Towards a Federal Europe?

Edited by
Alexander H. Trechsel

Journal of European Public Policy Series

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This book deals with federalism and the EU. Much has been said – separately – on both topics. However, combining federalism with European integration and investigating their mutual impact is a rather recent endeavour. While there is little doubt that the majority of contemporary observers ascribe to the EU certain federal qualities, detecting processes of federalization here and there, scholars of comparative politics increasingly include the EU among their cases when investigating the impact of federalism on, for instance, policy making. The last decade saw a new wave of scholarly publications hit the shores where research on federalism and on the EU comes together. These emerging strands of research genuinely enrich our understanding of the EU and its politics.

This volume contributes to the debate on the federalisation of the federalisation of the EU at a moment in time when it is undergoing profound changes. The book is structured around four interrelated dimensions:

1) the constitutional/theoretical dimension;
2) the institutional vision;
3) the party/citizens dimension and
4) the policy dimension.

This structure allows the reader to consecutively "funnel down" from the more theoretical and abstract levels to the more concrete, policy oriented level.

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Towards a Federal Europe
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Contents

Introduction

Alexander H. Trechsel

The present volume developed from the proceedings of an international conference inaugurating the 'Swiss Chair on Federalism and Democracy' at the European University Institute (Florence) in the summer of 2003.[1] The selected contributions have been revisited in relation to key issues that emerged during the conference, including discussions of the most recent political events related to the topic. This volume is structured around four interrelated dimensions: (1) the constitutional/theoretical dimension; (2) the institutional vision; (3) the party/citizens dimension; and (4) the policy dimension. This structure allows the reader to consecutively 'funnel down' from the more theoretical and abstract levels to the more concrete, policy-oriented level.

The guest editor's introductory contribution focuses on one possible avenue, hitherto much neglected, for further federalization of the European Union (EU). The piece compares the EU's efforts to give itself a Constitution with the federalization processes in Switzerland and the US. In doing so, it is argued that the unanimity principle for adopting the EU Constitution – and maybe even more importantly for its future amendments – may lead to a situation of deadlock. Such a risk is enhanced by the combination of the enlargement-induced increase in the number of veto-players, the extensive form the European Convention has given the EU Constitutional Treaty and the referendum procedure for ratification that has become fashionable in several member states. As a result of this constellation, the EU's 'federalist deficit' may come to play a role even more prominent than that played by the famous democratic deficit. Overcoming the federalist deficit may even become a prerequisite for a fundamental reduction of the democratic deficit.

Following this introductory piece, the *constitutional/theoretical dimension* contains two contributions that use the analytical tools provided by theories of federalism to understand and illuminate recent developments in the construction of Europe. Relying on a comparative approach, this section of the volume

identifies fundamental principles and current trends in the field of federalism and the EU. The contribution by *Andreas Auer* focuses on the linkages between the institutions of federalism and constitutional law. Starting off with a reflection on the contribution of federalism to modern constitutionalism, the author defines federalism on the basis of three main principles, which necessarily have a constitutional impact. Building on these principles, Auer shows that federal constitutions are different from non-federal constitutions, as they have some specific functions to perform. As a result, federalism can be seen as a main factor for fostering the legal, as opposed to the political, nature of the constitution. Finally, Auer – somewhat provocatively – contends that in terms of constitutional theory, a federal Europe has already become reality.

Klaus von Beyme addresses the questions 'whose Europe?' and 'who speaks for the Europeans?' which involve a basic contradiction in European constitutional engineering: federalist autonomy developed against democratic representation on the basis of popular sovereignty of equal citizens. Working on a European constitution includes the search for a fair balance of the modes of representation. Von Beyme shows, however, that the balance remains precarious. Asymmetries in *de iure* institutional settings and in *de facto* social and economic developments permanently reshuffle the balance. Europe – more heterogeneous than any of the existing federations or decentralized states in Europe – will suffer from this contradiction and has to be prepared for these dynamics.

The second dimension focuses on *institutional visions.* Whereas the first dimension looks at the development of federal principles, theories, constitutional engineering and their respective current problems, this second dimension provides a set of provocative visions about the institutional future of the EU. In this section, *Yannis Papadopoulos* stresses the tendency for comparisons of the 'European federation' to be made with the US or Germany. Yet, the Swiss model of federalism is in several respects the one that is closer to the EU model. In view of the many similarities between the two models there is much to learn from the Swiss experience. In particular, and as this contribution shows, some forms of participatory decision-making may be added to the European federalist framework. By conceptually simulating this potential addendum, Papadopoulos concludes that not only gains in legitimacy, but a significant contribution to the formation of a common European identity could well result from such an evolution.

The third – *party/citizens* – dimension concentrates on the impact of federalism on political actors and the frameworks in which they evolve. To this end, the contributions focus on the European party system, on electoral competition, on citizens' attitudes towards the multi-layered sharing of political competencies that exists within the EU. *Lori Thorlakson* draws upon research in comparative federalism to find insights into how institutions affect party systems and party organization in multi-level systems. These insights are then applied to the EU in order to identify how its institutional structure, and proposals for its reform under the European Constitution, will affect party competition. Applying the lessons from federalism as to how institutions structure politics

is also very useful for addressing broader questions such as possible future paths of development for the representative linkages between the citizens and the governing institutions of the EU, and debates on the development of a European 'demos'.

Thomas Christin, Simon Hug and Tobias Schulz emphasize that, as a federal system, the EU has to deal one way or another with the distribution of competencies. While conflicting views about this thorny issue are proffered in the literature, their contribution highlights the implications for political accountability. At the present time, most authors would concur that political accountability flowing from the institutional structure and decision-making in the EU is, at best, mixed. Thus, the authors propose to explore the ways in which the distribution of competencies is viewed from below, namely by the EU citizens. As one might expect, a considerable element in this view from below is its blurring.

Finally, the last dimension addresses the concrete level of *policy*. How do federalist arrangements affect policy outcomes in the EU? The emergence of regulatory policies at the EU level as well as the development of European monetary union (EMU) can be understood by adopting a comparative perspective that links federal theory with the ongoing debate on public policy in the EU. First, *Fernando Mendez* delves into an internet-related policy domain. In doing so, he traces the EU's growing involvement in this emerging policy field with particular reference to cybercrime. Using a comparative federalism framework he compares developments in the EU with two other federal polities, Switzerland and the US. Mendez identifies similarities with regard to the mobilization of actors and the interactions between different levels of government in all three cases. However, when it comes to the specificity of policy outcomes and, in particular, some of the co-ordination mechanisms that have developed, he argues that the EU comes closest to the Swiss case.

In his contribution, *David McKay* claims that there is a growing consensus among economists that certain aspects of the ways in which EMU operates are in need of reform. The purpose of this contribution is to place the findings and the implications of the economists' recommendations for reform in the context of federal theory and in particular to establish a link between policy choices that are deemed to be economically sustainable and those that may be politically sustainable. To this end, McKay applies the nascent rational choice and comparative politics literature on the self-sustainability of federal systems to EMU. The contribution first makes the claim that EMU effectively established the federal credentials of the EU before summarizing the findings and political implications of recent economics research on EMU. EMU is then placed in the context of federal theory. Finally, the author draws conclusions for the sustainability of the EMU federal project.

Herbert Obinger, Stephan Leibfried and Francis Castles' contribution builds upon their work on the link between federalism and welfare state consolidation in six federations. They show that federalism tends to slow down welfare state consolidation. At the same time, their research shows that welfare progress in

federations was enabled by different forms of bypass mechanisms. By applying their framework to the EU, they suggest that European regulatory mechanisms, the role played by the European Court of Justice as well as 'the open method of co-ordination' could well constitute equivalents of such bypass mechanisms on the EU level.

The last word of this volume is given to political philosophy. *Andreas Follesdal* elaborates on the EU Constitutional Treaty's federal features from a political theory perspective. He discusses the balancing of stability and legitimacy in the EU federal polity, arguing that the Constitutional Treaty facilitates trust and merit as well as trustworthiness among Europeans. This is, according to the author, of utmost importance for the development and future deepening of citizens' and political élites' 'dual loyalty' towards their respective member states and the EU.

NOTE

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How to federalize the European Union . . . and why bother

Alexander H. Trechsel

> Europe has charted its own brand of constitutional federalism. It works. Why fix it?
>
> J.H.H. Weiler (2001: 70)

1. INTRODUCTION

The present volume deals with federalism and the European Union (EU). Much has been said –separately – on both topics. However, combining federalism with European integration and investigating their mutual impact is a rather recent endeavour in political science. While there is little doubt that the majority of contemporary observers ascribe to the EU certain federal qualities, detecting processes of federalization here and there, scholars of comparative politics increasingly include the EU among their cases when investigating the impact of federalism on, for instance, policy-making. The last decade saw a new wave of scholarly publications hit the shores where research on federalism and on the EU come together (for those explicitly seeking this linkage see, for

example, Hesse and Wright 1996; Bednar *et al.* 1996; Follesdal 1997; McKay 1999, 2001, 2004; Burgess 2000; Kelemen 2000, 2003; Nicolaidis and Howse 2001; Abromeit 2002; Börzel and Hösli 2003; Dobson and Follesdal 2004; Swenden 2004; Filippov *et al.* 2004; Schmitter 2004). These emerging strands of research genuinely enrich our understanding of the EU and its politics. At the same time these contributions further develop the discipline of comparative politics – which is to say the discipline where the emphasis is put on comparison (Mair 1998: 309).

Despite this recent wave the topic of federalism and the EU is not washed out, yet. Indeed, quite to the contrary. In this volume, the authors seek to contribute to the debate on the federalization of the EU at a moment when it is undergoing profound changes. It is worth recalling a few very recent developments of major magnitude to the whole European integration process: the establishment of the euro as a strong and stable currency shared by over 300 million Europeans in the euro area; the grave crisis in transatlantic relations over the Iraq war that both provoked calls for a common European foreign policy and exposed profound differences in foreign policies among governments of EU member states. At the same time, we witnessed a truly unprecedented coherence of public opinion in the EU, with an overwhelming majority of Europeans opposing the war. With the 2004 enlargement the EU grew from a fifteen-member state construct to a polity encompassing twenty-five member states. When the next two states join, in 2007, the EU will have nearly half a billion citizens. Finally, the EU is currently in the process of creating a new constitutional settlement. This process started with the Laeken Declaration in 2001, followed by the establishment of the European Convention (2002–2003) that elaborated the Treaty establishing a Constitution, signed by all twenty-five member states on 29 October 2004 in Rome. All of the above cited developments provide high-octane fuel for the debate and topic of 'federalism and the EU'.

The authors of this volume address a large variety of issues, problems and possible solutions surrounding the initial question and title of this volume: 'Towards a federal Europe?' We have been guided by a comparative perspective. Every contribution explicitly tries to shed some further light on federal, or 'federalistic', features of the EU by using *flambeaux* provided by the experiences and trajectories of federal polities in Europe and elsewhere. We have all been stunned by a particularly enlightening *flambeau* that has remained mostly unlit in the comparative literature: the Swiss case. Let me briefly make an additional use of the latter and focus on its ability to shed some further light on the EU's ongoing federalization process. In particular, three fundamental structural and institutional developments that the EU is facing will be discussed which, in combination, may severely hinder the EU's capacity to adapt its constitutional order. By looking in particular at the Swiss but also at the American trajectories of federalization three options will be proposed for the EU to overcome – what one might call – its 'federalist deficit'.

2. PUTTING THE SWISS CASE INTO A EU PERSPECTIVE

Despite its small size, the Swiss political system is in many respects one of the most complex and fascinating among contemporary Western democracies. Not only does it build upon historical developments that were initiated centuries ago but, furthermore, the unique structure of today's society, the richness of its political institutions, the refined political arrangements and the multifaceted pressure for reforms constitute a laboratory for any scholar in the various disciplines of the social sciences. Often presented as the paradigmatic case of political integration (Deutsch 1976), consensual democracy (Lijphart 1984), multinationalism (Kymlicka 1995), or direct democratic decision-making (Butler and Ranney 1994), the Swiss political system has become a benchmark case for analyses in comparative politics.

When it comes to the study of the EU, references to the Swiss political system have become more frequent especially for the discussion surrounding the 'democratic deficit' of the EU, a term first coined by David Marquand in 1979 (see, for example, Moravcsik 2002; Zweifel 2002; Mény 2003). Also, scholars nowadays refer to similarities between the EU and Switzerland with regard to their respective decision- and policy-making procedures, fiscal arrangements, etc. Various contributions in this volume show that, when discussing the federalization process of the EU, the Swiss case is particularly insightful.

Nobody would challenge the statement that Switzerland is a federal state. However, the literature does not universally describe the EU as a federation or as constituting a federal arrangement. Some authors see the EU as a confederation, some as an international or supranational organization, others as a federation and yet others see it as a half-way house between a confederation and a federation, between a *Staatenbund* and a *Bundesstaat*. To be sure, these considerations are based on different definitions, yardsticks, conditions and interpretations of the minimal requirements for a governmental arrangement to be considered as 'federal'.

It is not the intention of this contribution to elaborate on these fine distinctions, which, in any case, have arguably overly preoccupied scholars of comparative federalism. Rather, it proposes a comparison between the federalization process, with an emphasis on 'process', of Switzerland and the EU. In doing so, it relies on a 'pot-pourri' of constitutional, institutional and political elements that are highlighted by the theory of comparative federalism.

Similarities

First, in both multi-tier systems we find activities of government that are divided between central governments and sub-units in such a way that each level of government has some activities in which it makes final decisions (Riker 1975). Changes to this division cannot be arbitrarily made, as formal rules of the agreement and how such an agreement can be changed exist in both cases. In both systems, the sub-units have a certain autonomy that is guaranteed and, at the

same time, restricted by a central government. For example, the form of cantonal governments cannot be simply altered by the federal level just as the form of EU member state governments cannot be altered by the EU (Auer 2005).

Second, both the EU and the Swiss process of federalization correspond to what is known in the literature as the 'coming together' rather than the 'holding together' type (Linz and Stepan 1996; Stepan 1999; Swenden 2004; Kriesi and Trechsel 2005 – contra: Benz 2003). Also, the process follows a pattern that could be best described as *federalization by aggregation* rather than by *devolution* (Friedrich 1968; Watts 1994). The Swiss constitution contains an extensive list of competencies – known in the German literature as a *Kompetenzkatalog* – assigned to the various levels of the federal state. The EU Treaties do not include such a detailed competence catalogue. However, the European Constitution is a very detailed and extensive text that contains no less than eight articles (Articles I-9 to I-17) concerning the – partly new – division of competences. In Switzerland and in the EU, competences have been given to the central state with the residue or the 'residual power' staying at the cantonal and member state level respectively. For example, a certain competence to act in a new policy domain first needs to be handed over by the sub-units to the central level before the latter can take legislative action in the particular domain.

Third, the legislative process on the EU and Swiss federal level contains complex consultation procedures allowing the sub-units, and even the sub-sub-units, to effectively participate in this process. Decision-making processes in both systems are highly negotiable rather than competitive, reflecting a consociational style (Papadopoulos 2005). For example, similar to the EU, the cantons are widely consulted before and during a federal legislative process.

Fourth, once policies are agreed upon, their implementation procedures place both systems into the category of administrative rather than legislative federalism. In both systems co-operative arrangements prevail. In domains where the centre is either solely competent or jointly so with the sub-units, the centre relies on the sub-units to implement its policies. As a consequence one finds in both systems a high degree of variation in the implementation of public policies (Papadopoulos 2005; Mendez 2005). One could even speak of *asymmetrical implementation outcomes*. For example, when the federal measures in the domain of energy saving were adopted, their implementation differed quite strongly from one canton to the other, with some cantons revealing a very passive attitude while others interpreted the federal measures by drastically accelerating the implementation of energy saving policies (Delley and Mader 1986). The same holds true, for example, for the liberalization in the EU energy sector (Schmidt 2002) where similar variations could be observed.

This is, of course, directly related to a fifth similarity among the two systems: both have a rather weak centre. Brussels and Bern have to rely on very limited budgetary resources with a very limited administrative apparatus. Large parts of both central budgets are primarily assigned to redistributive policies (Donahue and Pollack 2001: 109; Kriesi 1998: 64f.) and in both cases a high degree of

vertical fiscal autonomy prevails (McKay 2001, 2005). For example, the levels of taxation and the taxation mechanisms vary considerably from one canton to the other. In other words, the taxes one pays vary quite significantly from one canton to the other. The same applies, of course, for the EU.

Finally, one should note that asymmetries are also produced through horizontal co-operation at the sub-unit level. For example, there are inter-cantonal agreements involving a limited number of cantons in various domains, such as education, health care or security. This is not dissimilar from the asymmetric arrangements that occur in the EU. For example, Schengen and EMU gave rise to sub-sets of member states willing to co-ordinate their policies. There are also a number of central dissimilarities in the federalization processes of the EU and of Switzerland.

Dissimilarities

First, nation-states, including Switzerland, rely on a common defence policy that is lacking in the EU. However, with the development of a common foreign and security policy, the strengthening of the European security and defence policy is to be envisaged. The EU Constitution, if ratified, would make a significant step in this direction. In the long run, this could therefore become more of a similarity than a dissimilarity.

Second, the EU fundamentally differs from other federal orders with regard to its lack of a common *demos*. Usually, the supreme sovereignty over a state is exercised by the people. For some authors, the EU is unique in the sense that it does not presuppose the supreme authority and sovereignty of a federal *demos* (Weiler 2001: 57). This would lead one to believe that, in this regard, the EU and Switzerland fundamentally differ. On closer inspection, such a view can be challenged by an empirical observation: in Switzerland, the supreme authority of the federal state is not only embedded in the people, but also in the cantons. For amending the Swiss constitution, a mandatory and binding referendum has to take place and a double majority – the majority of the people and the majority of the cantons – must be reached. One could add that in Switzerland institutional procedures have emerged – and this could be of value for the EU – allowing for the co-existence of a number of sub-national *demoi* (Nicolaidis 2004), speaking different languages, belonging to different religious and cultural groups, in the absence of a real federal *demos*. Therefore, this point could well serve as an example of similarity rather than dissimilarity.

This leaves us with two central differences between the two federalization processes under consideration. First, the EU treaties allow – in theory – for unilateral secession of a member state from the Union. The EU Constitution, while adding a procedural complication to this possibility in the sense that a withdrawal procedure should be negotiated, does not fundamentally change this state of affairs. Even under the EU Constitution unilateral secession would be technically possible. In this regard, and when excluding the

non-democratic federal arrangement of the late USSR as well as the Ethiopian Constitution of 1994 (article 39), no other federal state allows for such a possibility. While this unilateral secession possibility might be an almost unique feature of the EU, it is worth reiterating that to implement such a move politically would be extremely difficult.

The second fundamental difference between the Swiss and the EU federal arrangement is, however, of utmost importance. What could be looked upon as the equivalent of a constitutional order, the European Treaties, can only be altered through unanimous consent of the member states. With the exception of Canada (and then only for a very limited set of articles) no Federal Constitution contains a unanimity requirement among the sub-units for its amendments. In general, supermajorities of various kinds are required. The EU, however, must rely on the unanimity principle for changes to its fundamental order.

The unanimity requirement's democratic value could be questioned. Most of classic democratic thought relies on the existence of majorities, with minorities accepting the majorities' will. Such minorities must develop a form of trust in the majority not to abuse power (see Follesdal 2005). Unanimity, however, is not simply a 'super-super-qualified-majority' – in fact, it is not a majority at all, as the very concept of majority implies the potential existence of a minority, the emergence of which, by definition, is not possible in procedures that require unanimity.

3. DOES THE EU SUFFER FROM A 'FEDERALIST DEFICIT'?

To be sure, the principle of unanimity in the EU has been greatly reduced by the generalization of qualified majority voting mechanisms, introduced by the Single Act of 1986 and extended thereafter. And if ratified the EU Constitution would expand majority voting even further (Follesdal 2005). However, for Treaty amendments, unanimity prevails. Therefore, and as the EU Constitution remains a Treaty, it can only be adopted by unanimity among all member states, ratifying the Constitution in accordance with their respective constitutional requirements. Also, supposing the ratification process would be unanimous, future amendments to the Constitution would have to follow, in principle, the same logic (Art. IV-443 EU Constitution). Of course, it would be possible to change this very rule through an amendment that, however, would have to be submitted to the unanimity-based procedure.

One could argue that for the EU to hold on to the unanimity principle constitutes a 'federalist deficit'. To become truly federal, all polities composed of more than two sub-units, 'coming together' into a federation, have at some point abandoned the unanimity principle for amending their fundamental order. They all have overcome – or at least reduced – the 'federalist deficit' on their way towards stronger integration. In all federal states the units composing them have a say when it comes to the amendment of the federal constitutional order. Typically, they have an equal say, independently of their

size even though in some federal polities there is a certain weighting according to size or other criteria. Generally, however, federal states give disproportionately stronger power to their smaller sub-units and disproportionately weaker power to their larger sub-units, which, of course, underpins the original idea of federalism (Follesdal 2005). In the American case, for example, an amendment to the Constitution needs to be ratified by at least three-quarters of all states, with every state having the same weight. A simple majority of cantons is needed in Switzerland with, however, six out of the twenty-six cantons having only half a vote. While any move from unanimity towards qualified majorities constitutes a reduction of the federalist deficit, the Swiss case illustrates a system in which the federalist deficit has been completely overcome. It combines the federal principle of equal power of the sub-units (with the six exceptions just mentioned) and the democratic principle of simple majority voting.

It is true that integration – and the EU is a prime example of this – is possible without reducing or overcoming such a federalist deficit. For half a century, the EU has precisely done this. However, does this presage that the federalist deficit – the unanimity requirement for amending its fundamental order – will remain unproblematic in the future? If examined as an isolated feature, some may conclude that the federalist deficit will not hinder EU integration, just as it did not constitute an insurmountable obstacle for integration in the past. Therefore, why bother? This is a legitimate question and it may well be the case that there is no need to bother. Institutional features, however, rarely develop their effects in isolation and, unless one ignores the more complex institutional set-up of the EU integration process, the question 'why bother?' cannot remain rhetorical. Put simply, it can be argued that this is not just a rhetorical question but rather a fundamental one that needs to be considered.

Today, the EU is facing (at least) three fundamental structural and institutional developments that could lead to a particular constellation in which the overcoming of the federalist deficit may well become essential for future steps in European integration: (a) the expanded number of veto players through the recent (and future) enlargement of the EU; (b) the proposed Treaty on the European Constitution drafted as a detailed text with a clear division of competences; and (c) the increasing use of national referendums on EU integration.

(a) The number of veto players

With the accession of the ten new EU member states on 1 May 2004 the (theoretical) veto probability for future integration steps has significantly increased. It goes without saying that increasing the number of veto players decreases the probability of unanimity. In practice, this theoretical rule can only be overturned if the additional veto players are perfect clones of the initial set of veto players. This, however, is clearly not the case (see also Tsebelis 2002 on the number and type of veto players; Obinger *et al.* 2005). Social, economic, political, geographic, linguistic and religious heterogeneity has significantly increased with the most recent round of enlargement. And should the accession

negotiations with Bulgaria, Romania, Croatia and Turkey result in a twenty-nine member state EU, this heterogeneity would be amplified even further.

(b) A detailed constitutional framework

As already mentioned, the European Convention has drafted – instead of opting for a lean constitution, containing but a small number of general principles *à l'américaine* – an *extensive* constitutional text that contains a large number of detailed provisions *à l'allemande* or *à la suisse*. It is sound to hypothesize that the more detailed a constitution defining the fundamental order of a polity, the more likely such a constitution's need to be amended. The American Constitution is one of the most stable in the world and has been amended on only six occasions since World War II. Of course, the stability of the US Constitution does not mean that constitutional law in the US does not evolve. It very much does so, above all through the role of the judiciary. By contrast, the German *Grundgesetz* has undergone over fifty amendments since 1949 and the Swiss Constitution has been altered more than a hundred times over the same period. There is no indication that would allow us to believe that the European Constitution would remain static; in fact, some future amendments are already being discussed with the Constitution not even ratified yet (i.e. future enlargements of the EU would alter the content of the European Constitution). As Swenden (2004: 388) accurately states: 'Comparative federalism makes it clear that detailed *and* rigid competence catalogues do not generally exist.' And even though the proposal of the German *Länder* to include such a detailed competence catalogue in the European Constitution was dismissed by the Convention at a rather early stage (Börzel 2003: 4), the Treaty establishing a European Constitution is very detailed indeed. A simple word count shows that the European Constitution is roughly fifteen times more voluminous than its American counterpart adopted by the Convention in Philadelphia (but only about three times as voluminous as the Swiss Federal Constitution).

(c) National referendums

As Hug (2002: 115) remarks, no other subject has – cross-nationally – 'led to as many referendums as the process of European integration'. After the ratification process of the European Constitution, only three member states will remain that never held a referendum on an EU-related issue, namely Cyprus, Germany and Greece. In some of the member states, the holding of a binding referendum on amendments to EU Treaties is mandatory (Denmark, Ireland). Most of the new member states have a rather large array of direct democratic institutions embedded in their constitutions (Auer and Bützer 2001) and referendums on European integration are therefore, as Hug (2002: 115) rightly argues, 'likely to occur'.

But why would these three factors all of a sudden transform the federalist deficit into an integration-blocking feature? After all, it can be argued that – in

itself – a larger number of veto players only *theoretically* increases the probability of failures in the integration process, as mechanisms have long been found – mainly in negotiations at the top – that allow for unanimous outcomes. The recent signing of the Treaty on the European Constitution as well as the opening of negotiations for Turkey's accession could well substantiate such an argument. The crux is that the risks of deadlock do not so much occur within the EU's 'summit diplomacy' (Lijphart 1968), but are heightened through a 'joint *popular* decision trap' (Scharpf 1985, 1988), created by the holding of national referendums, either because the latter are legally required or, more frequently, because governments of member states take an ad-hoc decision to hold a referendum. 'Summit diplomacy' enables consensual or unanimous decisions simply because the decision-makers are able to deliberate, bargain, co-operate and co-ordinate their actions. And here lies the fundamental difference with the simultaneous or consecutive holding of national referendums on the same issue: in referendums, the decision-makers – the electorates – have no means for closing deals with each other, no mechanisms for previously negotiated mutual agreements. They are isolated (if held simultaneously) or at best only marginally cross-influenced (if held consecutively) majoritarian decisions by millions of voters. In the EU context and under the rules of unanimity, a very small majority of voters within a very small country can block twenty-four member states.

Without any doubt the increased, and still rising, number of member states has augmented the probability of more frequent referendums on EU integration. And because of its constant need for adaptation the question arises as to whether the amendment procedure for the future EU constitutional order will not periodically run the danger of deadlock. The painful ratification procedures of both the Maastricht and the Nice Treaties showed that the federalist deficit loosens rather than strengthens the cords of the twenty-five swords of Damocles. So far, the EU could – in a sense – 'muddle through' its Treaty revisions, despite the referendum threat. However, could there be an increasing risk of future fundamental reforms going nowhere because of the EU's federalist deficit? It could be argued that with the recent enlargement (as well as those that are likely to be forthcoming) and the more frequent call for referendums, the uncertainty introduced into the procedure has grown and continues to do so. Popular veto points have been added and the 'joint popular decision trap' is looming larger and larger.

Additionally, with regard to the European Constitution, and unlike Schengen or European monetary union (EMU), where a Europe '*à deux vitesses*' is possible, one can hardly imagine a EU whose member states are divided into those belonging to a 'constitution zone' and those belonging to a 'non-constitution zone'. Worse still, it only needs one single referendum to go wrong and twenty-four states are prevented from adopting a Constitution unless they opt, as suggested by scholars, for a violation of the Vienna Convention on the law of Treaties. In this context one may add that Schmitter (2000: 118ff.) suggested the elaboration of two different constitutions, therefore

creating a 'constitution-one zone' and a 'constitution-two zone'. However, as Schmitter himself recognizes, both systems would have to be inserted 'with the same overriding judicial procedure for resolving eventual conflicts'. In other words, there would still be some need for a super-constitutional order on which all member states agree and our initial problem would remain unresolved.

The adoption of the Constitution and – arguably, even more importantly – its future amendment process might suffer from this 'unfinished business of federalization'. In a twenty-five member state organization whose political, social, economic, religious and cultural heterogeneity is greater than in any previous alliance that gave rise to a federal arrangement, this may lead to a 'creeping sclerosis' or even an atrophy of the integration process (for a similar line of reasoning, see Follesdal 2002). Reducing or even fully overcoming the federalist deficit might therefore become of the utmost importance to the future process of European integration.

4. HOW THE UNITED STATES AND SWITZERLAND DEALT WITH THE FEDERALIST DEFICIT

Other confederal or quasi-federal alliances have had to face a very similar dilemma at some point in their history. Evidently, the transition from the Articles of Confederation to the US Constitution comes to mind. By opting for a qualified majority of nine out of the thirteen states for the adoption of the Constitution (Article VII), the Philadelphia Convention of 1787 violated the Articles of Confederation that could only be amended through unanimity (Article XIII of the Articles of Confederation). In addition, the framers built into the US Constitution a provision for a three-fourths majority for future amendments (Article V). Two years later, representatives of the eleven states that had ratified the Constitution gathered in the First Congress in New York and officially adopted the US Constitution. Ratification in North Carolina followed the same year and the only state that had refused ratification, Rhode Island, finally ratified it a year later. *Nota bene*, Rhode Island was not only unique in that it initially refused ratification, it was also the only state that used referendary mechanisms for ratification. In a certain way, this move towards a qualified majority constituted a revolutionary act, as a new regime was established through a process that did not follow the rules of the former regime.

On the other hand, as Rakove (1996: 129) observes, the framers and many federalists, by proposing novel concepts of ratification, did not seize power for themselves in Philadelphia: 'Their stroke was not a coup d'état but a démarche – a sudden bold movement that shifted the country from a condition of political torpor and entropy into a feverish burst of activity.' It is noteworthy that the easing of the federalist deficit (the question of the number of states needed for ratification) was by far not as heatedly debated as the procedure by which the new Constitution should be ratified, i.e. should the procedure