be constitutive of the EU is a transcendent value because never fully or unequivocally embodied in the law or practice of any earthly power. On the contrary, the current European constitution is so ramshackle that nobody could construe it as a satisfactory source of political legitimacy. Therein lies, Weiler argues, the paradoxical utility of the current arrangements. By freely and repeatedly submitting themselves to the often arbitrary structure of the current EU 'constitution', practicing Europeans give expression to their adherence to the transcendent value of mutual toleration in much the way that a practicing Jew acknowledges the transcendent authority of God by adhering to the arbitrary laws of the Sabbath.

the return to mixed constitutionalism as part and parcel of a reconceptualization – part recovery, part anticipation – of democracy as dependent on difference.

A limit of this agonistic school even at its institutional pole is the dissociation of deliberation about difference from the practical activity of problem solving. At the limit, the purpose of agonistic democracy is to promote agonism as an exhilarating exercise in republican virtue. Hence the Nietzschean lilt in this formulation of Tully's: "After all is said and done, the democratic-constitutional citizen is not Lenin. She does not aim for the end of politics and the administration of things. She is more akin to the young Olympian athlete who greets the dawn's early light with a smile, rises, dusts herself off, surveys her gains and losses of the previous days, thanks her gods for such a challenging game and such worthy opponents, and engages in the communicative-strategic agon anew."

Epistemic Constitutionalism: Renewing the Community Method?

In corrective contrast, recent writing by Michelman and others in US constitutionalism is at pains to connect attentiveness to difference with the epistemic requirements of decision making: in other words to see democracy not just as an instrument for learning about difference, but also and fundamentally an instrument for learning from it.

Michelman's recent work frames some of the key conceptual difficulties with democracy, and plausibly establishes conditions for their deliberative solution. To be legitimate, Michelman argues, a democracy must ensure both that the people be self-governing and that the higher law guaranteeing the democratic character of lawmaking itself be protected from popular abuses through the supervision, for example, of a constitutional court. Two, symmetrically flawed methods are available for articulating the rules of a democratic polity so defined.

The first is substantive. Deliberators detached from everyday passions reason from the constitutional texts, and the traces of popular values in legal cases to a full specification of the rights and duties citizens of citizens. But now they run into what Michelman calls the pragmatic objection: In use these rights prove to be controversially indeterminate. The same problem arises with principles sought for the resolution of *these* controversies. The real decisions are made in way that looks, by the standards of these deliberative fora, unprincipled.

The alternative, procedural approach does no better. It aims to set the terms of full and fair participation by all citizens in democratic decision-making. But every choice of participatory procedure can be challenged, and must accordingly be defended, in the name of a principle. Justifications ascend. This justificatory ascent takes the procedurally inclined polity just where it was—wisely, given the failure of the substantive approach—disinclined to go: investigation of first principles.

Learning from these reverses, we can revise our standard of democratic legitimacy to disengage our concerns for self-rule as political responsiveness broadly conceived from concerns for procedural and substantive coherence. Thus Michelman proposes that a democracy is *epistemically* legitimate if it meets two conditions. First, it must embody the best possible interpretation of our understanding of democracy (our right to be treated as equal, for example). Second, those empowered to interpret the higher law—the constitutional judiciary for Michelman—must expose themselves and other institutions to the "full blast" of diverse opinions and interests in society. The first condition allows citizens to identify with our democracy. The second allows them a measure of participation in actual lawmaking.

Together these epistemic conditions shift the focus from the coherence of any one set of principles to the coherence of sets of institutions, each of which may embody many different principles. It is a rough but serviceable attempt to make our standard for judging democracy a kind of critical heightening of the things our democratic institutions can (be made to) do. Indeed, given that the "full blast" condition emerges from, and must respond to the pragmatic objection, the only way to make use of the principle is to try and learn from the experience of institutions that in some sense apply it.

By itself this epistemic turn is too barren institutionally to be of much use. It tell us that the institutions of agenda setting are key to the way we elaborate our fundamental commitments. But it does not say anything about the institutions that will do the job, except that they must respect the "full blast" criterion. Here is where the EU, and especially the Community Method, are again of central importance.

In Magnette's view, the Community Method rests on an implicit bargain that links institutional arrangements to (epistemic) constitutional values: the diverse member states abandon or relax some of their powers to obstruct Community action on condition that the institutional organization of agenda-setting ensures that all measures forwarded for final decision have been formulated in a public-regarding way. In practice this meant treating the power of the Commission to propose regulatory directives in collaboration with comitology as an instrument for filtering partial, self-interested proposals from debate, while giving due attention to the legitimate diversity of views within the EU.

From here it is a short step to the new compromise, in which the new institutions of network governance assure agenda setting that is epistemic in its public regard. The Protocol on Subsidiarity and Proportionality creates a first link between the institutions of the new governance and the constitution. The Convention could add many more

IV. The European Convention: From Stalemate to Synthesis?

The debate in the Convention on socio-economic governance replays in fast-forward the developments discussed in this paper as it moves through three distinguishing moments:

It re-evokes the familiar foundational principles of left and right – the battle over extending the national welfare state with its full panoply of powers and objectives to the European level.

It quickly reveals the limits of each position in relation to the other: the right can't keep social issues off the Convention's agenda, and the left can't force movement on extension of Union competences and powers → deadlock in WG on Economic Governance and creation of a new WG on Social Europe.

An emerging compromise has two components: incorporation of sustainable social protection more explicitly into the objectives of the Union, accompanied by a more explicit limit to the extension of the formal competencies and powers of the EU. But this compromise is made possible and in the long term is likely to be transformed by the emergence and anchoring in the Treaty of new governance mechanisms such as the OMC, which either do or do not, depending

on one's partisan point of view, allow the Union to take effective action in pursuit of its goals, particularly in the social sphere.

The initial political clash:

The (federalist) left within the Convention began by seeking to realize its historic maximum program for constitutionalizing Social Europe: parity of the EU's social and economic objectives; extension of Union competences and QMV to all areas of social and employment policy, including pay, strikes, and employee representation, as well as social security (cf. May 2002 Van Lancker paper).

The liberal right conversely sought to prevent any explicit discussion of Social Europe by the Convention, while also resisting any increase in the Union's competences and powers in the social field.

The stand-off: from economic governance to Social Europe

Social policy first came to the fore within the Convention's Economic Governance WG, which was unable to reach a consensus on any of the disputed issues. Although the WG was chaired by a member of the Party of European Socialists (Klaus Haensch, German MEP), he ruled that consideration of the Union's social objectives, competences, and powers was beyond the Group's mandate, and passed these questions back to the Convention as a whole for resolution. The plenary debate mobilized a broad front of Socialists, Christian Democrats, and British New Labourites in insisting that Europe must be more than a market, and that the draft constitutional treaty must therefore make explicit reference to the EU's social dimension.

In response to this groundswell of pressure from the floor, the Presidium agreed to establish a separate WG on Social Europe, which its President Giscard d'Estaing had hitherto resisted. The new WG's mandate covered all the major disputed issues, including not only the EU's social values, objectives, competences, policies, and decision-making procedures, but also the question of incorporating the OMC into the Constitutional Treaty, which three of the other WG Reports had already considered without reaching a definite conclusion.

If the creation of the Social Europe WG signaled the failure of the right's efforts to exclude the social dimension from the draft constitutional treaty, the WG's deliberations quickly

revealed the lack of broad support even within its own ranks for the left's historic program. Thus Nordic Social Democrats and British New Labourites joined hands with conservative liberals and Christian Democrats to oppose granting new competences or stronger legislative powers to the EU in sensitive policy areas like social security bearing directly on the core functions of national welfare states. (Public health as the only partial exception). Even in the case of QMV, historically favored as a general rule for EU policymaking by Christian Democrats and continental socialists alike on common federalist principle, the most the WG could agree to recommend was its extension to two largely symbolic areas, where the Treaty of Nice had already proposed that this decision-making procedure could be applied by unanimous consent of the Member States [TEC 137(1), d: "protection of workers where their employment contract is terminated"; and f): "representation and collective defence of the interests of workers and employers, including codetermination".]

Outlines of an Emergent Compromise

Yet despite – and in no small measure because of – this political stand-off within the Convention, the outlines of a possible historic compromise have begun to emerge from its proceedings, even if they are not yet fully visible to the actors themselves. One key element of such a compromise is a substantial strengthening within the draft constitutional treaty of references to the EU's social values and objectives, which would place them on an equal footing with Union's economic goals. It is not yet clear precisely what form this strengthening of the EU's social dimension will take. The Social Europe WG Report recommended adding a long series of items to the catalog of values and objectives in Articles 2 and 3 of the draft Constitutional Treaty, including a broad horizontal clause similar to that dealing with environmental sustainability, which would commit the Union "in all activities falling within its competence…to promote equality between men and women…full employment and a high level of social protection, protection of human health, advancement of education and training, and to guarantee universal accessibility of services of general interest which are financially viable, of high quality and organized on the basis of solidarity by the individual Member States", as well as to seek to eliminate inequalities [and] discrimination on the basis of racial or ethnic origin, religion or beliefs, age or sexual orientation…" (CONV 5116/1/03 REV 1, para 20). The Presidium's initial draft of the first 16 articles, by contrast, proposed a much shorter and less

expansive list of social values and objectives, in line with its general strategy of keeping the opening "constitutional" section of the revised Treaty to the barest essentials. But even the Presidium's draft, which will almost certainly be heavily amended, states that "The Union shall work for a Europe of sustainable development based on balanced economic growth and social justice, with a free single market, and economic and monetary union, aiming at full employment and generating high levels of competitiveness and living standards. It shall promote economic and social cohesion, equality between women and men, and environmental and social protection…. It shall encourage solidarity between generations and between States, and equal opportunities for all." (CONV 528/03)

The other key element of the emergent compromise is the incorporation into the draft constitutional treaty of the OMC as a vital instrument for enabling the Union and its Member States to take effective joint action in advancing their common social values and objectives. Thus the Social Europe WG Report endorsed the inclusion of the OMC in the draft constitutional treaty, as did those of the WGs on Economic Governance, Simplification, and Complementary Competences, provided that, as one summary of its conclusions put it, "the provision would not replace existing normative procedures or make the open method of coordination rigid in cases where there is no specific legislative methods of procedure" (European Policy Centre, "Convention Debates Social Europe", 11 February 2003). These provisos reflected in turn symmetrical fears among some members of the Working Group that constitutionalization of the OMC could undermine its flexibility and among others that it could subvert the use of the EU's existing Treaty powers to legislate in the social field. Hence certain members of the Group and of the Convention more broadly (including some government representatives) remained skeptical about the incorporation of the OMC into the draft constitutional treaty, while the majority of the Group insisted on specifying the scope and limits of the method, as well as the roles of different actors in the procedure, in ways that may threaten its practical viability.

Yet as in the case of the EU's social values and objectives, the contours of an eventual solution seem clear enough, even if the details remain contested. Thus the Social Europe WG Report (para 42) itself proposes to define only the fundamental characteristics of this method (its aims and basic elements) in a generic provision of the Constitutional Treaty. The precise nature of OMC procedures could then, as the Working Group Report suggests, be worked out

experimentally to suit the different issue areas concerned, rather than being specified in detail in the Constitutional Treaty, with the exception of the existing treaty-based coordination processes in economic and employment policy, which would be embodied in subsequent articles, supplemented by a specific constitutional provision on the application of the method in the social policy field, along the lines suggested by Frank Vandenbroucke, the Belgian Minister of Social Affairs and Pensions and endorsed by members of the Group in its final report (para. 47).

A generic provision for incorporating the OMC into the Constitutional Treaty might draw on the definition of the method proposed by Louis Michel, the Belgian Foreign Minister, and incorporated with some modifications into the Report of the Social Europe Working Group (para. 37), as a form of policy coordination "consisting for Member States, at their own initiative or at the initiative of the Commission, with due respect for national and regional diversity, in setting joint objectives and indicators on a given topic, and, on the basis of national reports, enabling these states to improve their knowledge, develop exchanges of information, experience and practice, and, in accordance with the objectives set, to promote innovative approaches likely to result where appropriate in guidelines, recommendations or other forms of European legislation" (WG XI, WD 30). Such a generic provision might also, as the Social Europe Working Group Report suggests (para 42), properly make reference to the importance within the OMC of establishing a timetable for action in advancing common objectives and assessing the ability of national actions to achieve those objectives against appropriate outcome indicators.

In the spirit of flexibility advanced above, however, a generic provision for constitutionalizing the OMC would not seek to prescribe in detail the respective roles of particular actors in its procedures. A better way of ensuring the "transparency and democratic character" of the OMC, which the Report of the Social Europe WG (para 44) rightly deems necessary, as De Búrca and Zeitlin have argued, would be to include within the generic provision of the Constitutional Treaty explicit requirements for transparency and broad participation in all OMC processes (including those specified in greater detail in subsequent articles). The requirements which would be added are firstly, an obligation to ensure that the OMC is conducted as openly as possible in accordance with the principle of transparency; and secondly an obligation to ensure the fullest possible participation of all relevant bodies and stakeholders, including social partners, civil society organizations, national parliaments, and local/regional

authorities, in accordance with national laws and practices. These twin requirements of transparency and broad participation are crucial to both the democratic legitimacy and practical effectiveness of the OMC, which is why they should be included as constitutional obligations (albeit recognizing the variety of national laws and practices through which such obligations will be given effect), rather than as permissive provisions for consultation of various types of actors during the implementation process (as proposed by the Social Europe WG Report, para 45; cf. also the recommendation for "widespread consultation" in the Economic Governance WG Report, para IV, 3). In particular, participation by the widest possible range of actors in OMC processes at all levels, which depends in turn on openness and transparency, is essential in order to ensure the representation of diverse perspectives, tap the benefits of local knowledge, and hold public officials accountable for carrying out agreed commitments in meeting common Union objectives. This might not be the "full blast" – but it would be a blast.