Small States and Constitution-making: The Causes of Different Outcomes in Philadelphia and Bruxelles

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The theme of this article is analysis of possible causes of different outcomes in two constitutional conventions - the American federal convention held in Philadelphia in 1787 and the Convention on the future of Europe held in Brussels in 2002-2003 - regarding the conflict between the large and small states, which was central in both conventions. This conflict was relevant in Philadelphia in the resolution of issues concerning the representation and voting power of states in the Congress and some other institutional issues (Electoral College, veto on the laws of the states, Senatorial powers, amendments) and in the European Convention on similar issues of voting power of states, and the composition or leadership in certain bodies (the Commission, the European Council). The small states in the Philadelphia Convention achieved success in defending the principle of equality of states primarily through the equality in the Senate and obtained some other important victories. This success in the process of 'arguing and bargaining' was the result primarily of four interrelated factors: favorable rules of play (voting by the states), voting strength of the small states and their cohesion and firmness throughout the Convention, their unyielding bargaining position as to the principle of equality of states and credibility of their threats that they would not ratify the Constitution under the terms imposed by the large states. Analyzing the conflict between the larger and smaller states in the European Convention it is obvious that the position of smaller states was institutionally weaker (the representatives of states were in the minority in the Convention's membership as they were only one of several institutional components; the majority of small states were accession states which had no right to challenge a 'consensus' of the Convention) and procedurally weaker (the rules of play were against them, because they were imposed and manipulated by the Presidium, dominated by larger states; the voting, which could demonstrate their possible strength, was forbidden). Finally and very importantly, the small states were not coherent and united in pursuing its goals, they were not firm in defense of the principles they had declared at the beginning of the Convention, and at the end they didn't use credible threats, as was the case with the small states in Philadelphia. This are the fundamental causes for the failure of the small states in the European Convention to secure institutional solutions which they favored.

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‘If there were only small nations and no large ones, humanity would most certainly be more free and happier; but there is no way of providing that there should not be large nations.’

Alexis de Tocqueville, Democracy in America, Volume I, Chapter VIII

I. INTRODUCTION

Jon Elster noticed 15 years ago that "the comparative study of constitution-making is virtually non-existent", and that "there is not a single book or even article discussing the process of constitution-making in a general comparative perspective". This observation was not quite accurate at the time, and even less it is accurate today, due to some excellent comparative studies not only of him, but also of some other scholars. However, there is still, in my opinion, a remarkable non-existence of comparative studies of processes of federal and/or confederal constitution-making. Federal and confederal constitution-making are not in the same categories of constitution-making and cannot always be compared. By confederal constitution-making I think of process of making a constitution for previously independent or confederated states. The classic example would be the Philadelphia Convention. By federal constitution making I think of process of constitution-making by states already associated in a federal state or a process of creating a federal state out of previously unitary state, in which case the actors of constitution-making could not be federal entities, because they are still not constitutionally created. Examples of federal constitution-making would be the creation of the Canadian Constitution Act of 1982.

2 See Elster, Constitution-making in Eastern Europe: Rebuilding the Boat in the Open Sea, 71 PUB. ADMIN. 169, 174 (Spring/Summer 1993).
5 See some excellent essays in ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY (2000).
6 McWhinney's little book FEDERAL CONSTITUTION-MAKING FOR A MULTI-NATIONAL WORLD (1966) is not about constitution-making process.
7 On the other hand it would be very difficult to categorize the Constitution Act of 1867. It was a British statute. Up to 1867, the colonies of British North America had no political connections and each had its own governor appointed by Great Britain, almost the same situation as was present in 13 American colonies before the Revolution.
or the process of creating the German Basic Law of 1949. Therefore, I think one should be very careful when comparing constitution-making processes in confederal or federal setting, as Elster does when he compares, for example, the American Federal Convention of 1787 and the German assembly that adopted the West German Basic Law of 1949.\(^8\)

It is true that there are not many confederal and federal constitution-making episodes, especially well documented. That partly explains why there are so few comparative studies dealing with constitution-making in (con)federal context. However, thanks to the recent process of European constitution-making, initiated by the Convention on the Future of Europe, we are witnessing at least a beginning of comparisons of this endeavor with similar earlier attempts. Most of these comparisons are related to the Philadelphia Convention.

Comparisons (both favorable and unfavorable) of the Convention on the Future of Europe with the Philadelphia Convention and the adoption of the US Constitution in 1787 are numerous.\(^9\) Even before the beginning of the European Convention its chairman Valery Giscard d'Estaing said, in his speech to the European Parliament on 6\(^{th}\) February 2002, that "the Convention on the future of the EU could be compared with the Philadelphia Convention, which prepared a constitution for the United States of America in 1787".\(^10\)

There were many reasons inducing analysts to compare these two events, despite of the opinion of some scholars that "comparisons of the Brussels and Philadelphia conventions are facile and uninformed…like comparing apples to oranges".\(^11\)

First of all, at the beginning of its proceedings many were thinking that the European Convention could give the final answer to the question *Quo vadis Europa?*, to define the definite

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8 Elster points out that constituent assemblies for federally organized countries face the choice between 'one state, one vote' and proportional voting power, and that the American Founding fathers in 1787 choose the former method, whereas the German assembly in 1949 used the latter. See Elster, *supra* note 2, at 179.


contours of the European integration, just as the American constitution-makers have defined the future of the United States. Then, the Philadelphia Convention was convoked after all other attempts of reforming the Articles of Confederation have failed, and similarly European Convention came into being also because of unsuccessful treaty reforms. Both Philadelphia and Bruxelles were the result of unsuccessful attempts to reform the existing ‘constitution’ of the American confederation and the European Union respectively, although the fundamental constitutive document of both unions has not been a constitution in a proper sense. Both conventions have been a completely new method of drafting the constitution, although such method was not envisaged by the Articles, or the EU treaties. Neither Philadelphia, nor Bruxelles Convention had a mandate to draft a new constitution, but both have, at the very beginning of its proceedings decided to make one. Both became constitutional conventions post festum. Frequent comparisons between the two conventions have emerged also because of their presumed historical similarities as bodies capable to figure out a new model of interstate integration, without precedent and example in the world. Finally, Philadelphia and the

12 THE GUARDIAN of Feb. 28, 2002 had the following title of the article dealing with the beginning of the Convention: “Pivotal moment in history: The Philadelphia Convention of 1787 defined America; now the EU could be on the brink of a new existence”. From the euro-federalist side there is Lutz Hager’s observation that “the Brussels congress finds its historical equal in the Philadelphia Convention which gave birth to the US constitution more than 200 years ago” (Hager, JEF – Germany on the Start of the Convention: Brussels is not Philadelphia, Convention Bulletin, No. 2, March 8, 2002). ECONOMIST (The founding fathers, maybe) in its edition of Feb. 26, 2002 writes: “The regular invocation of Philadelphia by delegates to Europe’s convention shows the depth of their ambitions—or pretensions”. Giscard d’Estaing himself contributed to this attitude constantly comparing Philadelphia and Brussels: “People, states or continents face, at certain times in their history, crucial decisions. They stand at crossroads…The Philadelphia Convention in 1787 was such a determining moment in American history…Today, the European Union is also at a major crossroads in its history…not wholly unlike that of Philadelphia 1787” (The Henry Kissinger Lecture, Library of Congress, Washington, assessed at http://european-convention.eu.int/docs/speeches/7072.pdf).

13 So the ambassador of the EU in the United States dr. Günter Burghardt emphasized that “…there is the most striking similarity between the convention in Philadelphia 215 years ago and the European constitutional convention from 2002 in the discontentment in reference to their starting position: defects of the Articles of Confederation of 1776 on the one side, and the defects of the achieved compromise in the Treaty of Nice in the December of 2000 at the other.” See Burghardt, Die Europäische Verfassungsentwicklung aus dem Blickwinkel der USA at 5, (Walter Hallstein Institut, FCE 4/02.).

14 Joseph Weiler would comment that “there does not exist officially a constitutional convention, it is a Convention on the Future of Europe. But they call themselves a constitutional convention. Giscard spoke more than once of Europe's Philadelphia” (American Perspectives on Europe’s Constitutional Convention, German Marshall’s Fund Transatlantic Center in Brussels, May 30, 2002). John Eric Fossum has also noticed this transformation of the European Convention: “Some of the discussion of the Laeken constitutional process – including the references to the Philadelphia Convention – has left a certain impression that the European Convention was a constituent assembly. That such an association was made is hardly surprising, given the central role of constitutional convention in mainstream constitutional thought. Formally speaking, the Laeken Convention was only a preparatory body which was asked to formulate one (or several) proposal. The Convention took upon itself to serve as a kind of drafting body” (European Constitutional Avoidance?, assessed at http://www.arena.uio.no/events/seminarpapers/2008/EuropeanConstitutionalAvoidance_070208.doc).

15 At the session of the European Convention on 27th February 2003 Finnish representative Kimmo Kiljunen said that “the Brussels Convention has the same historic potential as the Philadelphia Convention had to create something new – a model for a new type of power structure that is supranational…” (http://www.europarl.eu.int/europe2004/textes/verbatim_030227.htm).
European Convention have been compared because of the necessary compromises of opposing interests of big and small states. It is not my intention in this paper to compare the two conventions in all aspects of their work. Frankly speaking, we are still missing an elaborate and complete comparison of these two events. My ambition in this paper is more modest - to analyze only one aspect of their work, albeit a very important one. It is the conflict between the big and small states, which dominated the proceedings in Philadelphia, and was also very important in the Brussels Convention. Even if you are thinking that there are insurmountable obstacles in comparing the two conventions separated by more than two centuries, there is enough evidence pointing to similarity of this cleavage in Philadelphia and Brussels.

II. THE RELEVANCE OF SMALL STATES – BIG STATES CLEAVAGE IN TWO CONVENTIONS

The balance between smaller and larger entities is a critical issue in all federal or quasi-federal arrangements, as noted few years ago by Max Kohnstamm. Comparing the European Convention with the Philadelphia Convention he observed that

"In the Union, the debate is compounded further by the fact that, unlike the US in 1787, Europe is made up of many nations and its ultimate aim is not to build a single nation. The common purpose should thus be to find a compromise that is acceptable to all Member States, keeps the overall balance – thanks to a strengthened Community method – and allows a well-functioning enlarged Union."

Of course, there were other cleavages and power struggles between the states in both conventions. In the European convention we have seen the conflict between more federalist and more intergovernmental states, between the countries of 'old' and 'new' Europe and between the

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17 "In Brussels as in Philadelphia in the confrontations the small states opposed the large states. In the course of the European Convention, their opposition has appeared in the institutional debates" (Deloche-Gaudenz, Bruxelles-Philadelphie, supra note 10, at 138). "One of the main challenges to forming a more perfect European Union is one that the American founding fathers confronted: how to find a way for big states and small states to share power" (Seeking Unity, Europe Drafts a Constitution, N.Y.TIMES, June 15, 2003).
18 Kohnstamm, Max and Guillaume Durand, Common Nonsense – Defusing the Escalating 'Big vs. Small' Row (European Policy Center, 2003).
enlarged Union's six big and 19 small member states. In Philadelphia the most important conflicts, besides the one between big and small states, were between northern and southern states, slavery and non-slavery states, commercial versus agrarian states, and landed versus landless. However, only the conflict between big and small states has had a potential to provoke a breakdown of both conventions and therefore it is central in explaining some crucial institutional outcomes in Brussels and in Philadelphia.

It is interesting that the conflict between the big and small states repeated itself at another constitutional convention more than 200 years after the first one. This is even more interesting when one has in mind that the original conflict between large and small states as such was, for many analysts, in fact fictional or it has never materialized as such after the ratification of the Constitution. Robert Dahl once remarked that there "has, in fact, never been a significant conflict between the citizens of small states and the citizens of large states" and that "there has been no important controversy in the United States that has not cut squarely across the people in both small states and large". It is the same argument Madison put at the Philadelphia Convention reminding the delegates of the experience of Continental Congress: "Look to the votes in congress, and most of them stand divided by the geography of the country, not according to the size of the states".

The same argument was articulated by Giscard and his vice-presidents. Answering to the public presentation that the debates of the European Convention have reflected "a conflict of interest between the most populous and the least populous States of the European Union" they have concluded that "the alleged opposition between the most populous and the least populous countries in Europe is based on an inaccurate, and in any event superficial understanding of

21 In the long letter to Jefferson explaining the outcomes of the Convention one month after its ending Madison wrote that the conflict between the large and small states "created more embarrassment and a greater alarm for the issue of the Convention than all the rest put together". Madison to Jefferson, Oct. 24, 1787, in 1 THE DEBATE ON THE CONSTITUTION 202 (Bernard Bailyn ed., 1993). Clinton Rossiter argues that the Great Compromise "was essential to the continued existence of the Convention". See ROSSITER, 1787: THE GRAND CONVENTION 192 (1987).
24 1 THE RECORDS OF THE FEDERAL CONVENTION 476 (Max Farrand ed., 1966), thereafter RECORDS.
relations within the European Union".\(^{25}\) And recently Charles McCreevy, a member of the Commission, defending the double – majority rule in the Council voting as favorable for the small states in the Union, asked: "When can the big Member States ever agree on anything...? This is not a real risk".\(^{26}\)

However, the large state – small state conflict was evaluated as most important and most relevant for explaining a series of crucial decisions in most analyses of the Philadelphia Convention\(^{27}\) and the European Convention. In the Philadelphia Convention those issues were

- the ratio of representation of the states in Congress
- congressional veto on the laws of the states
- powers of the Senate
- election of the President and
- amendments on the Constitution.

In the European Convention the division between big and small states was evident foremost in the discussions on

- the voting system in the Council of Ministers
- presidency of the European Council and
- the size and composition of the Commission.

However, from the point of view of the smaller states, the outcomes of the two conventions couldn't have been more different. In Philadelphia, the small states had achieved "a great victory" with the Great Compromise, which have secured to them the equality of representation in the Senate. Two hundred years later in a celebration held in Congress one senator from a small state said: "On behalf of Montana and all States like it, with small populations, we thank those Connecticut Yankees for their foresight and their genius; their compromise permitted great States such as Montana and all the rest of the West, so diverse in a land of plains, mountains and rivers, so rich in agriculture and minerals and forests but limited in population, to become partners with other states on a footing of equality in the Senate".\(^{28}\) The senator from Montana could have also reminded the audience that the small states achieved some

\(^{25}\) The European Union Convention papers: Relations between the most populous and the least populous states of the European Union (assessed at europa.eu.int/futurum/documents/other/oth131103_en.pdf).


\(^{27}\) Shlomo Slonim concludes that "nearly all spheres of discussion at Philadelphia were permeated by large state-small state differences, and the final document reflected a much more ubiquitous compromise between large and small state and also between nationalists and that intent on preserving states' interests than is commonly recognized". See Slonim, Securing States' Interests at the 1787 Constitutional Convention: A Reassessment, 14 STUDIES IN AM. POL. DEVELOPMENT 2 (2000).

other victories, e.g. in enlarging the powers of the Senate or in Electoral College. And those victories have great consequences for the functioning of the American political system even today in many ways.

On the other side, analysts of the Convention of the Future of Europe have concluded that "the small states had only obtained very marginal concessions in the last minute race to find a compromise" (equal rotation for Council formations, diminished powers of the president of the European Council), but that they had lost in key battles at the Convention (accepting the long-term president of the European Council, the reduced Commission and the double majority system including the 60% threshold for population). On the issue of power in the EU "the result was clear: the small states had lost".29 K. Nicolaidis nicely summarizes the outcome of the European Convention from the point of view of the small states:

"Throughout the negotiations the bigger states apparently forgot that the EU was founded on a rejection of the hegemonic power politics…The nineteen smaller member-states desperately sought to protect their access to the upper echelons of union leadership against the big players’ attempts to marginalize them. They did accept the introduction of the so-called double-majority system, which supplements the one country–one vote rule by weighting the relative voting power of states in the council according to the size of their populations…but they warned that the principle should not be pushed too far, for without a single European demos, a European majority could be undemocratic if it overrode the will of a large number of national majorities… Most spectacularly, small and medium-sized states fought hard - but in vain - against the creation of a permanent chair for the European Council,…fearing that the new job could enshrine the preeminence of the Council of European heads of state, an intergovernmental institution dominated by big states, which is often pitted against the small state –friendly Commission. Most important, the position was to abolish the rotating presidency of the European Council, the most visible symbol of the EU’s shared leadership… Rotation gives European citizens a sense that EU policy is not made only in Brussels, but also in Madrid, Athens, and Vienna. With an indirectly elected president…the EU system will

move closer to leadership à la française, torn between a head of state and a prime minister...”

What are the causes of such different outcomes of the two conventions from the point of view of the small states?

Analyzing the European Convention and the conflict between the large and small states some scholars have found several causes of the small states failure. The first is that the Convention was dominated by intra-state bargains and in this type of negotiation a member state's size is the major resource. Therefore Germany and France imposed its 'hegemonic compromise' on the other, primarily small states, because of their 'material leadership resources'. The size of their population (over 30% of the EU population) was a crucial resource in the Convention's institutional debate, because Giscard d'Estaing, as the president of the Convention, defined consensus in terms of majority of the EU population, not majority of states. The second major resource of the two largest states in the Union was its past reputation as leaders in all treaty negotiations, and the third resource was "their privileged access to the Convention Presidium" and to the president, who was a 'crucial ally' of the bigger states, not only because he had become the Convention's chair on the insistence of their leaders. Thus "material leadership resources and influence in the Presidium, which the smalls lacked, proved most important and the final compromise trumped the interests of the smalls".31

I could partially agree with the above mentioned causes of the failure of the small states, especially as to the relationship between the bigger states and the Presidium of the Convention, but I think that the factor of 'material leadership resources' must not be perceived as crucial for the Convention's outcome. After all, and here comes the value of comparisons, the small states in the American federal convention have won regardless of their lack of 'material resources' or their 'reputation'. Before the Philadelphia Convention the two largest American states – Virginia and Pennsylvania – had over 30% of the total population of the original 13 states, and with the third largest (Massachusetts) they had over 40%.32 This corresponds very closely to the population's

32 The American constitution-makers didn't have exact data on the size of population in several states, but their estimates had been largely confirmed after the first census in 1790. See their estimates in C.C. Pinkney's speech in South Carolina House of Representatives in January 1788 (3 RECORDS 253) and the actual size of the population
strength of Germany, France and UK in proportion to the total EU population. The size of the population was not a dominant factor accounting for the results of the large states – small states conflict in Philadelphia.

In this article I would like to point to some other and more important causes of different outcomes in Philadelphia and Brussels. The analysis of the small states strategy in Philadelphia will show that they used maximally their voting strength, which was not available to the small EU states in Brussels, because of the Presidium's imposed rule of non-voting on any issue. They were also very decisive in their demands, uncompromising (especially as to the respect for the principle of the equality of states), and, which I consider as the most important fact, they were very convincing in their threats that they would not ratify the Constitution under the terms imposed by the large states. Another important reason for the success of the small states was their demonstrated strong cohesion and firmness throughout the Convention. Several important causes contributing to the small states success in Philadelphia lie in the organization and the 'rules of play' of the Convention, and particularly in the timing of the resolving the issues which were dividing the large and small states. We shall see that most of these factors contributing to the small states advantage in Philadelphia were not present in Brussels, or were not used effectively or not at all by the small EU states. Let's turn first to the Philadelphia Convention.

III. THE SUCCESS OF SMALL STATES IN PHILADELPHIA

The story of the Federal constitutional convention in Philadelphia is so well known and elaborated in numerous excellent studies that it is not necessary to repeat the most important scholarly findings. There is an almost universally accepted conclusion that the conflict between the large and small states had dominated the proceedings in the first seven weeks, and that in the period from 20th June to 16th July the Convention almost exclusively concentrated on the issue of the ratio of representation (proportional or equal), because numerous delegates thought that this question has to be solved before other issues (the powers and organization of federal government).


The first and the most fundamental issue of the Convention was design of the legislative branch, i.e. the choice between a unicameral or a bicameral body, elections by the people or by state governments and the issue of state representation (equal or proportional). The constitution makers recognized the fundamental importance of the issue of state representation.

Madison’s pre-convention strategy in preparing a constitution plan to be presented at the Convention clearly assumed that "the first step to be taken is...a change in the principle of representation". In other words, rejection of an unjust principle of equality of state votes prescribed in the Articles of Confederation, in favor of the principle of proportional representation that reflects differences in significance and influence of states. Madison believed that a favorable solution to this issue would result in readiness of the biggest states to delegate considerably more power to the new central government as well as the instruments necessary for its enforcement, which the Confederation Congress so obviously lacked.

Contrary to expectations of Madison, Hamilton, Wilson and other advocates of the national government that it is possible with relatively small difficulties to ensure a coherent majority at the Convention accepting a national government that would result from direct or indirect elections by the people, without any intermediary role by the states, advocates of a compromise gradually prevailed. Instead of adopting a purely national structure or keeping the existing federal structure of the legislative body, most delegates, i.e. state delegations, accepted in the end a position in the middle of the "two ideas...that in one branch the people ought to be represented, in the other, the States" (William Johnson). That implied that "the proportional representation in the first branch was conformable to the national principle and would secure the large States against the small", and "an equality of voices (in the Senate) was conformable to the federal principle and was necessary to secure the Small States against the large" (Oliver Ellsworth). Why did the small states succeeded in achieving the famous 'Great Compromise' that gives them the equality of votes in one house of the Congress, which is certainly their greatest achievement at the Convention?

We must start from the simple fact that everything in the Convention was decided by voting. Early in the Convention it was decided that each state delegation would have one vote, regardless of the population, in accordance with the rules that were in force in the Congress of Confederation (one state, one vote). It was from Madison's notes that we know that before the

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34 James Wilson stated these questions on June 20: "1. Whether the legislature shall consist of one or two branches. 2. Whether they are to be elected by the state governments or by the people. 3. Whether in proportion to state importance, or states individually". See 1 RECORDS 348.

35 James Madison to Edmund Randolph, April 8, 1787, in 1 THE FOUNDERS' CONSTITUTION 190 (Philip B. Kurland & Ralph Lerner eds., 2000).

36 1 RECORDS 461-462, 468.
formal beginning of the proceedings the voting rule has been made a subject of conversation among the delegates and that some of them from Pennsylvania demanded "that the large states should unite in firmly refusing to the small states an equal vote, as unreasonable, and as enabling the small states to negative every good system of Government, which must in the nature of things be founded on a violation of that equality". According to Madison again, this proposition was rejected because the Virginia delegation thought that "such an attempt might beget fatal altercations between the large & small states, and that it would be easier to prevail on the latter, in the course of deliberations, to give up their equality for the sake of effective Government". It was, as we know today, the wrong assumption.

Madison thought that he has behind him the solid coalition of six states consisting of the three largest states (Virginia, Massachusetts and Pennsylvania) and the three most southern states (North and South Carolina, Georgia). The population of the last three southern states was not the criterion of their 'largeness'. But all states in Madison's coalition were 'large' states because they had access to vast tracts of western lands, on the ground of their colonial charters or other legal basis, so they thought that in the near future they would have much larger population. That is the foremost reason for their voting for the proportional representation in Philadelphia. On the other side, the remaining seven states had no such lands in the Western territory. So, the division on the Convention was between states large in population or territory ('landed states') and the states with small population and/or bounded territory.

The coalition of large states had from the beginning an unexpected advantage, because two of the smallest states weren't represented at the Convention – Rhode Island didn't send its delegation at all, and the delegates of New Hampshire arrived finally after the 'Great Compromise'. So, up to the end of June, Madison's coalition of large states had a small but decisive advantage of 6 states to 5, and speaking strictly mathematically it should have won the fight over representation. Numerically speaking, the small states were in disadvantage and therefore they tried to break the coalition of large states using three weapons - arguments, threats, and appeals to compromise.

As to their arguments they focused on the following propositions: that the interests of the small states would be ignored, and that the influence of the large states would be overwhelming and dangerous to the federal system should proportional representation be installed in both 37
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37 I RECORDS 10-11.
houses, that states as states have interests deserving protection, and finally that state governments have to be equally represented in the legislative body of the confederation and have some means of self-defense against the federal government. Arguments from the large states centered on the republican (we would say today democratic) principle that the majority of people should elect the majority of representatives, and seven smallest states have only a quarter of population. The principle of equal representation of states would therefore, according to Wilson, establish the rule "that the minority will rule the majority." Madison also pointed out that there is no possibility of large states' coalition against the small ones, because there is no common interest of large states and their size as such was never a reason for their alliance: "Was a combination to be apprehended from the mere circumstance of equality of size. Experience suggested no such danger. The journals of Congress did not present any peculiar association of these States in the votes recorded".

Rational arguments and deliberation are of little help in situations of diametrically opposed groups, as witnessed by numerous examples of constitution-making episodes. Some scholars think that arguments of the small states were weaker. If that is so, than the threats of some small state's delegates could have been more important in persuading some of the delegates in the other camp to accept the equal representation at least in one house of the Congress. Let us cite once more Gunning Bedford and his most horrible threat heard at the Convention:

> In the words of small state delegate Gunning Bedford: "If political Societies possess ambition avarice, and all the other passions which render them formidable to each other, ought we not to view them in this light here? Will not the same motives operate in America as elsewhere? If any gentleman doubts it let him look at the votes. Have they not been dictated by interest, by ambition? Are not the large States evidently seeking to aggrandize themselves at the expense of the small? They think no doubt that they have right on their side, but interest had blinded their eyes... Can it be expected that the small States will act from pure disinterestedness... An exact proportion in the Representation is not preserved in any one of the States. Will it be said that an inequality of power will not result from an inequality of votes. Give the opportunity, and ambition will not fail to abuse it. The whole History of mankind proves it. The three large States have a common interest to bind them together in commerce. But whether a combination as we suppose, or a competition as others suppose, shall take place among them, in either case, the smaller States must be ruined." (1 RECORDS 491).

> William Johnson from Connecticut emphasized on 29 June: "The fact is that the States do exist as political Societies, and a Govt. is to be formed for them in their political capacity, as well as for the individuals composing them. Does it not seem to follow, that if the States as such are to exist they must be armed with some power of self-defense...Besides the Aristocratic and other interests, which ought to have the means of defending themselves, the States have their interests as such, and are equally entitled to likes means." (1 RECORDS 461).

> "Mr. Sherman urged the equality of votes not so much as a security for the small States; as for the State Govts. Which could not be preserved unless they were represented & had a negative in the Genl. Government" (2 RECORDS 5).


"The Large States dare not dissolve the Confederation. If they do the small ones will find some foreign ally of more honour and good faith, who will take them by the hand and do them justice. He did not mean by this to intimidate or alarm. It was a natural consequence; which ought to be avoided by enlarging the federal powers not annihilating the federal system."46

Similar threat was heard earlier from John Dickinson, when he said in the name of small states that "we would sooner submit to a foreign power than submit to be deprived of an equality of suffrage in both branches of the legislature, and thereby be thrown under the domination of the large States".47 Of course there were almost equally strong replays from some of the large states' delegates, arguing quite the opposite – that the small states would lose much more by the dissolution of the Confederation. Having in mind that the proposed Constitution was afterwards ratified very quickly and almost unanimously in the small states and very reluctantly, with deep divisions, in the larger states, we might conclude that the threats of small state's delegates had been unpersuasive, but the delegates of the larger states couldn't know that in advance of the ratification.

Bedford and Dickinson went further than any other delegate from a small state threatening not only the rupture of the Confederation in case of adoption of proportional representation, but also calling for some foreign power as a protector. This was probably said in the heat of the debates, so other delegates from small states had used a different argument, namely that the acceptance of proportional representation would be unacceptable and would be an insurmountable obstacle in ratifying the Constitution in their states.

Proposing that each state shall have one vote in the Senate on June 11 Roger Sherman said that "everything...depended on this", because "the smaller states would never agree to the plan on any other principle".48 Luther Martin said that he "had rather see partial Confederacies take place than the plan on the table".49 After the decision on June 29 that the representation in the first house (House of Representatives) shall be proportional Oliver Ellsworth from Connecticut said that the equal representation of states in the Senate could be "this middle ground" for a compromise between large and small states and that if this should not be accepted, all northern states, except one (Massachusetts), would not acceded to new government.50

46 1 RECORDS 492. Numerous scholars cite Bedford's speech trying to demonstrate the deep split between the large and small states at the Convention.
47 1 RECORDS 242.
48 1 RECORDS 201.
49 1 RECORDS 445.
50 1 RECORDS 468-469.
Madison was right writing to Jefferson after the Convention that the small states "made an equality in the Senate a sine qua non". This was also noticed by John Ruthlidge at the Convention. Speaking about the equality in the Senate he said that "the little states were fixt. They had repeatedly & solemnly declared themselves to be so. All that the large states then had to do, was to decide whether they would yield or not". Long after the Convention Gouverneur Morris, one of the most influential delegates in Philadelphia declared that "if the whole power of the Union had been expressly vested in the House of Representatives, the smaller States would never have adopted the Constitution. But in the Senate they retained an equal representation, and to the Senate was given a considerable share of those powers exercised by the old Congress".

### TABLE 1: Votes at the Convention on the Issue of Equal Representation for the States

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52 2 RECORDS 19.
53 3 RECORDS 405.
Source: 1 RECORDS 468, 510; 2 RECORDS 15.

Rhode Island sent no delegates to the Convention, and New Hampshire's delegates arrived after July 16. Majority of New York's delegation left the Convention just before the final vote on July 16.

The table is adapted from DAHL, DEMOCRACY IN THE UNITED STATES (supra note 23, at 29), with the difference that Dahl gives in the final column the voting on July 7 on the committee report, and I give the final vote on the committee report on July 16.

Because of Elsworth's proposal we often speak of "Connecticut compromise" or "Great compromise", but it is, for some scholars, doubtful if it is really a compromise.\(^54\) On the one side, it is uncontroversial that the proportional representation in Senate was defeated on July 16 with 5 states to 4, and 1 divided. The voting occurred after the departure of the New York's delegates, which were constantly in the "equality" camp, and before the arrival of New Hampshire's delegation, not to mention the missing Rhode Island. So, it could be said that at least 8 states would support the equal representation had the delegations of all small states been in Philadelphia.\(^55\) This must have been on the mind of some of the large state delegates when they voted for the equality of states' representation in the Senate. And precisely because of the fact that some of the large state delegates voted for the equality in the Senate there is some ground for the thesis which emphasize the 'Great compromise'.\(^56\)

It is impossible analytically to measure the real impact of different causes on the positive outcome for the small states, and it is not the purpose of this article to determine the exact influence of different reasons which brought the equal representation in the Senate but to identify them by analyzing the voting, the arguments and post-festum explanations of the participants at the Convention.\(^57\) There are strong arguments in favor of numerical advantage of the small

\(^{54}\) See Rakove, The Great Compromise (supra note 45, at 427); Jon Elster, Equal or Proportional? Arguing and Bargaining over the Senate at the Federal Convention, in EXPLAINING SOCIAL INSTITUTIONS 146 (Jack Knight & Itai Sened eds., 1998); LEE & OPPENHEIMER, SIZING UP THE SENATE, supra note 28, at 39.

\(^{55}\) Rossiter thinks that "it may be argued plausibly that the real vote for the Great Compromise of 1787 was 8-3, with two states divided". See ROSSITER, 1787, supra note 33, at 189.

\(^{56}\) On July 2 William Pierce voted for the equality in the Senate and thereby divided the vote of Georgia, resulting in a tie and the creation of the Grand committee. Some delegates from the large states' delegations voted for the committee report (proposing the equality of votes in the Senate) on July 16 with deep conviction that this is only way to save the Convention. Massachusetts vote was divided because Gerry ("we must make concessions on both sides") and Strong ("an accommodation had been proposed...he was compelled to give his vote for the Report") voted for the equality and North Carolina delegation voted, to Madison's surprise, for the equality for the first time (Williamson said that "if we do not concede on both sides, our business must soon be at an end"). See 1 RECORDS 515, 2 RECORDS 7-8.

\(^{57}\) As to a post-festum explanation I would cite Madison's note describing the meeting of a number of delegates before the begin of the proceedings on July 17 (a day after the 'Great Compromise'): "On the morning following
states because of the voting rules at the Convention\textsuperscript{58}, but equally it could be argued that the small states were decisive, uncompromising (as to the equality in the Senate) and, most importantly, very convincing in their threats that they would not ratify the Constitution under the terms imposed by the large states.\textsuperscript{59} Last, but not least, the small states demonstrated strong cohesion and firmness throughout the Convention. Reading the debates of the Federal Convention it is striking that the delegates of the small states had been so uniform in defending their position from the very beginning of the proceedings. It is worthy to recall that on 31 May Sherman said that he "favored an election of one member by each of the State Legislatures" in the Senate.\textsuperscript{60} And he defended that position no matter what. Confronted with such attitude of all the delegates from Connecticut, New Jersey, New York (except Hamilton) and Delaware, some of the large states' delegates backed after one and a half month of arguing, bargaining and threatening.

\textsuperscript{58} I agree with Elster that "a crucial feature was that voting was by majority rule, each state having one vote", but that this feature could not in itself ensure that the outcome would be equality in the Senate, because the small states were in minority at the Convention. However, the voting procedure adopted at the Convention increased the voting and bargaining power of the small states. See Elster, \textit{Equal or Proportional?}, supra note 54, at 148-149.

\textsuperscript{59} Elster is trying to explain the outcome of the conflict between the large and small states at the Convention by using the bargaining theory. He thinks that threats of civil war, disruption of the Union and foreign powers intervention used by some delegates had been part of a bargaining process. I don't see threats always as a sort of bargains. According to Elster, "bargaining concerns the division of benefits from cooperation, compared to a permanent breakdown of cooperation" (Elster, \textit{Equal or Proportional?}, supra note 54, at 154. So, e.g. if you say that you won't ratify the Constitution unless you get the equal representation in the Senate it is clearly a threat, and the other side has to evaluate if it is a credible threat. You don't even have to argue that the other side would lose some benefits, because the non-ratification of the proposed Constitution could simply mean that the result would be a status quo. In the concrete situation the status quo would be the retention of the Articles of Confederation. However, in such case both sides would lose some benefits because of failure "to form a more perfect union". In the context of the "arguing and bargaining" over equal representation in the Senate there is a story of a possible 'true' bargain, but it cannot be verified. Forrest McDonald has argued that there was a deal between some delegates from Connecticut and South Carolina. In short, Connecticut (and some other northern states) would support continuing slave trade (a strong benefit for S. Carolina and Georgia), and in return some delegates from key southern states (Georgia or North Carolina) would vote for equal representation. The only problem with this bargain is that there is no evidence that it ever occurred. See MCDONALD, \textit{E PLURIBUS UNUM}, supra note 38, at 291-294.

\textsuperscript{60} 1 RECORDS 52.
The firmness and steadiness of the small states in defending their interests was evident also after the 'Great Compromise' in the debates over the congressional veto, over the presidential election and the senatorial powers. It was again Madison which proposed a veto of the national legislature on all legislative acts of the states, considering this power as an essential instrument in the hands of national government for control of the state governments. Some small state delegates considered that this power is not only too dangerous in the hands of federal government, with many practical difficulties in its execution, but that it also enhances the power of the greatest states. Bedford nicely summarizes the fears of the small states:

"(He) would refer to the smallness of his own State which may be injured at pleasure without redress. It was meant…to strip the small States of their equal right of suffrage. In this case Delaware would have about 1/90 for its share in the General Councils, whilst Pa. & Va. would posses 1/3 of the whole. Is there no difference of interests, no rivalship of commerce, of manufactures? Will not these large States crush the small ones whenever they stand in the way of their ambitious or interested views. This shows the impossibility of adopting such a system as that on the table…It seems as if Pa. & Va. by the conduct of their deputies wished to provide a system in which they would have an enormous & monstrous influence."

It is indicative that the veto was rejected the day after the 'Great Compromise', with only three large states voting for it.

The small states were also very successful in securing large powers for the Senate in which they had obtained the greatest share of influence. It is true that originally the Senate was supposed to be the most important body of the new federal government according to Madison's plans, but after the 'Great Compromise' he and some other delegates from larger states wanted to diminish the senatorial powers, considering this body to be not properly constituted, and to transfer some crucial powers to the president, because they hoped that their states would have much greater influence in its election.

In the final compromise reached only few days before the end of the Convention, the small states, as put by Charles C. Thach Jr., "had demanded and obtained their pound of flesh". The powers over treaties and appointments were divided between the president (the power of

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61 See Slonim, Securing States' Interests at the 1787 Constitutional Convention, supra note 27, at 8.
62 1 RECORDS 167-168.
63 2 RECORDS 28.
treaty proposal and nomination of public officials) and the Senate ('advice and consent'), which was the concession of the small states, and in return the large states accepted that the small states would have larger influence in the election of the president (partly by the composition of the electoral college and partly by the contingency arrangement that the president shall be elected by voting of the state delegations in the House of Representatives, each state having one vote, in case that no candidate has obtained the majority of electoral votes).  

Assessing retrospectively the results of the Federal Convention from the small states' point of view we may conclude that they have been very successful in the process of 'arguing and bargaining'. The small states have obtained the equality in the Senate, than have secured that this legislative house has extra-powers of treaty-making and appointments, then they acquired a more significant influence in the election of the president, and finally at the end of the Convention they have won the crucial concession – "that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate". Let us see now how did the small states come out of the European Convention and the IGC.

IV. THE FAILURE OF SMALL STATES IN BRUSSELS

First, we need to define large and small states in the European context. There is no unified definition. We could use different categories for definition, e.g. size of population and territory, economic size (GDP) or 'political size' (meaning military and administrative capabilities), or a combination of some categories. However, the simplest category and the one most used is the size of population. The American constitution makers have used the same criteria, when distinguishing between large and small states, although they had been thinking also about prospective growth of population in some territorially large states with small  

65 The majority of American constitution makers were convinced that after George Washington there would be no person with such fame in the several states to obtain the majority of electoral votes. So they prescribed the contingency procedure by which, in case no candidate has a majority of electoral votes, the House of Representatives would choose the President among the five candidates with the greatest number of electoral votes, but "in choosing the President, the Votes shall be taken by States, the Representatives from each State having one Vote" (U.S.CONST. art. II, sec. 1). In 1800 this procedure had been used for the first time (Jefferson's election), and afterwards Gouverneur Morris, one of the most significant of the constitution makers wrote: "The necessity of voting for two persons as President, one of whom should not be of the State voting, and the right of choosing a President out of the five highest on the list, where no absolute choice was made by the electors, is perhaps the most valuable provision in favor of the small States, which can be found in the Constitution" (3 RECORDS 405). Of course, we know today that thanks to the development of the party system this contingency procedure was used only once more, in 1824, but we are interested here in the original compromise between the states.  

66 U.S.CONST., art. V.  

population. I shall accept the following definition of small states in the European Union: "Small EU states are defined as those with significantly less than 40 million inhabitants". In the EU-27 only six states are large: Germany, France, Great Britain, Italy, Spain and Poland. Romania and possibly Netherlands could be considered as 'medium-size' countries, but other countries are clearly 'small' or 'very small'.

Confrontations between large and small states in the American context had begun with the drafting of the Articles of Confederation, eleven years before the Philadelphia Convention. Similarly, first clashes between large and small states in EU had started over the qualified majority voting in the Council and the size of the Commission at the Amsterdam IGC, five years before the European Convention.

A. The Institutional Implications of Enlargement

The accession of three small states (Austria, Finland and Sweden) to the EU on January 1, 1995, and the prospective eastern enlargement reinforced fears of large states that they would loose their influence in decision-making and that the original balance of power between large and small states would be destroyed. First evaluations of the possible impact of some new method of voting had been made almost a decade before the eastern enlargement, with special emphasis on the double – majority system.

The bargaining process between large and small states has begun at Amsterdam IGC over two separate issues: a re-weighting of national votes in the Council of Ministers and the number of Commissioners. It was estimated that in an EU of 26 countries (after the eastern enlargement), according to same calculations, a qualified majority could be achieved with the support of governments representing less than half of the EU population, and that was accepted as illegitimate even by a number of small states. Amsterdam IGC brought no agreement over

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68 See Madison’s proposition to fix the representation of the states in the House of Representatives according to their population, because population is in America “the principal criterion of wealth” in 1 RECORDS 584-586.

69 Simone Bunse, Paul Magnette and Kalypso Nicolaidis, *Is the Commission the Small Member States' Best Friend?*, 8 (Sieps, 2005). A slightly different definition is one which defines large state in the EU as one with over 50 million people. In that case Spain and Poland are defined as 'almost large' or 'medium size' countries, and all other EU countries are 'small' or even 'very small'. See Eloi Laurent & Jacques Le Cacheux, *Integrity and Efficiency in the European Union Constitutional Treaty*, 13 (Paper presented at the CONNEX Workshop 'Delegation and Multi-level Governance, Paris, May 2005).


these institutional questions, because of "the realization that there was plenty of time to implement such an agreement before eastern enlargement and the understanding that future bargains over enlargement might offer a more attractive venue for institutional linkages".

Three years later, in Nice, 'Amsterdam leftovers' had to be solved. After bitter and prolonged negotiations and bargaining, agreement has been reached on most pressing institutional issues, but some solutions have been postponed for another IGC. Having in mind the accession of new members from Eastern Europe by 2004, mostly small countries, the large states pressed for a new balance or better to say redistribution of power (weighting of votes in the Council and composition of the Commission). Those questions were at the same time interrelated because the expected reduction of the number of commissioners was seen as a bargaining chip by the large states, which have expected some concessions by smaller countries as to the votes in the Council. Put simply, the determination of the EU smaller countries was to retain representation in the Commission or, as a second best option, to have a strict equality of Member States if it comes to a rotation system. On the question of votes in the Council their preferred option was the simple 'dual majority system', whereby a qualified majority decision would be reached when supported by a simple majority of Member States, representing a majority of population of the EU. The large Member States (Germany, France, UK, Italy and Spain) wanted a smaller Commission, with at most 20 Commissioners and a rotation system. However, as to rotation the larger countries didn't speak with one voice – e.g. Italy defended rotation for every Member State, and Spain favored rotation system only for small EU states. All larger states presented a united front in refusing to surrender its second Commissioner if a 'one Commissioner per Member State system' were to be accepted. As to the re-weighting of votes in the Council larger countries have been split – Germany and Italy favored a 'dual majority system' and the other three large countries opted for modification of the 'degressive

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72 As to the voting system in the Council two proposals were advanced: increasing the number of votes of the five largest countries (Germany, France, Great Britain, Italy and Spain) and the introduction of a variant of 'dual-majority system in which decisions could be reached with a fixed percentage of weighted votes and votes from states representing certain percentage of EU population. Smaller states supported the dual majority system, but this system was unacceptable to France, because it would give it smaller voting power than to Germany. Equality of voting power between Germany and France in the Council has been the sine qua non since the beginning of European communities.


74 Reading some fragments of transcripts published in ECONOMIST dealing with bargaining over votes in the Council one has impression that nothing had changed since Philadelphia. See 'At two in the morning', ECONOMIST, Dec. 14, 2000.

75 Germany favoured a 'dual majority system', as did the smaller countries and the Commission, but with some important differences. Namely, Germany wanted different thresholds for achieving 'dual majority': a simple majority of states and bigger percentage of population (as much as 70%) for reaching decisions. Insisting on much higher threshold for population meant that it would be much harder to achieve the requisite majority without Germany (which had 22.86 % of total population of EU-15 and 17.05 % of EU-27) or impossible without three biggest EU
proportionality system'. The Commission's position was somewhere between the smaller and larger countries, although nearer to the smaller states. Regarding the number of Commissioners the opinion of the Commission was that the number should be 20 at most, with a system of equal rotation of Member States, or 'one Commissioner per Member State'. As to the system of voting in the Council, the Commission proposed the simple 'dual majority system' as the most efficient and transparent. 

So how did it end the struggle for power and influence in Nice? The agreement reached after four days of bitter negotiations could be called a compromise, even if the larger states fared better. The 'dual majority system' wasn't adopted primarily because of France's disagreement – its introduction would lead to inequality between Germany and France, and the voting parity of these two countries has been one of the fundamental institutional founding principles of the European Communities. Instead, it was accepted a 'triple majority system', based on three legs: votes according to principle of 'degressive proportionality', states and population. In a most complicated system ever invented decisions in the Council would be adopted if supported by a qualified majority of Member States weighted votes (255 votes out of a total of 345 in an EU-27), a majority of the Member States, and a demographic majority of at least 62% of the total population of the EU. The 'dual majority system' would eliminate this third leg – weighted votes according to the principle of degressive proportionality, which is neither objective, nor stable (because it requires constant adaptations with every new enlargement), and therefore produces most bitter negotiations at intergovernmental conferences. So it was also in Nice. The bigger states obtained larger increases of weighted votes, than smaller, which induced Antonio Guterres, the Portuguese prime minister to complain of "an institutional coup d'etat" executed by the bigger states.

On the second important institutional issue separating big and small EU states the later succeeded in defending the principle of 'one Commissioner per country'. For ten smaller EU Member States this was "non-negotiable throughout the IGC". Allegedly the Dutch Prime Minister Wim Kok said at the Nice conference "that for him there were two certainties in life: states (Germany, UK and France), with over 40% of total population in EU-27. On the other side, the smaller countries wanted minimal majority thresholds which would diminish the possibility of few larger Member States veto.

76 See European Commission, Adapting the institutions to make a success of enlargement, COM (2000).
77 In Greece Ta Nea, a pro-government newspaper, complained that the big countries "did everything they could to create a directorate, which will control all decisions, leaving the little countries at the margins." (So that's all agreed, then'. ECONOMIST. Dec. 14, 2000).
Compromise between the big and small countries was in linking two different institutional issues: big states shall abandon their right to a second Commissioner, which would allow that every Member State has its Commissioner as of 1 January 2005, and in exchange they would get more weighted votes in the Council. Finally, a sort of compromise was reached whereby the Commission would have fewer members than Member States when the EU reaches 27 states, whenever that may be. However, Protocol on enlargement of the EU specified neither the number of Commissioners, nor the implementing arrangements for the system of rotation. This was left for another IGC or unanimous decision of the European Council.80

In the Declaration on the future of Union adopted in Nice it was declared that "with ratification of the Treaty of Nice, the European Union will have completed the institutional changes necessary for the accession of new Member States"81. However, at Laeken IGC in December 2001 the Member States adopted new Declaration on the Future of the European Union.

The Laeken Declaration has opened a whole specter of institutional questions which would be debated in the Convention on the Future of Europe, dealing principally with the issue of democratic legitimacy and transparency of the present institutions. Here are some of the most important institutional questions: "How can the authority and efficiency of the European Commission be enhanced? How should the President of the Commission be appointed: by the European Council, by the European Parliament or should he be directly elected by the citizens?... Should the way in which we elect the members of the European Parliament be reviewed? Should a European electoral constituency be created, or should constituencies continue to be determined nationally? ...Should the role of the Council be strengthened? Should the Council act in the same manner in its legislative and its executive capacities?.. A second question… involves the role of national parliaments. Should they be represented in a new institution, alongside the Council and the European Parliament?...Should they focus on…preliminary checking of compliance with the principle of subsidiarity? The third question concerns…the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States… better implementation? Is there a need for more decisions by a qualified majority? How is the co-decision procedure between the Council and the

79 Yataganas, The Treaty of Nice, supra note78, at 261.
81 Declaration on the Future of the Union, O.J (C 80) 85 (2001).
European Parliament to be simplified and speeded up? What of the six-monthly rotation of the Presidency of the Union?82

It could be noticed that the most important questions that would later divide large and small states in the European Convention were not mentioned at all in the Laeken Declaration – we mean the proposal for a new system of voting in the Council, the reduction of the number of Commissioners and the introduction of the president of the European Council (of course, excepting the last question as to the future of six-monthly rotation at the helm of the European Council which didn't imply the solution later proposed and accepted at the Convention). It is difficult to guess what have been the true reasons to reopen these institutional questions, so soon after the Nice IGC, and even before the solutions concerning the size of the Commission and the system of voting in the Council have been tested. Probably it was the discontentment of some (larger) states with the Nice results after the first analyses have been made as to their possible gains and losses in the new enlarged Union.

Convention on the Future of Europe started in February 2002 and it was evident from the beginning of its proceedings that the Conventioners would strive to make a single proposal to the IGC, which would be at the end officially called the Draft Treaty establishing the Constitution for Europe, although the Laeken Declaration simply raised the question of whether the "simplification and reorganization (of the Treaties) might not lead in the long run to the adoption of a constitutional text in the Union".83

B. Organization and the 'rules of play' of the European Convention from the point of large states – small states conflict

Let us now examine the organization and proceedings of the Brussels Convention, and the settlement of the crucial institutional issues that have been in the centre of conflict between the large and small states. Comparing it with the Philadelphia Convention we shall see important differences in the organization of the two conventions, in their decision-making procedures and positioning of the small states.

When analyzing the Philadelphia and the European Convention many scholars have been refereeing to them as 'constitutional conventions'. This is not quite true, especially as to the Philadelphia Convention. Federal convention in Philadelphia was, as was correctly noticed by

83 Laeken Declaration, supra note 82.
Roger S. Hoar in his classic work on constitutional conventions, "really a diplomatic treaty-making body, rather than a constitutional convention in the purest sense of the term". However, all other conventions which ratified the American Constitution were, in his opinion, "all regularly-called constitutional conventions". The state legislatures had appointed the delegates of the Philadelphia Convention, paid their expenses, and gave them instructions which they had to obey. The whole organization of the Convention was based on the representation of states: every state had one vote (regardless of the number of its delegates), seven states made a quorum, majority of present state delegations were competent to decide all questions. State was therefore organizing category of the Convention. Speaking in contemporary language, Philadelphia Convention was actually an intergovernmental conference.

The Convention on the Future of Europe did not follow the logic of Philadelphia. Quite contrary – the Convention came as a result of discontentment with the treaty-making process at the Nice summit. Although the organization of the European Convention, as in Philadelphia, reflected "the fundamental idea of establishment of a body legitimized and capable to do the initial, 'expert' part of the job on elaborating the constitutional document" it was in almost all the details of its membership, organization and the way it did its business completely different from the American Federal Convention. As to its membership, it did not consist only of the representatives of Member States governments, but also of representatives of national parliaments, members of the European Parliament and the European Commission. The representatives of applicant countries also attended the Convention, but it was stated in the Laeken Declaration that they "will be able to take part in the proceedings without, however, being able to prevent any consensus which may emerge among the Member States".

Another very important difference between the two conventions was the fact that the European Convention had another steering body envisioned by the Declaration. It was the Presidium of the Convention composed of the Convention Chairman and Vice-Chairmen and nine members drawn from the Convention (the representatives of all the governments holding the Council Presidency during the Convention, two national parliament representatives, two European Parliament representatives and two Commission representatives). The European Council itself appointed the former French president Valery Giscard d'Estaing as chairman, and Giuliano Amato (former Italian prime minister) and Jean-Luc Dehaene (former prime minister of Belgium) as vice-chairmen. This important decision of the European Council has signified that

84 ROGER SHERMAN HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 8 (1917).
86 Laeken Declaration, supra note 82.
the chiefs of states and governments of the EU countries didn't want to let an 'uncontrollable meeting' to happen, in the sense of its possible goals and decisions. In the Declaration was stated just that the "Chairman will pave the way for the opening of the Convention's proceedings by drawing conclusions from the public debate", but his role throughout the Convention was far more significant and couldn't be in no way compared with the symbolic role of George Washington's chairmanship of the Philadelphia Convention. It would be more appropriate to compare him with James Madison\textsuperscript{87}, as he was, like Madison, the most important author of the constitutional draft.\textsuperscript{88} Madison was, as far as we know, the most important among the Virginia's delegates in drafting of the Virginia plan, and Giscard was the principal author of the 'preliminary draft Constitutional Treaty' of October 2002 and, what is even more important, of the Draft Institutional Proposals of 22 April, 2003.\textsuperscript{89}

Giscard's role as a constitution drafter was accompanied by his strong leadership of the Convention. As noticed by scholars he was as Chairman the 'agenda-setter' in the Convention-making proposals to the Convention, deciding which amendments would be accepted and which won't, prohibiting voting, summarizing the daily proceedings and defining the terms of existing or missing consensus among the delegates on certain issues.\textsuperscript{90}

I attach great importance to the fact that the Convention didn't vote on proposals, amendments, and drafts of articles or, at the end, on the draft constitutional treaty. As to the decision-making, the European Convention was completely opposite of Philadelphia. Early in the Convention, on the first informal meeting of the Presidium on 22 February 2002, as to the working method of the Convention it was concluded that "given the non-homogenous character of the composition of the Convention it was not appropriate to resort to a vote. The Convention should aim at achieving consensus or, at least, a substantial majority".\textsuperscript{91} Without the possibility

\textsuperscript{87} Although Giscard, by mistake, compared himself with Jefferson: "I tried to play a little bit the role that Jefferson played, which was to instill leading ideas into the system...Jefferson was a man who wrote and produced elements that consolidated the (American) Constitution" ('United Europe's Jefferson? Giscard d'Estaing Smiles', N.Y.TIMES, June 15, 2003). As we know, Jefferson was in Paris, not in Philadelphia.

\textsuperscript{88} George Tsebelis claims that Giscard "may be the most influential author of a constitutional document in the history of the EU". However, that was said before the referendums in France and the Netherlands and the subsequent downfall of the Constitutional treaty. See Tsebelis, Agenda Setting in the EU Constitution, 4 (Paper presented at the DOSEI conference, Brussels 2005).

\textsuperscript{89} See Editorial comments: Giscard's constitutional outline, 39 C.M.L.REV. 1211 (2002); NORMAN, THE ACCIDENTAL CONSTITUTION, supra note 19, at 343-349.


\textsuperscript{91} European Convention, Summary of Conclusions, 1st informal meeting of the Presidium, Feb. 22, 2002. On the plenary session of the Convention on May 16, 2003, Giscard elaborated the Presidium's conclusions as to voting: "The Convention does not vote and for a simple reason: its composition does not allow it. There are two representatives from the Commission. The Commission will not have 2 out of 105 votes. That would not make sense. There is the group of national parliamentarians which is three times greater than the group of members from
of voting on anything it was up to the President (and the Presidium) to declare when consensus exists on certain issues and what does it imply. One scholar has argued that, because all the states had the same number of representatives in the Convention (one representative of the government and two representatives from the parliament), it would be very difficult, if not impossible, to vote in such an assembly without some system of weighted votes, because the majority could represent a very small minority of the EU population, and therefore the Convention was condemned to try to find consensus. Such thinking presupposes illegitimacy of decision-making by state voting, although the decision-making in the most of federal systems starts, at least partially, from the principle of equality of member states. This proposition is even more valid when we speak of confederal unions of states. The American constitution makers voted by states in Philadelphia principally because it was the method of voting of the Congress of Confederation. Elster sees a possible causal connection in this, in the sense that the Philadelphia Convention "adopted the principle (one state, one vote) for its own proceedings because it was used by the institution that had called it into being. And it proposed the principle for the future because the smaller states at the Convention benefited from the disproportionate strength which they derived from its use at that stage." On the other side, the European Council, as the creator of the Brussels Convention, didn't specify in the Laeken Declaration anything as to the decision-making process, and the Presidium didn't even think, as far we know, to adopt the system of qualified majority voting in the Council as a possible solution for the voting in the European Convention. However, we know that the Presidium itself had voted on some occasions, and so it did use the decision-making procedure which it didn't want to use at the level of the Convention.

Because of absence of voting it was, as we shall see later, impossible for the delegates of small EU countries to prove that their position is the majority position in the Convention on some crucial institutional questions, or at least that there is no consensus on some institutional proposals which would change the institutional solutions accepted at Nice IGC. With the absence of voting it was up to the Presidium and especially up to the President to expose if there is a consensus or a large majority in the convention in favor of some proposal or amendment. And

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92 See Paul Magnus, The Convention and the Problem of Democratic Legitimacy in the EU, 10 (Center for European Studies, Harvard University, 2003).
93 On one occasion William Paterson from New Jersey asked the delegates of the large states: "If a proportional representation be right, why do we not vote so here?" and then answered himself by reading the Article 5 of the Confederation giving each state a vote'. 1 RECORDS 250.
94 Elster, Constitution-making in Eastern Europe, supra note 2, at 180.
that gave to the Presidium and to Giscard a great power of manipulation and the power to be 'the arbiter of consensus'. As an insider critic of the way the Draft Constitutional Treaty was made, Gisela Stuart argued that "consensus was achieved among those who were deemed to matter and those deemed to matter made it plain that the rest would not be allowed to wreck the fragile agreement struck…The 'consensus' reached was only among those who shared a particular view of what the Constitution was supposed to achieve." \(^{96}\) This is relevant for our theme because we know that Giscard was particularly inclined to favor the position of large states \(^{97}\), as we shall see when we turn to certain crucial institutional questions. And in this he was fully supported by the Presidium.

This shouldn't surprise us when we know that the composition of that body was not representative from the point of view of the small EU states. The Presidium numbered originally 12 members (and later they co-opted Lojze Peterle, as a representative of the candidate countries, but with no right of voting). Of this 12 members seven came from large EU countries: Giscard as Chairman (France), Giuliano Amato as Vice-Chairman (Italy), Michel Barnier as a representative of the Commission (France) Mendez de Vigo (Spain) and Klaus Hänsch (Germany) as representatives of the European Parliament, Ana Palacio (Spain) as a representative of one of the three governments holding the six-month rotating presidency during the Convention's life, and Gisela Stuart (UK) as one of two national parliamentarians. Only five members of Presidium came from the small states - Jean-Luc Dehaene (Belgium) as Vice-Chairman, Antonio Vitorino (Portugal) as the second representative of the Commission, Henning Christopherson (Denmark) and George Katiforis (Greece) as representatives of remaining two governments holding the six-month rotating presidency, and John Bruton (Ireland) as the second representative of national parliamentarians. So, the large countries had a 7 to 5 majority in the Presidium, and besides they certainly had the support of Christopherson from Denmark, who approved key institutional changes proposed by the Presidium. \(^{98}\) It could be said that the Presidium was meant to be representative of different institutional components of the Convention's membership, and not the representative of Member States, but nevertheless I don't think that is only by accident that all five big EU countries had their representative in the Presidium (France and Spain with two), and some key small states (as e.g. Austria, Finland and Holland) had no representatives in that body. The majority of small states of the EU were


\(^{97}\) Peter Norman reports that Giscard "was generally perceived as a 'big country' man – an impression he did nothing to dispel while chairing the plenary". See NORMAN, THE ACCIDENTAL CONSTITUTION, *supra* note 19, at 152.

\(^{98}\) Denmark was closer to the intergovernmental position of France, UK and Spain, and therefore it supported from the start the election of the President of the European Council, instead of rotation system.
therefore in the minority in the Presidium. The power of agenda-setting and of submitting the draft proposals was firmly in the hand of the larger EU states. What a difference as to the Philadelphia Convention – in cases when the American Convention was deeply split on certain issues the members resorted to grand committees consisting of one representative from each state to find a compromise solution which could be accepted by the Convention as a whole.

There is one another cause, in my opinion, favoring the larger states in the European Convention. It is their more serious attitude to the Convention and its possible role in preparing a draft of document to be presented to the IGC. This is visible in the high-profile of representatives of the larger states at the Convention, especially in the second-half of its proceedings. So, from October 2002, but before the debate on the institutions was opened, Germany was represented by Joschka Fischer, its minister for foreign affairs. Afterwards, France similarly sends its foreign minister Dominique de Villepin to the Convention. Britain was represented from the start with Peter Hain, its Minister for Europe and Italy with Gianfranco Fini, the deputy prime minister. However, the trend-setter was actually Spain, which decided in July 2002 to appoint its MEP and member of the Convention Ana Palacio as foreign minister, and send her as a representative of the Spain government in the Presidium. This 'invasion of foreign ministers' in a large part transformed the convention in an 'disguised IGC', because the "foreign ministers, and ministers of cabinet rank such as Hain or Fini, could negotiate and cut deals in the expectation that they would be supported by their governments and parliaments. This was less certain for those countries represented by non-politicians, be they officials or academics". P. Norman argues that Finland, which was not represented in the Convention by a politician, was among the more disappointed member states at its end. This observation is confirmed by Kimmo Kiljunen, one of Finland's members at the Convention:

"That Finland failed to gain a seat in the Presidium was partly due to a failure on part of the Government. In Laeken, as the Convention was being set up, Finland concentrated on one thing alone: the Food Agency. The nature of the Convention was also drastically misjudged – it was viewed as an academic exercise. But whenever politicians convene, they want to decide. That is why the Convention morphed into a constitutional congress. That is why it produced a single Draft Constitution".

It might be that at certain point in the Convention's proceedings, when it was evident that it would try to propose a single proposal to the IGC that the larger countries decided to settle the crucial institutional issues at the Convention, and not afterwards in the IGC. And it must have been an attractive option to them having in mind that the rules of play were set to favor them. Therefore it should not come as a surprise that the 'deal' between the larger countries achieved at the Convention (except Spain's discontentment with the QMV) withstood later IGC and was with almost no significant changes incorporated in the Lisbon Treaty. All attempts of the smaller EU states to 'improve' the Draft Constitutional treaty and insure their goals after the Convention were mostly in vain.

C. The timing of the debate on institutional issues

As I said earlier the American constitution makers wanted to settle the crucial issue of the 'distribution of power' in the legislative branch of the new Congress before the rest of constitutional design. The Virginia plan, made by Madison and his colleagues in the delegation and presented at the beginning of the proceedings, was at most a constitutional outline, specifying only some basic principles of the new government. Although the Convention debated all the points elaborated in the plan, it was obvious from the beginning that no question of the organization of the government or its powers could be settled before the final decision would be made on the distribution of power (proportional or equal) between the states. Only after the 'Great compromise' had been achieved, the first draft of the constitution was made by the members of the Committee of detail in late July. What I want to stress is that the solution of the issue of the representation in Philadelphia had precedence over all the other issues. So, in the heat of the debates over representation the American constitution makers had nothing to lose by insisting on its conflicting demands, because they had no agreement as to the rest of the constitutional content. And here I find another important difference in the proceedings of the European Convention.

The debate on the institutional questions began only in January 2003, in the second half of the Convention and the articles dealing with institutions were presented to the conventioneers in late April 2003, just two months before the planed ending of the proceedings. After the 'listening' phase, and then a phase of 'analysis', with a dozen working groups preparing its reports on various important constitutional issues, the most important 'writing phase' began only in October 2002, when the Preliminary draft Constitutional Treaty emerged, but it was merely a skeleton, looking more as a table of contents of a future constitutional treaty. Far more important
was a draft of the first 16 Articles presented to the Convention in February 2003. At that time it was certain that the Convention is going to produce a document called a constitutional treaty, not some recommendations for the IGC. After a year's work the conventioners had invested much of their time and talent in the project called 'Constitutional Treaty' or 'European Constitution'. After much of the eventual Constitutional Treaty's content has been agreed, it was impossible for a great majority of conventioners to bring the whole project into question because of their differences as to the institutional issues. When you have almost 90% of the Constitution accepted by consensus it is very difficult to give it up because of the 10% of contested content. The pressure to reach some kind of agreement as to the rest of the text must be strong at that point of constitution making.

D. The proposals on the Union's institutional architecture

We have seen that in the American Convention the crucial constitutional draft, or better say, an outline of constitution, was presented at the beginning of the proceedings. Virginia plan was the logical starting point of the debate because it was the work of the delegates from the largest and most important state in the Union. The other two plans submitted to the Convention (New Jersey plan and the plan of Charles Pinckney) had no chance to be taken seriously as relevant constitutional drafts. So it is not surprising to find similar logic at work in the European Convention. Many draft constitutions had been submitted to the Convention in its early phase by individual delegates, but none of them was taken seriously.
There is only one plan submitted to the Convention, and dealing with the institutional issues, that could be, at least superficially, compared with the Virginia plan. It was the Franco – German contribution on the institutional architecture of the EU, a compromise proposal of the two largest states, send to the Convention in January 2003. For some analysts this joint proposal became the key turning point in the Convention’s proceedings. ¹⁰⁵ I am not going to dispute this observation, but for the discussion on the institutional issues which are the theme of this paper it would be more appropriate to present the key institutional proposals in four crucial contributions submitted to the Convention comprising almost all EU Member States from December 2002 till March 2003.

The Franco – German contribution was a compromise between German federalist desires and French intergovernmental inclinations. In short, "France agreed to the Commission President being elected by the European Parliament, and Germany agreed to the European Council being headed by a president elected by qualified majority by the Council for once-renewable two-and-a-half year term or a single one of five years."¹⁰⁷ German preference was for the continuation of the process of parliamentarisation of the relationship between the Commission and the EP and the strengthening of the community method. Therefore, according to the joint proposal, the Commission President would be elected by the EP and afterwards approved by the European Council. He forms a college of commissioners, taking account of the geographical and demographic balance and may distinguish between commissioners with sectorial portfolio and those with specific functions, with a strict system of rotation, which did imply the Commission with smaller number than the number of the Member States. On the other side, an elected president of the European Council was perhaps the most important institutional innovation of the Franco-German proposal, although it was earlier informally proposed by some European statesmen.¹⁰⁸ The idea was to have a stable Presidency to give the leadership of the European Council continuity, stability and a higher profile. The elected President would prepare, chair and organize the proceedings of the European Council and he/she would represent the Union on the

¹⁰⁴ Norman calls them 'freelance constitutions', most of which were "noted and forgotten". NORMAN, THE ACCIDENTAL CONSTITUTION, supra note 19, at 65-67.
¹⁰⁶ NORMAN, THE ACCIDENTAL CONSTITUTION (supra note 19, at 174); Crum, Genesis and Assessment of the Grand Institutional Settlement, supra note 102, at 98.
¹⁰⁸ The idea of an elected president of the European Council was presented separately by Spanish premier Aznar, British Prime Minister Blair and French president Chirac and therefore was informally known as ABC proposal.
international arena. The highest intergovernmental organ of the EU would, therefore, have a leader, competing with the Commission President for the pre-eminence.

At the end of February 2003, partially as a response to the Franco – German proposal, UK and Spain submitted its joint proposal entitled 'The Union Institutions'. Among other proposals, the two governments endorsed the idea of a full-time 'chair' of the European Council appointed for four years. However, as to the election of the Commission President, UK and Spain differed from Franco – German proposal by proposing that he/she would be appointed by the European Council and afterwards approved by the European Parliament.

The small states submitted, in my opinion, two important contributions in the early phase of the institutional polemic within the Convention. The first contribution was submitted even before the Franco – German proposals. It was contribution of Benelux countries from 11 December 2002. In the Memorandum of the three small founding Member States it was proposed that the Commission, as the institution that guaranties the common interest of the Union, needs to be strengthened in the following way:

- A Commission President elected by the European Parliament according to a procedure to be determined and by a three-fifth-majority vote of its members. Then the Council, in its composition of heads of state and government, will pronounce itself by statuating with qualified majority.
- A strong Commission and, in accordance with the Nice decisions, eventually reduced in numbers. A Commission guaranteeing the equality of all member states in both its operation as its composition, based on the principle of equal rotation.
- A Commission responsible before the two institutions involved in its appointment and subject to dismissal through censure by one of those institutions.
- A Commission mandated with the exclusive right of initiative in legislative matters.

Answering to, at that time, informal proposals for an elected president of the European Council, Benelux countries stated:

"The Benelux is of the opinion that the system of the Council Presidency must be reformed in order to guarantee the effectiveness and the continuity of Council’s activities in an enlarged Union. The status quo is no longer a viable option. At the same time, we must safeguard the principle of equal treatment of all member states, just as the balance between the institutions of the Union. The Benelux is of the opinion that the proposal of President of the European Council, appointed outside the circle of its members and for a

\[\text{Pater Hain & Ana Palacio, The Union Institutions (CONV 591/03).}\]
long period, does not come up to these conditions… the Benelux favors maintaining rotation on the level of the European Council and specialized councils. The Benelux will in any case never accept a President elected from outside Council (emphasized by R.P.).”

The fourth significant contribution came also from the small EU states. Sixteen Member and accession states, practically all small countries except Benelux countries and Greece, submitted to the Convention their joint document, in which they responded to proposals of the large countries on the institutional architecture of the Union. The document starts from the proposition that the Constitutional Treaty must reflect the Union's "unique nature as a union of states and peoples". The equality of states is, according to the small states, "a core principle which must be respected in the reform of the Union's institutions". Therefore, the small states cannot accept "any arrangements which sought to establish a hierarchy of Member States or to differentiate between them in terms of their entitlement to involvement in the operation of the institutions". The small states shall insist on maintaining the rotation, especially in the Council, and establishment of no new institutions, especially those that could upset the institutional balance. All of them, except two countries (Denmark and Sweden) shall emphasize their support for "retention of rotating system in particular in the European Council, the General Affairs Council and Coreper".

Smaller states supported all the measures aiming at enhancing democratic legitimacy of the Commission, emphasizing that "guaranteed equality as between member states in the composition and operation of the Commission must be retained" and also the principle of one Commissioner per Member State".

Reflecting on the stated positions of the Member and Accession States on some key questions of the Union's institutional architecture dividing the large and small states in the Convention and afterwards in the IGC it could be concluded that the larger states were unanimous in favoring the establishment of an elected 'chair' or 'president' of the European Council, and practically all small states were against that idea. As to the idea of smaller Commission and abandoning of the principle of one Commissioner per Member State, this was only hinted in the Franco – German proposal, and not even mentioned in the UK – Spanish

110 'Memorandum of the Benelux: a balanced institutional framework for an enlarged, more effective and more transparent Union' (CONV 457/02).
111 The document, called 'Reforming the Institutions: Principles and Premises' was signed by Austria, Denmark, Sweden, Portugal, Ireland, Finland, Malta, Slovenia, Estonia, Latvia, Lithuania, Cyprus, Hungary, Czech Republic, Slovakia and Bulgaria.
112 Reforming the Institutions: Principles and Premises' (CONV 646/03).
contribution. On the other side, all small countries insisted on the retention of the principle of one Commissioner per Member State, as one of the key principles emphasizing the equality of the Member States in the EU. It is interesting to note that in none of the four documents there is any mention of the possibility or urging for a change in the definition of the qualified majority voting in the Council, except that in the contribution of 16 small states it was stated that "while we accept that demographic factors are relevant both to representation in the European Parliament and to the voting weights in the Council of Ministers, we would not support any further reliance on them".

The Presidium of the Convention made its long awaited proposal of the Draft articles on the Union's Institutions on April 23, 2003.\textsuperscript{113} We know that the proposal was based primarily on Giscard's Draft Institutional Proposals leaked to the press the day before.\textsuperscript{114} In this paper we are interested only in examining the three institutional issues – QMV in the Council, the composition of the Commission and the chairing of the European Council. In all of these questions Giscard's draft and the Presidium proposal favored the position of the larger states. In Article 17a it was proposed that "when the European Council or the Council takes decisions by qualified majority, such a majority shall consist of the majority of Member States, representing at least three fifths of the population of the Union".\textsuperscript{115} In Article 16a the Presidium proposed the election of the European Council Chair, for a term of two and a half years, renewable once, and in Article 18 it proposed, against explicit statements of great majority of states that the principle of one Commissioner per Member State must be retained, that "the Commission shall consist of a President and up to fourteen other members", and that "it may call on the help of Associate Commissioners".

Let us now turn separately to the three crucial institutional issues which have divided the large and small states at the European Convention and see how in each of them the larger states prevailed in the end.

\textit{E. Qualified majority voting in the Council}

The revision of the voting system in the Council was indeed the "most provocative article"\textsuperscript{116} in Giscard's draft, because it eliminated the essential part of the Nice triple majority

\textsuperscript{113} The Presidium proposal on the Institutions – draft articles for Title IV of Part I of the Constitution (CONV 691/03).
\textsuperscript{114} See NORMAN, THE ACCIDENTAL CONSTITUTION, supra note 19, at 223-235. Giscard's Draft is published in Id., at 343-349
\textsuperscript{115} In Giscard's draft it was proposed even higher threshold for population (two – thirds of the Union's population).
\textsuperscript{116} NORMAN, THE ACCIDENTAL CONSTITUTION, supra note 19, at 225.
system – the weighted votes based on the degressive proportional system. The weighted votes have been the backbone of the Council's voting from the beginning of the European Communities. They were based on a complex balance between demographic aspects of Member States and their equality, favoring more the smaller countries in the Union. This was evident from the start when we have in mind that the three large founding Member States (France, Germany and Italy) had according to the Treaty of Rome four votes each in the Council of Ministers, and three Benelux countries had together five votes, although their overall population was twofold smaller. With successive enlargements this system of weighted votes has been constantly adapted and its evolution was unproblematic till the latest enlargement. However, it seemed that the complex solution accepted in Nice could be a solution for the Council voting for a longer period. It was a wrong assumption.

In January 2002, a month before the European Convention started, and before the Treaty of Nice was even ratified, the German Foreign minister Joschka Fischer said that "the real challenge of Nice was to balance the interests of the bigger and the smaller Member States…because this is very important for an enlarged European Union". However, the problem was very difficult to solve, according to Fischer, because there was no agreement "on the principle that the majority principle in the federation would be the double majority". According to Fischer:

"If this principle had been accepted in Nice, then…things would have been very easy. By not accepting the principle and not making a clear-cut decision about the principle, it was very, very complicated to bring all the different interests together in some sort of freestyle compromise…So, you see, it is very complicated to find a compromise without the principle, without a compromise about the principle. So, the question for the Convention will be whether there will be the strength, the wisdom and also the vision for a Maastricht-like compromise."  

Perhaps we could find in these Fischer's thoughts the reason for proposing the principle of the double majority at the Convention, so early after Nice. The proposition came from Giscard, but there is suggestion from an insider that the proposal had originated from Klaus

Hänsch, the member of the Presidium from Germany. Motives for the proposal of the double majority at the Convention, excepting Fisher's striving for a principled solution for the Council's voting, are missing. They are not evident even when one reads the debates of the European Convention, because only a few speakers talked about it. The proposal for a simple double majority (majority of states representing at least 50% of the EU population) was brought forward on 20 January 2003 by Louis Michel, Belgian Foreign Minister, and then supported by Erwin Teufel, the member of German Parliament and Maria Berger (Austria) alternate Member from the EP.

In the Convention's proceedings on 15 and 16 May 2003 some speakers commented the Presidium's proposal on the QMV in the Council, but it was far from a true debate that could be expected having in mind such a radical change. What a difference in relation to Philadelphia! Although Andrew Duff and Giscard d'Estaing pointed out that the Convention was here because the Nice Treaty had failed and that it was the job of the Convention to find the remedy, majority of speakers came against the changing the rules that had been adopted at Nice IGC, arguing that Nice "introduced a well-balanced compromise" (Hübner from Poland). Hololei from Estonia said that

"Important compromises that maintained the institutional balance and guaranteed equality of Member States were made in Nice and it makes no sense to restart the discussion from square one. What was the logic behind the sweat and tears during the discussions in Nice if we do not allow the outcome to function in practice? We must give Nice a fair chance. The size and principles of the composition of the Commission, the weighting of votes in the Council and the size of the European Parliament should be left untouched by the Convention."

118 See ALAIN LAMASSOURE, HISTOIRE SECRETE DE LA CONVENTION EUROPEENNE 379 (2004). Norman's view is that the 'double-majority' was Giscard's idea and that it was "completely unexpected". See NORMAN, THE ACCIDENTAL CONSTITUTION, supra note 19, at 321.

119 There were some rumors that the proposal for a 'double majority' system was proposed having in mind its long – range utility in keeping out of the Union some large European (or non-European) countries. In an interview with the IHT in September 2004, Giscard suggested that double-majority voting could undermine Turkey's wish to join the EU because its population in 10 to 15 years, might exceed that of every other member state, and so it could have possibly the largest weight in EU decision making, and that could discourage member states from allowing Turkey into their club. Giscard even admitted that "With accession, Turkey would become the most populous country in the EU with the greatest voting power in the council". While Giscard didn't say that the new voting rule had been designed to make it harder for Turkey to join the EU, another member of the Convention's Presidium, Ana Palacio from Spain, suggested that the proposal could have been related to Turkey's membership: "I would say that the proposal was not tabled in innocence, and having been a member of the convention, I know what I'm saying...I strongly believe that it is in the EU interest to have Turkey as a member, but under the double-majority arrangement, Turkey has no chance of ever joining." See 'Giscard says 'a rule we can't change' hurts Ankara's chances: Will Turkey join the EU club?' (IHT, Sept. 13, 2004).

Another and related argument was that the Nice voting compromise was at the same time a promise to accession countries and that they had held its referendums according to the terms of the Nice treaty. There were just few speakers (Kiljunen from Finland, Michel from Belgium) arguing for adoption of simple double majority voting system in the Council. Interesting enough, only one member – Jens-Peter Bonde, eurosceptic from Denmark, tried to point to the advantages that the larger states would have according to the Presidium's proposal. According to Bonde "the demand that 60% of the population must be attained in QMV means that the three biggest countries can block a decision sought by 22 Member States" in EU-25. Therefore, he asked, "Why not demand that 75% of Member States and 50% of the population must be required for the adoption of all laws?" Bonde was right in emphasizing that rising of threshold for the population favors the larger states, but no one from the smaller states carried on with this line of argumentation.121 If anything could be concluded from such a thin debate it is first, that there was no consensus evident in the Convention for changing the rules of voting in the Council, and second, that the deliberations (or negotiations) on this were held outside the Convention's plenary.

F. The 'president' or 'chair' of the European Council

In the heart of the institutional debate on the Brussels Convention was the question of location, exercise and control of the executive power.122 The conflict was initiated, as we know, with the British, French and Spanish proposal to appoint a 'president' or 'chair' of the European Council for a longer term, instead of the six-months rotation of the presidents of states and government on the top of the EU. The British support for the originally French idea was elaborated by then Foreign Minister Jack Straw in October 2002:

"The European Council should set the strategic agenda for the Union. But one of the problems with delivery has been that—unlike the commission which is appointed for five years—there are musical chairs every six months in the European Council and the Councils of Ministers. The presidency switches from one country to the next. This stop-go comes at the expense of consistency and efficiency. I therefore support Jacques Chirac's proposal for a full-time president of the European Council, chosen by and

accountable to the heads of government. He or she would serve for several years, overseeing delivery of the Union's strategic agenda and communicating a sense of purpose to Europe's citizens.\textsuperscript{123}

The ABC proposal had been formally submitted to the Convention by France and Germany in January 2003, just in time to provoke a very strong reaction on the Convention's floor at the session on January 20-21. The cleavage in this and also in the session in May, dealing with institutional articles, was not only between the members of larger and smaller states, but also between the federalists and intergovernmentalists, and the two cleavages were crosscutting.

Franco – German proposal produced the sharpest reactions among the delegates and the states at the Convention. For the delegates it was disputable because of the impression that the two largest states "were trying to present a fait accompli, a compromise agreed outside the Convention that the Convention should accept".\textsuperscript{124} It was noticed also that some countries, which supported the introduction of the permanent chair of the European Council, had been lobbying strongly among other states to win them over to its side. That meant that the intergovernmental negotiations went parallel and outside of the Convention.\textsuperscript{125}

The small states shall oppose such reforms, especially of the presidency of the European Council, perceiving in them the strengthening of the role of the largest countries. This was clearly stated by Finish Prime Minister Paavo Lipponen even before the Convention: "There are obvious intentions to change the system into a kind of directorate, where the European commission and smaller countries will be pushed aside."\textsuperscript{126} The president of the European Council, according to the fears of the smaller countries, would be someone coming from a larger country or at least someone preferable by them, and that would render impossible for the politicians from the smaller EU states to represent the Union, at least symbolically for the period of six months.\textsuperscript{127} This was nicely summarized by an analyst:

\textsuperscript{123} Jack Straw, \textit{A Constitution for Europe} (ECONOMIST, Oct. 10, 2002).
\textsuperscript{124} Hughes, \textit{The Battle for Power in Europe}, supra note 122, at 8.
\textsuperscript{125} As noticed by Kristy Hughes: " Having established the Convention to debate these issues and find solutions, some governments are now trying to obtain an intergovernmental agreement outside the Convention – which government representatives would then bring within the Convention. Not so much the IGC happening within the Convention but the IGC happening in parallel on the outside". See Hughes , \textit{The Institutional Debate: Who is Pre-empting the Convention?}, (available at www.epin.org/pdf/comment_hughes_pre-empting.pdf).

\textsuperscript{126} Blair and Schröder plan to open up EU, (GUARDIAN, Feb. 26, 2002).
\textsuperscript{127} The possibility of some kind of directorate of the largest EU states is accentuated by the recent revelation of a secret deal between the UK, France and Germany "not to back a candidate one of the others doesn't want" for the post of the president of the European Council. See 'Brown deal bars Blair from top EU job' (INDEPENDENT, April 20, 2008).
"The insistence on keeping the rotating presidency of the Council shows the importance of symbolism in the ongoing integration process. Like medieval kings that rather than residing in a capital, traveled through their lands from place to place to personalize political power and strengthen their legitimacy, the European Union is still in need to celebrate European rituals in the different parts of states and make integration visual to local citizens and civil servants. For the next years, until the EU is accepted as natural part of the political landscape, the Union should keep the itinerant circus of European council presidencies, though practical matters might be transferred step by step to supranational organizations."

The strongest reason for the opposition of most of the delegates to the institution of the permanent president was their deep conviction that it essentially increases the possibility of conflict of roles and missions of the president of the European Council with the president of the Commission. In the plenary on January 21, 2003 Antonio Vitorino said, in the name of the Commission, that "two competitive, two parallel executives would have neither transparency nor accountability". The representative of the Italian Senate Lamberto Dini and British MEP Andrew Duff in their joint contribution to the Convention admitted that the EU needs stronger leadership, however this could be done not by installing another president on the top of the EU, but by electing 'a president of the Union' with the dual legitimation of Council and Parliament. Guy de Vries, Holland's government representative, emphasized that the creation of new institutions in the Union must not impair the principle of the member states' equality and that the rotating presidency is one of the most important elements in the balance among the Member States. Far from making the Union more effective and more democratic in his opinion, a full-time president of the Union risks having the opposite effect – he will "inevitably encroach on the powers of the President of the Commission" and "the result would be confusion, acrimony and stalemate. Thus weakened, he asked, would the European Commission still be able to attract senior politicians and who would want to head a Commission with its wings clipped? The strongest opposition to the institution of the full-time president of the European Council came, expectedly, from the delegates of the accession countries, because its countries would never have the opportunity to lead the Union if the rotation system would be abandoned.

128 Bernd Halling, Rebellion of the small (EUobserver, April 10, 2003).
129 In its special reaction to the Presidium draft of the institutional articles the Commission stated that "The Union needs a clearly defined and fully accountable executive, acting in the general interest", but that "the proposals fall short of clarifying who would play this role and, instead, contribute to institutional fragmentation". See Reaction of the European Commission to the proposals for institutional reform (Convention), (IP/03/563, April 23, 2003).
130 See their joint contribution 'A proposal for a Unified Presidency', (CONV 524/03).
Kelam from Estonia said that the current system of a rotating presidency has considerable merits, especially in bringing the Union closer to citizens, and giving national administrations an ownership feeling and providing a fresh impetus, twice a year, to the functioning of the Union. Danuta Hübner, representative of Poland's government, stated that "the rotation system is the best possible expression of equality among Members of the Union. It is also a good way to make the public identify with European integration". Her colleague Rytis Martikonis, representative of Lithuania's government, similarly pointed out that "undeniable political – or shall we say popular – advantage of a rotating presidency is in ensuring that Member States are directly involved in the governance process, thus playing a crucial role in connecting or legitimizing the Union with its citizens". Other delegates repeated these arguments in the sense that the system of rotation is the only one guaranteeing the true equality of Member States, that it ensures that every Member State has the right to chair the European Union and gives to every Member State an international visibility.

On the other side, the majority of delegates from the larger Member States, regardless of which component of the Convention they may represent, supported the idea of the president of the European Council stating, like Peter Hain, that in a EU-25, the European Council with a constantly changing president cannot be an effective partner for the Commission or Parliament and so it "needs the continuity and strategic drive of a long-term president if it is to play its full role in the dynamic of a new, enlarged European Union".

Reading the speeches of the delegates of the two days' discussion it is obvious that the large majority of speakers were critical to the proposal of electing the full-time president of the European Council. According to Hanja Maij-Weggen, at the end of two-day debate in January, of 91 speakers on the subject of European Council presidency only 12 were for the long-term president, 15 had serious reservations, and 64 were against this institutional innovation. At the plenary session on May 15, 2003 Austrian delegate Voggenhuber said to Giscard: "Up to now, 101 members have put his signature against this proposal of the long-term European Council presidency, 15 governments. Is this enough, or must we still torture ourselves for weeks with this plan, that has no majority and will never have a consensus behind it?... I think, the president of this Convention can gladly discuss at all of Italian markets, but he – and the Presidium with him, needs to take knowledge that in this Convention an enormous majority is consensually against

this notion of a long-term Council presidency." Do I have to say that Woggenhuber earned applause for this remark.  

Having in mind the interventions of Hanja Maij-Weggen and Woggenhuber it is difficult to see how Giscard and the Presidium could have proposed the 'European Council chair' in their Draft articles on the Union's Institutions and in the final draft of the Constitutional treaty. I have never read a satisfactory explanation how it is possible that after such an undisputable negative reaction of the great majority of the delegates, the Convention could at the end accept consensually the institution of the president of the European Council.  

G. The size of the Commission

As we said before, it was well known to Giscard that practically all smaller countries are in favor of the retention of the principle 'one commissioner per member state'. It is true that the Commissioners must, according to the Treaties, act impartially and independently of their home states. They are not the delegates of their governments in the Commission, and the Commission is not a replica of the Council. It has to act in the general interest of the Union when proposing legislation. However, precisely because the Commission is the body defending the common, general interest it is regarded as the small states' best friend, because it is perceived as the institution that could protect the smaller Member States against the possible dominance of the larger Member States. And secondly, the commissioners are always regarded at least as ears and voice of their country in the Commission. The smaller states have been skeptical to the proposals for the reduction of the number of Commissioners because they thought that in such case the Commission, as argued few years ago by the Portuguese State Secretary for European Affairs, would de facto run at the level of the senior officials where the large Member States are better 'represented' than the smaller states.  

Contrary to the attitudes of at least 16 smaller states that had stated in April, before the IGC in Athens, that they insist on 'one commissioner per member state', Giscard and the Presidium proposed the reduced composition of the Commission with two classes of Commissioners – those with full voting rights and the so-called 'associate commissioners'. This proposal was made in complete agreement and with full support of larger states, which Giscard

133 The euro-sceptic opponent of the Constitutional treaty Jens-Peter Bonde shall explain at the end of the Convention what is this consensus all about: "He would be called chairman in the English edition, and president in the French edition". 'We the people?', (BOSTON GLOBE, June 15, 2003).
134 Cited according to Youri Devuyst, EU Decision-making after the Treaty establishing a Constitution for Europe, (University of Pittsburgh, Center for West European Studies, Policy Paper 9, July 2004), at 12.
had consulted during the conference in Athens on April 16, 2003. At the conference Giscard argued that the time has come to redress a democratic balance that had been upset as power flowed to the smaller states with EU expansion. He specifically declared that if the system of 'one commissioner per member state' were left unchanged, then the seven smallest countries of the EU, with just 2.4 per cent of the population, would have more seats and votes on the Commission than the six biggest states, which represent 75 per cent of the population. And therefore it is, in his opinion, not enough to take only the number of states into account, but "we also have to take into account their populations, because we operate in a democratic way here."\(^{135}\)

The crucial debate on the size of the Commission at the plenary on May 15-16, 2003 showed deep dividing lines between the delegates from large and small states and a large majority of speakers called for one commissioner per country\(^ {136}\), explicitly rejecting the possibility of having some kind of associate commissioners, because this solution would go against the principle of equality of states. Some of them indicated that they would be willing to consider the second-best option – a smaller Commission based on the principle on the equality of states.\(^ {137}\) Serracino-Inglott from Malta, speaking on behalf of the small countries, said that "we still hope that the Convention will overcome, what the media at the time of Nice called 'the Lilliput complex', that is, the strange fear that seems to have struck or afflicted the large states, the fear that they might be overwhelmed by the influx, nine-strong, of small countries". On the other side, the members from larger states insisted on the smaller Commission, repeating the arguments of efficiency and thinking that the number of commissioners must be dissociated from the number of Member countries and that the President of the Commission should be given the right to determine the number of Commissioners. However, the British government representative Peter Hain indicated that the consensus could be found, but the Convention "must

\(^{135}\) Small states join forces against EU power shift' (TIMES, April 24, 2003). Allegedly, after the Convention's end Giscard said that the accession of the countries of former Yugoslavia would, under existing provisions, mean that they would have five Commissioners (Giscard did not anticipate the breaking of Federal Republic of Yugoslavia into Serbia and Montenegro), while the founding Member States would have one each. See Rainhard Rack & Daniela Fraiss, A Constitution for Europe, in TOWARDS A EUROPEAN CONSTITUTION: A HISTORICAL AND POLITICAL COMPARISON WITH THE UNITED STATES 66 (Michael Gehler et al., 2005).

\(^{136}\) This corresponds with contribution submitted by Jens-Peter Bonde in late June 2003 consisting of just one sentence: "Every Member State shall have one representative each in the Commission". It was signed by 118 conventioneers. See CONV 819/03.

\(^{137}\) Slovenian delegate Rupel said that "any other composition that is not based on the principle of 'one state, one commissioner' would be acceptable only if founded on the principle of equality of Member States". He was supported by Finnish delegates Tiilikainen and Kiljunen and DeRossa from Ireland.
base any settlement on equality and rotation of countries, big and small”. He was supported, among others, by Dini and Haenel.138

Giscard didn't change his position even after a clear negative response from the majority in the Convention. First, he argued that Member States should have 'equivalent rights', but this did not imply that they should all have equal status, because in his opinion the EU system should be based first of all on the equality of citizens. After the session he told at the press conference: "You can speak of equality of citizens, that people are equal. But small states do not have the same economy; they do not pay the same contributions".139 It is obvious that with this kind of logic the demographic factor must determine the composition of the Union's institutions and the rules of voting and this must be favorable to the larger states. The composition of the Commission is not exempted from this logic – it was still acceptable when in EU-15 five largest states, with two commissioners each, had parity with the small states in the Commission of 20 members. But after Nice agreement this five states (Germany, France, UK, Italy and Spain) have only five of 25 Commissioners. One Convention official explained frankly why the size of the Commission must be reduced: "The trouble with a large Commission (one commissioner per country) is that, as it decides by simple majority, commissioners representing less than 10% of the Union's population could carry decisions…The only way to avoid this is to break the one country – one commissioner link and to have a smaller (Commission) team". Another one, close to Giscard, said that 'all states are equal' taboo must be broken if the Union is to be built on 'sound political foundations'. That means that the principle of the equality of states must be modified because the principle of equality of citizens must be taken in account also: "Malta is not as big as the UK or Germany, and does not pay the same amount of money to the EU budget either. How can you say they are equal? They are obviously not. But they should have equivalent rights…But EU citizens are equals and that should be reflected in the composition of EU institutions. We will spell out in the constitution that the EU is a union of states and peoples. We should be serious about the people and not only prepare a Union of states".140

This statement reminds me of James Wilson's remarks at the Philadelphia Convention. Defending the interests of the larger states and the majority principle based on the population he asked: "For whom do we make a constitution? Is it for men, or is it for imaginary beings called

139 Dana Spinant, 'Citizens are equal – but some states more equal than others' (EUR. VOICE, Vol. 9, No. 19, May 2003).
140 Spinant, supra note 139.
states, a mere metaphysical distinction?" Wilson was trying to build a national state, and not a confederation, based on the principle of equality of states so it is understandable his insistence only on the equality of citizens. However, it is not at all obvious why the same argumentation should be accepted in the EU, a union of states with no ambition at this point to create a national state.

When the Presidium published its draft of Part One of the Constitutional treaty on 26 May 2003 (CONV 724/03) it was obvious that the draft was highly favorable to the larger states – in all three institutional issues we have been analyzing the draft went against the majority of small states and majority of Convention's members: it proposed the European Council president, the reduced Commission of 15 members with associate Commissioners, and the Council's decision-making by qualified majority consisting of the majority of Member States, representing at least three-fifths of the population of the Union. A month before the end of the Convention it was time for a final compromise or breakdown.

H. The Convention's Compromise

What were the options for the small states after the Presidium published its draft of the first 'constitutional' part of the Constitutional treaty? The first option was to stick by its principled positions formulated several times in the past few months, threatening to undermine Giscard's single proposition of a Constitutional treaty, and instead to forward several 'options' to the IGC. The second was to try to find a balanced compromise with the larger states.

At the first sight, the first option looked that it could be successful. After the Giscard's meeting with the government representatives on 4 June (which Giscard had left before it ended) George Katiforis, the Greek government alternate, faxed him the summary of positions of representatives of Member State governments on crucial dividing institutional issues. According to Katiforis, among other things,

- 18 government representatives backed the six-months rotating president of the European Council against five supporting a full-time elected chair;
- 18 were against reopening the Nice agreements on the weighting of votes in the Council of Ministers, the number of European Parliament seats and the structure of

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141 1 RECORDS 494.
142 See more Randolph C. Adams, The Legal Theories of James Wilson, 68 U.PENN.L.REV & AM.L.REG. 345 (1920).
the Commission. If the Commission had to be downsized, equal rotation among member states should apply.144

It seemed that the group of small states is cohesive and firm, and more united than ever, but it was soon evident that they have some fundamental weaknesses. First, we must have in mind that majority of the small state coalition was made of accession countries. As we know, according to the Laeken Declaration, they were able to take part in the proceedings, but with no right "to prevent any consensus which may emerge among the Member States".145 And we know also that Giscard didn't count the vote of Alojz Peterle, the representative of the accession countries, when the Presidium had voted.146 So, the bloc of small countries was effectively much smaller – it consisted of seven Member States (Belgium, the Netherlands, Luxembourg, Portugal, Finland, Austria and Ireland). These so called 'seven dwarves' coordinated their activities from March 2003, but they never made a united front versus the five larger states. The reason for this is a semi-detached position of Benelux countries from the beginning of the Convention. Instead of being a leader of the small states group (something akin to the position of Connecticut at the Philadelphia Convention) Benelux countries have from the beginning of the European Convention insisted on its special position as founding members. We mentioned before that the Benelux countries had made their first contribution on the institutional issues in December 2002, even before the Convention started, and that they didn't sign the joint contribution of 16 small states in March 2003 ('Reforming the Institutions: Principles and Premises').

In the split between the Benelux countries and the other small Member States, especially Austria, Finland and Ireland, as to the institutional architecture of the Union and the content of the possible compromise with the larger states, I see one of the crucial reasons for the small states failure at the European Convention.

Let us repeat the starting position of Benelux – even in December 2002 it was partially different from the subsequent position of 16 small countries. Benelux countries stated at the time that they shall never accept a full-time President of the European Council (the same as other small countries), and they favored the size of Commission in accordance with the Nice decisions, eventually reduced in numbers, on the principle of equal rotation. Nothing was said about the QMV in the Council. On the other hand, 16 small countries insisted on the respecting the Nice compromise as to the QMV and as to the size of the Commission, giving no alternative to the principle of 'one commissioner per member state'. And they strongly rejected the long-term

144 Reported according to NORMAN, THE ACCIDENTAL CONSTITUTION, supra note 19, at 277.
145 Laeken Declaration, supra note 82.
146 STUART, THE MAKING OF EUROPE'S CONSTITUTION, supra note 95, at 24.
president of the European Council. Benelux countries strongly rejected the abandoning of the rotating presidency also in their reaction to the Franco-German proposal in January\textsuperscript{147}, and again in May in their final contribution on the institutional issues.\textsuperscript{148} And then, in June, just before the European Council meeting in Thessaloniki it was stated in the statement of Prime Minister Guy Verhofstadt and Deputy Prime Minister Louis Michel (who was Belgium’s representative at the Convention) that, among other things, it is "regrettable that the European Council is to become a separate institution (albeit without legislative authority)" and that "the text also sets out the new function of the President of the European Council, but also contains a number of elements that limit that role".\textsuperscript{149} The question is why Belgium accepted the President of the European Council; although it had at least three times before solemnly declared that this institution is unacceptable. In December 2002 it even declared, together with the Netherlands and Luxembourg that "the Benelux will in any case never accept a President elected from outside Council".\textsuperscript{150}

We know today from the proceedings of the Philadelphia Convention that when the small countries declared that they shall never accept the proportional representation in both houses of the Congress they really meant what they said. The warning, or the threat, if you wish, was serious, and at the crucial moment the large states were aware that the small states will not surrender to their demands. In Brussels, we have the same stated position of the smaller states that they shall never accept the institution favored by the large states, and at the very end of the Convention they yield to them. Could we speak of some sort of a compromise regarding the President of the European Council? It could be said that the smaller states succeeded in limiting his role, making him more of a 'chair-person' at the meetings of the European Council, than a president who could be a rival to the president of the Commission, but this could hardly be called a compromise. It is true that, as was emphasized often, the European Council president has been granted little formal powers, but, as remarked by an analyst, "at this point of time we see only

\begin{footnotes}
\item[148] See Contribution by Benelux countries 'The Union's Institutions', May 8, 2003, CONV 732/03.
\item[150] Philippe de Schoutheete, a former Permanent Representative of Belgium, said in March 2008 that Benelux countries have accepted the long-term president of the European Council "in exchange for other concessions and the implicit assurance that this new President would not necessarily be provided by one of the big EU countries". See "Belgian diplomat: Benelux accepted Blair's EU President proposal on condition that it would not be filled by the big countries" (Open Europe, press summary, March 18, 2008).
\end{footnotes}
glimmers of the new office, weakly shining from the yawning risks of failure. We tend to forget that it was thus with the American Presidency at the time of its creation”.\textsuperscript{151}

The Benelux position against the president of the European Council practically disappeared near the end of the Convention, as witnessed by P. Norman, "because Belgium did not share Luxembourg’s deep distaste for the long-term European Council president”.\textsuperscript{152} And when the Benelux didn’t oppose the installation of the European Council president it meant at the same time that there exists a sort of consensus of the founding Member states on this point and that the coalition of ‘seven dwarves’ is gone. When we have in mind that Denmark and Sweden have from the beginning accepted the reform of the European Council it is obvious why the larger states could impose its preferred solution.

The smaller states also yielded to the larger in the matter of QMV in the Council. Although practically all of them were losers in the new system of 'double majority' the only thing in which they succeeded was to prolong the introduction of this voting system till 1 November 2009, which could hardly be called a compromise. The question of the new voting system has received inadequate attention at the Convention and in the public, which is very strange comparing with the situation in the American federal convention. Someone from the United States might say that the Convention's solution is almost the same as adopted in Philadelphia, and so it's, from the normative point of view, the best possible solution. Only at the first sight it might seem that the European 'double majority' system has any resemblance to the American 'double majority' system. But it is completely wrong. In the United States the double majority includes both branches of the Congress and means that each law is enacted by the majority of people, represented in the House of Representatives, and the majority of states, represented in the Senate. And in most federal systems population weight is the dominant factor in one, but not in both houses of the legislature. In the European Union, in which the co-decision procedure is envisaged as a normal procedure of law-making\textsuperscript{153}, the European Parliament and the Council resemble the classic federal legislature, albeit with a different logic than the rest of federal systems: both European Parliament and the Council are based on demographic factor – with the

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\item[151] John W. Sap, \textit{The European President}, 1 EUR.CONSTL.L.REV. 51 (2005).
\item[152] NORMAN, \textit{THE ACCIDENTAL CONSTITUTION}, supra note 19, at 322.
\item[153] Article I-20 of the Constitutional Treaty stated that the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions", and Article I-34 para. 1 stipulated that "European laws and framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council under the ordinary legislative procedure as set out in Article III-396. If the two institutions cannot reach agreement on an act, it shall not be adopted.” In the Lisbon Treaty Article I-20 of the Constitutional Treaty is numbered 9a in The Treaty amending the Treaty on European Union, and Article I-34 as Article 249a of the Treaty states that "the ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission”.See the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ (C306) 1 (2007).
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degressively proportional system of allocation of representatives in the EP and with the full population impact in the second leg of the 'double majority' system in the Council.\textsuperscript{154}

Even in the German federal system, which deviates from the principle of the equality of state's representation in the federal house of legislature, and adopts instead the system of weighted votes there is much smaller span of votes between the smaller and larger federal units.\textsuperscript{155} The \textit{Bundesrat} has a total of 69 votes and each of 16 federal units has between three and six votes. So, the greatest \textit{Land}, North Rhine-Westphalia with population of 18 million has 6 votes in the \textit{Bundesrat}, the same as Lower Saxony with 8 million people. The smallest Bremen, with less than a million, has 3 votes. The effect of the distribution of votes is that the largest four states (North Rhine-Westphalia, Baden-Württemberg, Bavaria and Lower Saxony) with almost 50 million people (more than 60\% of total population of FR Germany) have only 24 votes, which is just over a third of total votes in the \textit{Bundesrat}. The largest states cannot dominate in the \textit{Bundesrat}. On the other side, the smallest 11 countries with 25 million people have 40 votes which is the majority of all votes. The question is how it is possible that the German federal system which is characterized often as a 'unitary federal state' is much more just to the smaller federal states, than the EU federal system, which is only a union of states. It is evident, having in mind all these considerations that Germany has imposed in the EU’s federal legislature a system of voting which is far more favorable to the larger states than is her own. And the second paradox is that the conflict over the 'double majority system' was fought principally between the large states themselves – with Germany and France on one, and Spain and Poland on the other side.

In my opinion only the solution regarding the size of the Commission could really be called a compromise; although I think that it would be better for the small states if they succeeded in their defense of the principle of 'one commissioner per member state'. We know that the 16 smaller states (practically all except Benelux) insisted in their contribution \textit{'Reforming the Institutions: Principles and Premises'}, submitted in March 2003, on "guaranteed equality between member states in the composition of Commission" and retaining the principle of 'one commissioner per member state'.

This position was actually completely consistent with the attitudes of the European citizens. The standard Eurobarometer survey conducted in March – April 2003 in EU-15 showed

\textsuperscript{154} This argument is elaborated in Devuyst, \textit{EU Decision-making}, supra note 134.

\textsuperscript{155} The German system of weighted votes and the logic behind it was clearly an inspiration for the Founding Fathers of the European Communities.
that EU citizens in all member states strongly support (with average majority of more than 70%) keeping one commissioner per country.\textsuperscript{156}

The problem from the beginning was an ambivalent position of Benelux on this issue. In their contribution in December 2002 they proposed "eventually reduced... Commission guaranteeing the equality of all member states in...its composition, based on the principle of equal rotation".\textsuperscript{157} In its second contribution in May 2003 Benelux submitted the following proposal: The Commission is to consist of maximum 15 Commissioners, including the Minister for Foreign Affairs, assisted by the same number of Assistant Commissioners (commissaires delegues). Each Member State cannot have more than one Commissioner. Commissioners are to be appointed by rotation, based on the principle of equality of all Member States, reflecting the political and geographic balance and diversity of all member states. The Commission is to take decisions by the majority of Commissioners. Assistant Commissioners cannot vote.\textsuperscript{158} The Benelux proposal was different from the other smaller states' position in accepting the smaller size of the Commission, and different from the larger states in insisting on the equal rotation of all member states in the collegium of commissioners. As a middle position it could be called a compromise position.

Why did Benelux countries differ from the rest of the small countries in its acceptance of reduced Commission? There is no definite explanation, only some possible hints. One is that the Belgian preferences during the Convention changed because of the impact of Jean Luc Dehaene, the former Belgian Prime Minister and the Vice-President of the Convention.\textsuperscript{159} Another is that that the smaller and more efficient Commission looked more promising from the federalist perspective, favored by Belgium and at least some other smaller countries. And the third possible explanation is that the reduced Commission, formed according to the principle of equal rotation of all member states, "promised the smalls a fair shot at the top Commission jobs, whereas they would have no such guarantee in a large Commission in which the Commission president would choose how to divide responsibilities".\textsuperscript{160} At the end, the final compromise proposal of the

\textsuperscript{156} European Commission, Eurobarometer 59, June 2003, at 10.
\textsuperscript{157} Memorandum of the Benelux, supra note 110.
\textsuperscript{158} Contribution by Benelux countries 'The Union's Institutions', supra note 148.
\textsuperscript{159} Peter Bursens argues that although Dehaene had no direct impact on the Belgian government his impact on the Belgian position was substantial. On the number of Commissioners, and Bursens thinks that this was the only substantial issue that has witnessed a change of preference of Belgian government during the course of the Convention, Dehaene’s impact was very important. According to Bursens, "At the outset, the Belgian government had made clear that every Member State should remain entitled to appoint one commissioner, underlying the high symbolic value for the citizens of each Member State. It was only during the latter stages that Belgium changed its position, after consultations with Jean-Luc Dehaene, and declared in favor of a rotation mechanism, arguing that a smaller Commission would guarantee greater effectiveness". See Bursens, \textit{Enduring Federal Consensus: An Institutionalist Account of Belgian Preferences regarding the Future of Europe}, 2 COMP.EUR.POL. 352. (2004)
\textsuperscript{160} NORMAN, THE ACCIDENTAL CONSTITUTION, supra note 19, at 268 and 320.
Presidium (equal rotation between all the member states and the arrangement that the replacement of the system of 'one commissioner per member state' will be delayed and 'will take effect on 1 November 2009') was acceptable for majority of the smaller countries so that in the end only five of them still have adhered to the principle of large Commission, consisting of nationals of all member states.

As we can see, on the three major issues dividing large and small states in the European Convention, the small states lost outright on two (QMV in the Council and the long-term presidency of the European Council) and reached a sort of compromise on one (a reduced Commission with equal rotation of member states), which, from my point of view, is not favorable to the small states in the long term.

Some scholars, looking for explanations for the failure of the small states in the European constitutional convention, have seen them in their negative coalition, i.e. in their opposition to the proposals of larger states, without offering its alternative. When you defend the status quo, as was the case with the small states regarding the retention of the Nice compromise on the size of the Commission and the system of QMV in the Council, and the rotation of the European Council presidency, you don't need to present an alternative proposal. In a certain way, this could be compared with the position of the small states in Philadelphia. They had defended the status quo regarding the equality of states in the Senate, because it was the principle of voting of the Confederation Congress. And it is a serious mistake, often made, to think that the acceptance of different principles of representation in the two houses of Congress was a result of a compromise. The issue of representation in the House of Representatives had been solved separately and before the issue of the Senate and according to a completely different compromise (the 3/5 clause on the representation of slaves).

However, the argument regarding the 'negative coalition' of the small states is related to another one, which is more relevant for me: the weak cohesion and solidarity of the small states group. I would like to cite a longer account of the member of the Convention who gives, in my opinion, very good explanation for the failure of the small states:

"The representatives of small Member States desperately tried to agree on a consensus but failed. They did manage to write a joint letter to Valery Giscard d'Estaing, but this only contained points that were self-evident anyway…

161 For example Anna Verges Bausili argues that "generally speaking, the group (of small states) was more united as an opposing front to specific institutional proposals led by large countries, and in denouncing a perceived bias in the Chairman (seen as favoring large member states) than in presenting a single commonly agreed alternative". See Anna Verges Bausili, *The Constitutional Convention and Ireland* (The Federal Trust Online paper 21/03), at 6.
The only real issues addressed were that the equality of the Member States should be preserved in the composition of the Commission and that the Presidency of the Council should rotate. That was all. The small Member States could not even agree on whether they should defend the practice of each Member State having a Commissioner of its own. The small Member States thus broke ranks. Only Austria and Portugal, and a number of candidate states, eventually remained with Finland. That was not much of a position in which to make an impact. Perhaps there was not a great deal of desire to do so either, because it was understood that the whole matter would be reopened at the IGC. There the Member States have equal representation and there every government must agree before final solution. There was no such a veto available at the Convention, and there was therefore no point in aiming for compromises. Standing firm at the Convention equals leverage at the IGC, or so the Finnish Government believed. Unfortunately, this assessment proved inaccurate, to say the least.\footnote{KIMO KILJUNEN, THE EU CONSTITUTION, supra note 100, at 143-144.}

In this testimony of a participant in the European Convention we could identify the dissension, lack of preparation and bad tactic on the part of the small states in the process of European constitution-making, which had to result in their failure in defining a new 'institutional architecture' of the EU.

I still think that, regardless of Giscard's rules of identifying consensus in the Convention, the small states could have used their veto in the Convention, assuming that there was a majority of them willing to use this 'nuclear weapon'. However, in the final days of the Convention, in the hectic of Giscard's appeals on the members and the institutional components (government representatives, representatives of national parliaments, MEPs) to think of the consequences of failure to reach a consensus, it was difficult to organize the large group of small states and insist on some 'red lines'. This role could have been played by the Benelux countries, but they were the first who broke the ranks of the small state coalition.

It was, as predicted by Kiljunen, absolutely wrong for the small states to think that the IGC could change the core of the 'institutional compromise' of the Convention. Immediately after the Convention Joschka Fischer said that it would be wrong and very risky to open 'the Pandora box' on the IGC, i.e. to re-open some sensitive questions on which the Convention had barely succeeded to achieve a 'compromise'.\footnote{Joschka Fischer said earlier on the Convention's plenary on Nov. 8, 2002 that "what the Convention could not achieve, it would be very difficult to achieve elsewhere", See the transcript of the session on http://europarl.eu.int/europa2004/textes/verbatim-021108.htm.} So the gains that the small states achieved after
the IGC negotiations are, in the main, some further delays in the application of rules regarding the composition of the Commission\textsuperscript{164} and the new double majority system in the Council.\textsuperscript{165}

The hardest blow made by a small state to the new 'institutional architecture' of the EU came unexpectedly with the Irish 'no' at the referendum on the Lisbon treaty. Among many different reasons for voting against the treaty the prominent place in the 'NO' campaign had the opposition to the new institutional solutions, favoring the larger states. Among the eight reasons "to vote NO to Lisbon" published on the website of 'Libertas org.', a coordinating centre of the Irish campaign against the Lisbon treaty, the first three are the ones we have been emphasized as the worst outcomes for the small states:

"1. Creates an unelected President and a Foreign Minister of Europe.

The new President and Foreign Minister for Europe will be appointed by the European Council by qualified majority vote. Although many of the terms and conditions of these roles have yet to be decided, they will be committed through the Lisbon Treaty to 'drive forward' the agenda of the Council and discussions have already taken place to provide a presidential palace and executive jet for the President.

2. Halves Ireland’s voting weight while doubling Germany’s.

The Lisbon Treaty would implement a new system of voting by the European Council which is primarily based on population size. This means that Ireland’s voting weight would be reduced from 2% at present to 0.8% if the Treaty was implemented, while Germany’s would increase from 8% to 17%.

3. Abolishes Ireland’s Commissioner for five years at a time.

The Lisbon Treaty proposes to reduce the number of Commissioners to two thirds of the number of member states. This would mean that, on a rotating basis, Ireland would have no seat for five years out of every 15 in the body that has the monopoly on initiating legislation. This would clearly affect a small country like Ireland to a far greater extent.

\textsuperscript{164} The Commission shall have one national from each Member state till Oct. 31, 2014 (five years more than proposed in the Constitutional treaty) and as from 1 November 2014 the Commission shall consist of a number of members corresponding to 2/3 of Member States. That means that in the EU-27 the Commission shall have 18 members, which is three more than proposed in the Constitutional treaty.

\textsuperscript{165} Mostly because of Poland’s opposition to the new voting rules the application of the double majority system was postponed till Nov. 1, 2014, with the transitional period till March 31 2017, during which the Member States shall be entitled to request that instead of the new voting rules, the Nice QMV rules continue to be used when the proposed act is of a particular political sensitivity to that Member State. Furthermore, the thresholds in the double majority system for the states and the population were raised to 55%, and 65% respectively. And this higher threshold for population favors the larger states, as said before, and it was insisted on by Poland. The other threshold (55% of the Member States) is useless after the entry of the 28th country in the EU.
than, for example, Germany which is having its voting weight doubled under the Treaty."\textsuperscript{166}

In the first reactions to the Irish ‘NO’ it was stated that there were specific fears of a small country that the Lisbon treaty is a ‘bad deal’ which would greatly diminish its influence in the Union.\textsuperscript{167} But it would be erroneous to think that one small state, like Ireland, could stop the ratification of the Lisbon treaty or the implementation of the crucial institutional innovations we have been writing about in this paper. It is just a question of time and/or different legal form of ratifying these institutional provisions.

V. LESSONS FOR THE FUTURE

However, the story of small states' failure at the European Convention is relevant for the future because of at least two reasons. First, because it is envisaged in the ordinary Treaty revision procedure that if the European Council adopts a decision in favor of examining amendments to the treaties, proposed by authorized bodies, "the President of the European Council shall convene a Convention composed of representatives of the national parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission" and the Convention "shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States" (Article 48 of the Treaty on the European Union). Therefore, the Convention is going to be a permanent body authorized to submit proposals (except in the case of European Parliament's opinion that the Convention is not needed, which is hardly to be expected).

In a future Convention the small states must not repeat the same mistakes as to their preparedness and defense of some principled positions, before its beginning. Some Finnish delegates of the past Convention have certain excellent ideas about the procedural changes that would be necessary, if the small states wish to avoid repeating the failure from the Convention on the Future of Europe. I have summarized the most important of their suggestions:

\textsuperscript{166} ‘8 Reasons to Vote No for Lisbon’ (assessed at http://www.libertas.org/content/view/293/139/ on June 20, 2008)

\textsuperscript{167} In its first commentary Der Spiegel wrote: "But there were specifically Irish fears which played into the “no” vote as well -- fears which proved difficult to dispel. The Lisbon Treaty, its opponents never tired of pointing out, would have lessened the voting leverage of smaller EU members and would thus have been bad for Ireland. Furthermore, Ireland, like the other 26 EU members, would have had to do without its own EU commissioner at times due to a provision in the treaty to shrink the size of the European Commission. Such a loss would not be a big deal for bigger countries like the UK or Germany, whose influence in Brussels is secure. For a small country like Ireland, however, it was clearly a consideration." ‘Why Europe Should Listen to Ireland’, DER SPIEGEL, see at http://www.spiegel.de/international/europe/0,1518,559639,00.html.
1. All Member States must have an equal right to participate in the preparation of any future Convention and to be taken into account

2. The Member States must define the rules of play, working methods and the mandate of the Convention in advance and those decisions must be precise, equitable and should also be adhered to, unless all the Member States unanimously decide otherwise

3. The work of the Convention must be transparent, not only regarding the plenary sessions, but also specially regarding the Presidium

4. The Convention must elect its own Presidium, including the Chairmen, as was the case in the Convention working on the Charter of fundamental rights

5. The Presidium and Secretariat of the Convention must without question have a representative from each of the Member States, because the EU is fundamentally a union of states

6. The Convention should be able to vote, as was the case in the Presidium, because the alternative, as was experienced in the Convention on the Future of Europe, was 'consensus', the definition and very existence of which was at the discretion of the Presidium, and was often artificial and even dishonest.\textsuperscript{168}

The second important reason is that the only relatively successful compromise of the smaller states achieved at the Convention, and I think of the equality of rotation of all Member States in the Commission, is the one that could be brought into question by the larger states.

In February 2007 the Group of Political Analysis of the European Commission discussed aspects of institutional reform and prospects for an institutional settlement. The issue of reforming the Commission was also discussed, because the solution envisaged in the Constitutional treaty (and now in the Lisbon treaty) was an aberration. It was concluded that "it was unrealistic at any rate to believe that larger Member States would give up their Commissioner for a certain period in a rotation system".\textsuperscript{169} In January 2007 the vice-president of the European Commission Günther Verhaugen questioned the need for small EU countries to have their own member of the European Commission, as part of far-reaching proposals to reform the EU executive. He declared publicly that small member states could have deputy rather than fully-fledged members of a future Commission: "A small member state would benefit more from

\textsuperscript{168} The suggestions are from Kimo Kiljunen, Matti Vanhanen, Jari Vilen and Esko Helle. See KILJUNEN, THE EU CONSTITUTION, supra note 100, at 155-203 passim.

providing a deputy commissioner in an important area than from providing a commissioner dealing with a marginal area”.

The smaller EU states should be careful – the principle of equality of states – remaining in the equal rotation in the composition of the Commission, has been questioned by the representative of the largest state before it was even tested. Looks familiar, isn't it?

VI. CONCLUSIONS

The theme of this article was comparison of just one, albeit central aspect of two constitutional conventions – the American federal convention held in Philadelphia in 1787 and the Convention on the future of Europe held in Brussels in 2002 – 2003. It is the conflict between the large and small states, which was central in both conventions.

This conflict was relevant in Philadelphia in the resolution of issues concerning the representation and voting power of states in the Congress and some other institutional issues (Electoral College, veto on the laws of the states, Senatorial powers, amendments) and in the European Convention on similar issues of voting power of states, and the composition or leadership in certain bodies (the Commission, the European Council).

It is beyond doubt that the small states in the Philadelphia Convention achieved success in defending the principle of equality of states primarily through the equality in the Senate (confirmed through the constitutional provision that "that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate") and obtained some other important victories (extra-powers of treaty-making and appointments in the body in which they are dominant, significant influence in the election of the executive etc). This success of the small states in the process of 'arguing and bargaining' was, in my opinion, the result primarily of four interrelated factors:

1. favorable rules of play (voting by the states)
2. voting strength of the small states and their cohesion and firmness throughout the Convention
3. their unyielding bargaining position as to the principle of equality of states
4. credibility of their threats that they would not ratify the Constitution under the terms imposed by the large states.

Analyzing the conflict between the larger and smaller states in the European Convention it is obvious that the position of smaller states was institutionally weaker (the representatives of

170 Small EU states do not need full commissioners, Verhaugen says, (EUobserver, Jan. 4, 2007).
states were in the minority in the Convention's membership as they were only one of several institutional components; the majority of small states were accession states which had no right to challenge a 'consensus' of the Convention) and procedurally weaker (the rules of play were against them, because they were imposed and manipulated by the Presidium, dominated by larger states; the voting, which could demonstrate their possible strength, was forbidden). Finally and this is very important, the small states were not coherent and united in pursuing its goals, they were not firm in defense of the principles they had declared at the beginning of the Convention, and at the end they didn't use credible threats, as was the case with the small states in Philadelphia. This I consider to be fundamental causes for the failure of the small states in the European Convention to secure institutional solutions which they favored.