

Federalism in the European Union: Rhetoric and Reality

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It is an appropriate moment to take stock of the European Union (EU). Over the past half-century, the EU successfully expanded its substantive scope and institutional mandate until it now stands without parallel among international institutions. These institutions are so significant that political innovation in contemporary Europe is as likely to come from Brussels as the national capitals.

Consider first the substance of European Union policies. Tariffs, quotas, and most customs barriers within Europe have been all but eliminated. In regulatory areas such as environmental policy, competition—that is, anti-trust—policy, agricultural policy, and various types of industrial standardization, the EU is a dominant regional and global force. Today close to 80 per cent of new economic regulation of productive activity in Western Europe comes from Brussels. European Union spending on agriculture and regional policy totals 5–10 per cent of the GDP of smaller Member States. The EU is a bone fide superpower in the area of global trade negotiations. It is hardly an exaggeration to say that, at least until recently, what the US and EU decide under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) is what happens. Thirteen of the 15 Member States of the EU have agreed to a common currency and a monetary policy centralized in Frankfurt. Discussions are under way concerning common social, transport, immigration, police, foreign, and defence policies.

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Consider next the EU's uniquely stable and powerful institutions. The European Court of Justice (ECJ) has established the supremacy of EU law, the right of individuals to file suits on this basis—direct effect—and overall constitutional review for consistency with the Treaty of Rome, which is binding through the near-uniform acceptance of its decisions by domestic courts.¹ The powers of the directly elected European Parliament (EP) have steadily increased over the past decade.² The European Commission enjoys exceptional autonomy among international secretariats. It holds a unique power of proposal in core legislative procedures, considerable responsibilities to implement regulations, and unique prosecutorial powers in areas like anti-trust. The European Council is a forum for permanent meetings. Under its aegis, thousands of meetings among national officials, ministers, and heads of state and government are held annually, resulting in hundreds of pieces of legislation.

This spectacular record of growth and achievement has sparked controversy. Euro-enthusiasts favour an emergent European federal state. The success of the EU, they argue, clearly demonstrates not only that European integration has been successful, but that integration breeds more integration through myriad spillovers. Moreover, many Euro-federalists maintain, the status quo is unstable. This is the so-called 'bicycle theory': should integration cease, the 'rider' will fall off and progress to date will be lost. Euro-sceptics, led by British and American conservatives, by contrast, evaluate federalism negatively.³ They warn of the rise of a 'superstate' in Brussels run by democratically illegitimate technocrats—a 'bureaucratic despotism' recalling the *ancien régime* in France and, in a few more extreme formulations, the Nazi dictatorship in Germany.⁴ In this view those who would defend democracy and freedom, as well as the existing accomplishments of European integration, should band together globally—even if this means effective withdrawal from all or part of the EU—to fight the creation of a European superstate.⁵ If

¹ Anne-Marie Burley and Walter Matli, 'Europe before the Court: A Political Theory of Legal Integration', *International Organization*, 47/1 (1993), 41–76.

² Richard Corbett, Francis Jacobs, and Michael Shackleton, *The European Parliament*, 4th edn (London: Cartermill, 2000).

³ For discussions of the bicycle theory, see George Ross, *Jacques Delors and European Integration* (Oxford: Polity Press, 1995); Andrew Moravcsik and Kalypso Nicolaidis, 'Keynote Article: Federal Ideals and Constitutional Realities in the Treaty of Amsterdam', *Journal of Common Market Studies*, 36 (1998, Annual Review), 13–38.

⁴ For an intelligent but inflated comparison to the *ancien régime*, by way of de Tocqueville, stressing the threat of 'bureaucratic despotism', see Larry Siedentop, *Democracy in Europe* (London: Penguin, 2000). Numerous Tory politicians have obliquely raised the parallel to Nazi Germany.

⁵ Bill Cash (Conservative MP), 'Is the EU a Threat to U.S. Sovereignty?', remarks presented at the American Enterprise Institute, Washington DC (4 April 2000). For a response

determined opposition fails, efforts to establish European federalism will surely lead the EU to overreach, thereby undermining not just new projects, but progress to date—a sort of 'reverse bicycle theory'.

The battle between Euro-enthusiasts and Euro-sceptics grabs the headlines and tempts political entrepreneurs, but it disguises broad agreement on shared assumptions. Journalistic commentaries, politicians' speeches, and scholarly articles agree on two main points. First, something akin to a federal nation-state is the natural outgrowth of current developments in Europe. Second, in order to be legitimate such a federal state must be substantially more democratic—that is, more accountable to popular majorities than the EU is today.

As is so often the case in ideological debates, the middle is missing. The current debate between Euro-enthusiasts and Euro-sceptics overlooks a plausible position, one that is distinctive in both a positive and a normative sense. Perhaps Europe is not headed for a substantially more federal and democratic future. Perhaps, instead, we already glimpse the constitutional compromise that is the logical endpoint of European integration, at least for the foreseeable future. The current position of the EU is likely to remain unchanged for some time. Perhaps the major functional tasks that could optimally be carried out at a regional level—liberalization of movements in goods, services, and factors, monetary stabilization, and economic regulation closely connected with trans-border externalities or non-tariff barriers to competitiveness—are already launched. Perhaps, moreover, the functional pressure for cooperation that has powered European integration for two generations is lessening and nothing comparable will replace it. The EU may expand geographically, reform institutionally, and deepen substantively, but all this will take place largely within existing contours of European institutions. Perhaps the existing hybrid status quo is sufficiently efficient and adequately legitimate to resist any fundamental institutional reform.

If we accept the premise—the line of argument I shall explore in this chapter—two conclusions follow, one positive and one normative.

The positive conclusion: *the EU is not a superstate in the making*. The contemporary EU is far narrower and weaker a federation than any extant national federation—so weak, indeed, that we might question whether it is a federation at all. The EU plays almost no role—at most a weak sort of international coordination—in most of the issue-areas about which European voters care most, such as taxation, social welfare provision, defence, high foreign policy, policing, education, cultural policy, human

to this 'conservative idealist' line of reasoning, see Andrew Moravcsik, 'Conservative Idealism and International Cooperation', *Chicago Journal of International Law* (forthcoming).

rights, and small business policy. European Union institutions are tightly constrained, moreover, by supermajoritarian decision rules, a tiny administration, radical openness, stringent provisions for subsidiarity, a distinct professional ethos, and the near-total absence of the power to tax and coerce. The EU was designed as, and remains primarily, a limited international institution to coordinate national regulation of trade in goods and services, and the resulting flows of economic factors. Its substantive scope and institutional prerogatives are limited accordingly. The EU constitutional order is not only barely a federal state; it is barely recognizable as a state at all. To term it a 'superstate' is absurd.

The normative conclusion: *the current institutional form of the EU may well be democratically legitimate, despite the absence of many institutional opportunities for direct participation in majoritarian decision-making.* Current critics judge the EU against an abstract standard of democratic participation rather than assessing it as a second-best constitutional compromise designed to cope pragmatically with concrete problems. Constitutional checks and balances and indirect democratic control appear adequate to avoid abuse. The insulation of decision-makers, moreover, can be justified as a second-best means to empower median voters against powerful but particularistic interests—such as protectionist economic sectors, concentrated recipients of government assistance, and oligopolistic producers. It is striking, in this regard, that the political functions that the EU carries out—constitutional adjudication, trade negotiations, technical administration, central banking, and criminal prosecution—are rarely subject to highly participatory and majoritarian decision-making in the Member States of the EU, or in other advanced industrial democracies. This suggests that the insulated policy-making style of the EU is a function of the particular activities delegated to it, not—as many claim—unfair advantages enjoyed by multinational capital, the scale and scope of transnational politics, or the happenstance particularities of EU institutions. If such arrangements are common within national polities, should they be controversial in Europe? Perhaps, then, the existing institutions in Brussels, Strasbourg, and Luxembourg are not just stable, but just and fair as well.

This chapter explores this line of argument in detail. The first section describes existing EU institutions, focusing on the substantive narrowness and institutional weakness of its mandate. The second section examines the causes of this narrow and weak institutional mandate. The third section assesses its consequences of our normative assessment of the democratic legitimacy of the EU.

1. The Confederal Structure of the European Union

Viewed in comparative perspective, the EU is an exceptionally weak political structure. The range of issues it handles is narrow and the institutional authority it enjoys to handle them is modest compared with any advanced industrial democracy.⁶ Such constraints are deeply embedded in the constitutional structure of the EU and are unlikely to change significantly in coming decades. Indeed, the last decade of the EU is best interpreted as a simultaneous movement in two directions: towards deepening and widening of cooperation in an established core of economic issues, and towards the imposition of looser, less centralized arrangements on cooperation outside of these core areas.⁷ Let us consider in detail just how narrow and weak the EU really is.

The Narrowness of the EU: Substantive Constraints

Compared with existing domestic federations, the EU is substantively narrow. Its core functions are restricted almost entirely to the regulation of policy externalities resulting from the direct regulation of economic production. European Union regulation focuses on trade in goods and services, the movement of factors of production, the production and trade in agricultural commodities, exchange rates and monetary policy, money, foreign aid, and trade-related economic regulation of other externalities, such as certain environmental, consumer, competition, and workplace policies. In addition, there is a smattering of policies that emerged as side-payments for the acceptance of core policies by recalcitrant States, notably regional and structural funding.

⁶ Some, most recently German Foreign Minister Joschka Fischer, have treated the EU as the analogue of the US under the Articles of Confederation, thereby suggesting an optimistic future trajectory. The two institutions look similar, yet it is unclear how useful it is to draw an analogy between a confederation of limited eighteenth-century States and a confederation of modern nation states. The difficulty is clear: most of the activities of the twenty-first century state were not carried out by any government in the eighteenth century, hence their absence is of little significance. Today, the failure of the EU to carry out many of these activities, and the corresponding success of national governments, is far more significant.

⁷ Though space does not permit a full exploration of the history of the EU, there exists substantial evidence that the Member States *deliberately* created a weak polity because it suited their interests to do so; it is not an unintended consequence or an unfortunate happenstance. For an extended argument, see Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca: Cornell University Press, and London: UCL/Routledge, 1998).

Impressed by this wide range of activity, analysts of the EU rarely stop to consider what is missing.⁸ Consider the following.

First, the EU is almost entirely uninvolved in the major activity of advanced industrial democracies, namely, the provision of social welfare. National welfare systems provide direct income support, unemployment insurance, various forms of medical care, retirement and pension benefits, assistance for children—hardly any of which is directly regulated by the EU.⁹ The only exceptions involve a narrow set of trans-border problems, such as the right of individuals to receive benefits abroad or invest pensions abroad—and even these rights are limited. In the related area of labour regulation, the EU has provided weak labour standards at something close to the lowest common denominator of national political aspirations.

Second, the EU lacks significant defence, military, and police policies.¹⁰ As we have seen, this is perhaps the oldest and most fundamental activity of the modern state and it remains one of the largest elements in state spending in advanced industrial democracies. Even if the ambitious plans currently on the table for European defence coordination were realized, NATO would remain the preeminent international institution in European defence. The EU does not have, and does not envisage having, control over the details of military spending. It is hard to see why current proposals for defence industrial rationalization should be more successful than those of years past or, if they are successful, why they should take a 'European' form.¹¹ Through its third pillar, the EU is coordinating efforts to combat international crime, but the basic structure of national police, criminal justice, and punishment systems remains unchanged.

⁸ Few of the issues I mention are found on Mark Pollack's elegant tables elsewhere in this volume. Pollack's admirable work is typical of the tendency of scholars studying the EU to focus on policies that are present rather than policies that are absent. The result is to inflate the importance of modest inroads into large policy areas.

⁹ For a nuanced, maximally optimistic, yet nonetheless sceptical view of European social policy, see Stephan Leibfried and Paul Pierson, 'Social Policy: Left to Courts and Markets?', in Helen and William Wallace (eds), *Policy-Making in the European Union*, 4th edn (Oxford: Oxford University Press, 2000), 267–92. For an argument that the CAP should be seen as an indirect form of social policy closely related to the rise of the post-war social welfare state, see Elmar Rieger, 'The Common Agricultural Policy: Politics against Markets', in Wallace and Wallace (eds), *Policy-Making*.

¹⁰ Jan Zielonka, *Explaining Euro-Paralysis: Why Europe Is Unable to Act in International Politics* (New York: St Martin's, 1998); Anthony Forster and William Wallace, 'Common Foreign and Security Policy', and Monica den Boer and William Wallace, 'Justice and Home Affairs', in Wallace and Wallace (eds), *Policy-Making*.

¹¹ The most informed prognoses predict that European defence industries will link up with US champions.

Third, the EU lacks a significant education policy.¹² With the exception of admirable but sporadic efforts to assure mutual recognition of advanced degrees and the free movement of students for semesters abroad, education policy in Europe remains national and local. All issues of primary and secondary education, as well as nearly all the educational issues that spark true public controversy in advanced industrial societies—the level of financing, the quality of education, the substance of the curriculum, admissions, and preferential access, the role of religion, multiculturalism, the proper role of unionized labour, the status of private schools, and so on—are almost entirely outside EU competence.

Fourth, EU policies aimed at the provision of civilian infrastructure—material structures like transport, energy, telecom networks, and other public works—are limited.¹³ To be sure, the EU seeks to provide equal market access for external producers and funds particular infrastructure in poorer regions. Yet these programmes remain far smaller than national programmes, except in the poorest Member States, and are geographically restricted. They emerged, as we shall see in the next section, largely as side-payments to larger bargains and are unlikely to be expanded in the new, more 'flexible' EU that is emerging today. David Allen concludes: 'Consolidation would appear to be the name of the game for the next decade.'¹⁴

Fifth, the EU lacks a significant cultural policy.¹⁵ European governments have relatively extensive policies to protect and propagate national cultural traditions. Though globalization, backed by EU regulations, has of course expanded access to media in Europe, EU regulations have little direct impact on media content.

Sixth, the EU has only a peripheral impact on national legal systems and civil litigation. To be sure, the EU enforces trans-border economic rights and, by virtue of an explicit clause in the Treaty of Rome, influences gender equality in the workplace. International protection of any other civil and political rights, in so far as it exists at all, occurs not through the EU, but rather the European Convention on Human Rights or the Council of Europe. Specific definitions of domestic economic discrimination, economic rights, and positive policies—'affirmative action'—

¹² For an optimistic scenario, in which national governments remain dominant, see Wiltold Tulasiewicz with Colin Brock, 'The Place of Education in a United Europe', in Colin Brock and Wiltold Tulasiewicz (eds), *Education in a Single Europe* (London: Routledge, 2000).

¹³ David Allen, 'Cohesion and the Structural Funds', in Wallace and Wallace (eds), *Policy-Making*.

¹⁴ David Allen, 'Cohesion and the Structural Funds', in Wallace and Wallace (eds), *Policy-Making*.

¹⁵ Major overviews of EU policy rarely make any mention of cultural affairs.

towards racial and ethnic minorities, women, and the elderly, is dictated almost entirely by domestic law. The EU has little impact on policy towards religion and family. Similarly, electoral systems, the definition of political parties, and the regulation of other forms of political competition are defined domestically.

Seventh, isolated exceptions inherited from the 1970s aside, EU environmental policy is limited to those policy instruments directly related to cross-border economic or environmental externalities. Product regulation of the industries with high economies of scale, such as the chemical and automotive industries, and process regulations on levels of water and air pollution constitute the bulk of recent EU activity. This leaves to the Member States policies involving conservation, land management, natural resources, commons, noise pollution, and many other forms of environmental degradation. There is increasing scepticism about further deepening in this area.¹⁶

Eighth, direct support for industry and small business remains largely national. To be sure, the EU increasingly regulates industrial subsidies that might distort international competition, and construes that task increasingly broadly. Yet national industrial subsidies and tax advantages remain significant. Positive EU activities are limited to R&D policies, which mostly, though not exclusively, coordinate existing national subsidies. Small-business policy, in so far as it does not discriminate against foreign businesses, is relatively untouched by the EU.

Let us not exaggerate. European policy specialists will rightly object that the EU has made modest inroads in this or that policy area. Social scientists may justly point out that some large national federations—notably Germany, Canada, and the US—decentralize some of these functions, most often education, policing, some types of civil law, and support for small business. Still, there remains a difference so great as to be a difference in kind. No national federation relegates all of these policies—those regulating social welfare, pensions, unemployment, children, national defence, policing, education, civilian infrastructure, culture, human rights, industry, small business, and many environmental externalities—to sub-national authorities. The decentralization of European policies is particularly surprising, given the traditionally centralized character of many West European states.¹⁷

¹⁶ Alberta Sbragia, 'Environmental Policy: Economic Constraints and External Pressures', in Wallace and Wallace (eds), *Policy-Making*.

¹⁷ Comparisons with the eighteenth century US under the Articles of Confederation, as we have seen, are unhelpful.

The Weakness of the EU: Constitutional Constraints

Substantive limitations on EU policy are not just happenstance. They are related to underlying constitutional structure. Lacunae in EU policy reflect limitations on EU policy-making institutions. Not only are EU policies narrow, but EU institutions are weak. What characteristics of EU institutions perpetuate its substantively limited policy role?

Fiscal Constraints

One institutional weakness is the EU's insignificant fiscal capacity. Since the early modern era, much of the centralization, and perhaps also the democratization, of the modern state has been connected with the need to strengthen its power to extract revenue.¹⁸ In the twentieth century, tax revenues and state spending increased, often initially in connection with war but generally longer-term in connection with social welfare, until they totalled 25–50 per cent of GDP across advanced industrial nations. This trend is often cited as a measure of the power of the state.

Yet the EU remains an exception. It lacks the common fiscal base of a modern state. Its fiscal resources, derived through agricultural levies and a portion of national value-added taxation, remain capped at 1.27 per cent of GDP—roughly 3 per cent of national and local government spending in its Member States, which totals 30–55 per cent of GDP. Most of these financial resources are explicitly dedicated, moreover, to a small range of policies: the common agricultural policy, structural funding, and development aid. This leaves little discretionary funding. Even in its areas of the EU's greatest activity, the bulk of public funding remains national and local.

Though creative accounting, economic growth, and enlargement may create temporary slack of interest to EU policy analysts, there is no medium-term prospect of significantly lifting the formal fiscal ceiling—the overall 1.27 per cent constraint. EU budgetary policy is subject to unanimity and thus remains tightly controlled domestically by finance ministers, foreign ministers, and heads of state and government.¹⁹ To be sure, the accession of poorer countries in central and eastern Europe will create demands for a more robust fiscal system. Yet such demands are unlikely to lead to increased EU spending. In the past, enlargement to include such countries—Britain, Ireland, Spain, Portugal, and Greece—new financial

¹⁸ John Brewer, *The Sinews of Power: War, Money and the English State, 1688–1783* (Cambridge: Harvard University Press, 1990); Margaret Levi, *Of Rule and Revenue* (Berkeley and Los Angeles: University of California Press, 1989).

¹⁹ Brigid Laffan and Michael Shackleton, 'The Budget', in Wallace and Wallace (eds), *Policy-Making*.

demands were backed by threats to veto common policies, resulting in a series of significant financial side payments. Current candidates face a radically different situation, however. Few new policies loom on the horizon and those that do are likely to be established with 'flexibility' provisions designed precisely to permit 'core' member countries to circumvent a veto and thereby avoid burdensome financial transfers. As Brigid Laffan and Michael Shackleton observe, 'Funds are unlikely to approach the level of transfers found in traditional federal systems. The Union . . . does not conform to the principles of fiscal federalism and is unlikely to do so in the future, notwithstanding the arrival of EMU'.²⁰

The overall result, as Giandomenico Majone has written, is that the EU remains a 'regulatory polity'—a polity with administrative instruments but little fiscal capacity.²¹ It is surely not coincidental that most of the policies listed in the preceding section as absent from the EU's policy portfolio—notably social welfare, defence, education, and infrastructure—require significant direct government expenditure. The institutions of the EU are most authoritative and autonomous, by contrast, in areas that do not involve the disbursement of tax revenues, notably constitutional adjudication, technical regulation, state prosecution, and legislative agenda-setting.

Administrative Incapacity and the Absence of Coercive Force

Not only is the EU a regulatory state; it is a regulatory state that does not implement its own regulations. Policy analysts often observe that the real politics of regulation lies in implementation. Yet while the Commission oversees implementation of EU policies, it actually implements almost none of them. Let us start with the obvious. In contrast to all existing national federations, the EU has no police powers, no army, and no realistic prospect of obtaining either one.²² Even if successful, recent efforts to create a modest intergovernmental capacity to cooperate militarily would not change this. The EU does not rely on its own means either to resolve disputes among levels of government or even simply to enforce the law. When the ECJ—often cited as the critical element in the EU's enforcement apparatus—issues a decision, it generally takes the form of an advisory opinion to national courts under Art. 177 of the original Treaty of Rome,

²⁰ 'The Budget', in Wallace and Wallace (eds), *Policy-Making*, 240.

²¹ Giandomenico Majone, *Regulating Europe* (London: Routledge, 1996).

²² Even the most ambitious among recent proposals for a European rapid deployment force foresee a small unit designed for ad hoc intervention, with NATO approval, in cases of peace-keeping and peace-making.

which then orders, if it so chooses, enforcement of that opinion using national legal and coercive means.

With the exception of competition policy, where the Commission has independent prosecutorial powers—though even there we are dealing with only a handful of important cases—and the conduct of, though not the ultimate control over, external trade negotiations, the administrative and implementation powers of the Commission are extraordinarily weak. Policies are typically implemented by national or perhaps sub-national governments. It could hardly be otherwise, for the EU bureaucracy in Brussels is extraordinarily small. Setting aside secretarial and logistical positions, the entire Commission employs no more than 5,000–7,000 top officials—about the size of a European city government or a single moderately-sized Washington agency. These officials tend to have generic skills rather than specific technical and legal knowledge—a situation the Commission is currently seeking to correct—and are often at a disadvantage in areas like agricultural and environmental policy when facing larger and more permanent national bureaucracies. The core of the EU legislative process lies therefore in the complex subcommittees of the Committee of Permanent Representatives (COREPER)—the heart of the Council of Ministers—which structures the constant participation of national officials in ongoing meetings on specific legislative items. These officials, along with their permanent staffs in Brussels, far outnumber Commission officials. Indeed, the legislative system of the EU can be thought of as a network of specialized regulatory officials from national governments, centred on COREPER and the Council of Ministers, engaged in the dissemination of information about national positions, technical possibilities, and legal details. The process of policy-making is as much diplomatic as it is technocratic.

Even these relatively modest agenda-setting enforcement powers of the Commission, Court, and Parliament are constrained by the institutionalization over the past decade of a 'three pillar' structure within the EU. Since the Maastricht Treaty, the EU has been moving consistently towards a structure in which core economic policies remain subject to the 'Community method' of legislation, which accords a prominent role to the Commission and Court—the 'first pillar'—but many issues of defence, foreign policy, policing, and immigration policy—the second and third 'pillars'—as well as monetary policy, remain outside of this traditional legal order. With the exception of monetary policy, which has been assigned to an independent agency, these policies remain under classic intergovernmental control, quite similar to what is found in most international organizations.

Subsidiarity, Flexibility, and Unilateralism

To a greater extent than in most federations, member governments of the EU can avail themselves of alternatives to strict multilateralism that, in practice, permit them to opt out of particular policies. Three separate forms of unilateralism can be distinguished. The first and simplest form of unilateralism is to act alone. In recent years EU Member States have begun to define the concept of 'subsidiarity'—the notion that policy tasks adequately carried out at a lower level of government should best be addressed there—so as to explicitly discourage the expansion of the EU into certain new areas such as education, culture, and some sorts of social policy.

The second form of cooperation is unilateral action in areas of mixed competence. While in the core areas of tariff and subsidy policy EU rules are relatively strict and inflexible, there are numerous areas in which governments can act unilaterally inside or outside of the EU. This is true of most policies in foreign policy, home and internal affairs, non-tariff trade barriers, and many policies regarding service provision. In many areas, such as human rights, defence, and border controls, this has led to the formation of alternative international organizations. In other areas, it has encouraged unilateralism, as when the US was recently able to forge bilateral air transport agreements with a half dozen smaller west European countries. In other areas, such as environmental and social policy, special exceptions have been made permitting richer countries to adopt regulatory standards higher than the EU standard, even if trade is thereby diverted. The EU standard becomes little more than a floor.

More interesting and unique to the EU, as compared with national federations, is a third type of divergence from strict multilateral policy-making whereby a 'core' of governments can move ahead collectively inside the institutions. This is commonly termed a 'multi-speed Europe' or a 'Europe of concentric circles'.²³ Some governments can opt out of any policy. Currently outsiders have a *de jure* veto over the formation of any such core—though if the veto provokes even less desirable forms of institutional cooperation outside of the EU, it may not be of *de facto* importance. As recently as 1988, this sort of arrangement was viewed as 'anti-European' and championed only by Margaret Thatcher. Yet European federalists soon came to realize that progress can be made only

²³ For a fuller discussion along these lines, see Andrew Moravcsik, 'Europe's Future at Century's End', in Andrew Moravcsik (ed.), *Centralization or Fragmentation? Europe Facing the Challenges of Deepening, Diversity, and Democracy* (Washington, DC: Brookings Institution Press, 1998).

on this basis. Provisions for 'flexibility' or 'enhanced cooperation' have become part of the Brussels orthodoxy.

We see such provisions in many policy areas. It is employed in the initial decision at Maastricht to move ahead in social policy with 14 of the 15 Member States and to move ahead later to a single currency with eleven—soon to be twelve—of the 15 members. Foreign policy and defence policy coordination is focused on 'coalitions of the willing', in which those governments that wish to pursue a particular policy may move ahead without fully committing the others. In transport, R&D and structural fund policies, similar ad hoc arrangements have long existed. The Schengen Agreement establishing a zone free of customs checks has increasingly been integrated into the EU, though it does not include all EU members and not all participants belong to the EU. There will very likely be long transition periods in extending the Common Agricultural Policy (CAP) to eastern Europe. The primary purpose of such arrangements is to avoid a veto by, compromise with, or side-payment to smaller and weaker states. This sort of organized fragmentation is found in no national federation, though ad hoc collaborative arrangements sometimes do arise among sub-national governments in the US, Canada, and elsewhere.

Consensual Decision-Making and Transparency

Political decisions in the EU are taken under rules that require unanimity or super-majoritarian support in order to reach a decision. This level of consensus, namely, support of representatives of between 70 per cent and 100 per cent of the weighted votes of territorial representatives, depending on the particular issue, is far higher than in any existing national polity. The resulting bias in favour of the status quo imposes narrow constraints on legislative activism.

The creation of single market, agricultural policy, single currency, parliamentary reform, and other major new policies required unanimous amendment of the Treaty of Rome. Today this requires consent by all 15 governments, followed by subsequent parliamentary or administrative ratification.²⁴ This high level of consensus is difficult to achieve. It has emerged in the past two decades only by focusing on core areas of broad consensus, by watering down specific proposals to near insignificance, or by providing financial side-payments.

Even everyday EU legislation must secure approximately 70 per cent of the weighted votes of national ministers sitting in the Council of Ministers.

²⁴ The creation of the Common Agricultural Policy in the 1960s, which took place within the existing Treaty of Rome, required unanimous support but not separate domestic ratification.

This is a comparatively high standard, which severely limits potential legislative activity. Many veto players are thereby empowered. Though supermajorities are sometimes required in existing federal polities to close debate—for example, the US Senate—or to pass legislation in certain circumstances—for example, Canada and Germany—no existing federal state requires such a high level of consensus for all legislation. Statistically speaking, it is harder to pass an everyday piece of legislation in the EU than to amend the American or German constitution. An exceptionally broad consensus of European leaders is required to initiate change.

The ECJ, it is important to note, is a significant exception to this rule. The European Court decides, it appears, by majority vote. In the EU context, where its decisions cannot easily be overridden by legislation—a characteristic due, ironically, to precisely the decision-making rules designed to constrain the EU's autonomy—its power to legislate judicially is further enhanced.²⁵ In the context of supermajoritarian decision-making and judicial independence, it is not surprising that the ECJ has been, in comparative perspective, an exceptionally strong branch of government.

In addition to impeding new policies, this cumbersome decision-making process has another implication, seldom noted. It renders EU politics—contrary to its reputation—exceptionally transparent. With a score of commissioners, 15 national representatives, more than 600 parliamentarians, and constant participation by national officials, there can be no monopoly of information in the EU. In contrast to the widespread impression of a cadre of secretive Brussels-based gnomes, supranational officials in fact work under public scrutiny far more intense than that prevailing under most national governments. Take it from me as an active scholar: it is far easier to get information from the Commission than the British or French government! The recent scandals, often cited as evidence of the lack of control over the corruption of Brussels bureaucrats, in fact prove the opposite. In this much-publicized scandal, parliamentary investigation uncovered only one case of corruption in the Commission, that involving the former French Prime Minister and then Commissioner, Edith Cresson, who had awarded a contract to her home-town dentist. During a long and successful political career in France, Cresson—who, to put it charitably, had never had the reputation of having particularly clean hands—had never been called to account for such activities. Shortly after her arrival in Brussels, the intense multinational and multi-institutional scrutiny characteristic of the EU had led to her resignation. The press reports of these

²⁵ Joseph H. H. Weiler, 'The Transformation of Europe', *Yale Law Review*, 100 (1991), 2403–83.

scandals, not to mention the use made of them in certain political circles in Europe, are quite misleading. The EU is, without a doubt, more transparent than all, or nearly all, of its Member States.

Territorial Representation

In most EU contexts, the most critical decision-making institutions represent established territorial interests. This is true in two senses. The first is that representatives to the most critical forums for legislation and treaty amendment, the Council of Ministers—national ministers—and the European Council—heads of state and government—are under the direct instruction of existing national governments or states. In other words, the Councils represent territorial governments rather than territorial electorates. A hypothetical analogy with the US is instructive. Imagine a system in which US senators were not only selected by national legislatures, as was once the case, but rather served at the pleasure and under the direct instruction of State governors. They could be recalled and reinstructed at any time. Whereas this is true of some legislative bodies in existing national federations—for example, the German *Bundesrat*—the regional loyalty of such representatives is typically tempered by party discipline. Yet party discipline is—and this is the second sense in which EU representation is territorial—all but absent in the EU. Individual representatives in the Council tend to directly represent particularistic territorial interests. Compromises on specific issues are generally reached ad hoc or by supermajority vote, rather as a function of partisan discipline and institutional hierarchy. This system of decision-making tends to privilege defenders of existing institutional prerogatives, who enjoy a formal veto over institutional changes. The axes of influence and responsibility in the EU tend to run vertically from national governments to their supranational representatives, rather than horizontally through transnational party structures or interest groups.

The Commission and European Parliament constitute only partial exceptions to the EU's extreme tendency towards direct representation of national governments. The Commission is able to act relatively independently in proposing and, in conjunction with the ECJ, enforcing everyday legislation. Yet national representatives and interests still play an important role, since the need for Council of Ministers agreement tightly constrains the set of viable proposals. The EP is directly elected, generally by proportional representation within governments, and it does have a working system of party cooperation and votes often split along party lines. But the EP's influence is limited by three factors. First, though there is cooperation among parties, there tends to be little sense of a transnational

electoral process.²⁶ The mandate for European parties to act is correspondingly weak. Second, while its power has increased over the past decade, it remains able to amend or reject legislation only once it has been proposed by the Commission and approved by the Council. Voting rules make it difficult for the EP to act decisively. Its ability to shape the agenda of European politics remains modest. As a result, most sober cross-issue studies of decision-making in the EU still give pride of place to the territorial interests of member governments.²⁷

This analysis confirms Daniel Elazar's conclusion, elsewhere in this volume, that in comparative perspective the EU polity appears more confederal than federal. The EU, we have seen, is a political institution incomparably weaker, narrower, and more decentralized in most respects than any existing national federation. It is substantively limited largely to the tasks of international economic liberalization and stabilization. It lacks the powers to tax, to coerce, to police, to administer, and to mandate uniform application of the law. Its cumbersome decision-making process is constrained by super-majoritarian and unanimous decision-making, as well as direct representation of national and sub-national governments. To the extent that these five conditions obtain, the EU should be thought of a polity so much weaker and narrower than any national federation that a difference in quantity becomes a difference in kind. Yet determining on which side of this abstract dichotomy the EU falls is a far less important task than addressing its causes and consequences—to which I now turn.

2. The Causes of the European Constitutional Settlement

Why did the EU evolve as a multi-level political body narrower, weaker and more diffuse than anything found at the national level? Three circumstances account for these differences: the essential irrelevance of military force, the absence of a common identity, and the prior existence of comprehensive national bureaucracies. In each of these respects, the history of the EU differs from that of modern nation-states. Let us consider each in turn.

²⁶ Jean Blondel, Richard Sinnott, and Palle Svensson, *People and Parliament in the European Union: Participation, Democracy and Legitimacy* (Oxford: Clarendon Press, 1998).

²⁷ See, for example, Jonathan Golub, *Europeanization and Domestic Structural Change: The Case of EU Environmental Policy* (Fiesole: European University Institute, 1996); Adrienne Héritier, Susanne Mingers, Christoph Knill, and Martina Becka, *Die Veränderung von Staatlichkeit in Europa. Ein regulativer Wettbewerb: Deutschland, Großbritannien, Frankreich* (Opladen: Leske+Budrich, 1994), 386, passim.

The Essential Irrelevance of Military Force

The functions and borders of existing nation-states, if not their very sovereign status, were often created to meet external or internal military threats.²⁸ The evolution of the EU has had little to do with such considerations. Traditional geopolitical considerations—matters of power, order, and war—play at most a secondary and sporadic role in EU history.

The EU as we know it is the result of many incremental decisions punctuated once a decade by major intergovernmental bargains. Five or six major decisions, depending on how one counts, stand out: the negotiation of the Treaty of Rome in the 1950s, the terms of the CAP in the 1960s, the European Monetary System (EMS) in the 1970s, the Single European Act in the 1980s, and the Maastricht and Amsterdam Treaties in the 1990s.²⁹ Consistently the most important national purposes underlying these bargains were commercial and the most important force underlying European integration was therefore globalization. The establishment of a common market and a common currency served to promote the long-standing economic interests of European states faced with unprecedented opportunities to profit from rising trade and factor flows. Beginning in the late 1940s Europe witnessed the epochal expansion in export-led growth among advanced industrial democracies, followed in the 1980s and 1990s by a similar expansion in flows of investment and information. These global forces were irresistible, and they influenced countries' national policies whether they were members of the EU or not. Yet those governments that accommodated them through policies of trade liberalization, openness to factor flows, and monetary stability tended to profit most. If such policies were pursued more thoroughly in Europe than elsewhere, it has been primarily because Europe was far more interdependent economically.³⁰

The story of post-war European integration is of course more complex than can be captured in this simple account of functional adaptation. Two exceptions deserve mention. First, geopolitical considerations such as the rehabilitation and reintegration of West Germany, the relative decline of Britain and France *vis-à-vis* the superpowers, and the Soviet threat, not to mention the attractiveness of European ideology as a centrist alternative to proletarian internationalism, played significant, though clearly

²⁸ The literature is extensive. For one effort to link the literature on Western state formation to that on the EU, see Gary Marks, 'The Third Lens: European Integration and State Building Compared' (Chapel Hill: University of North Carolina, n.d. [1990s]).

²⁹ Moravcsik, *Choice for Europe*; Alan S. Milward, *The European Rescue of the Nation-State*, 2nd edn (London: Routledge, 2000).

³⁰ For comparative data, see Moravcsik, *Choice for Europe*, 495.

secondary, roles.³¹ Second, the ECJ, in a process described in detail elsewhere, established the important constitutional principles of supremacy and direct effect, which in turn contributed to the effectiveness of European governance.³² Still, for 50 years European integration has been, above all else, a functional adaptation to economic interdependence.

Still, geopolitics played a relatively minor role in European integration. Indeed, recent historiography reveals that considerations such as the prevention of future Franco-German war, the maintenance of the cold war balance, and the desire for independence from the superpowers—the geopolitical factors most often cited by clever politicians and conventional diplomatic historians to justify European integration—are of decidedly secondary importance in explaining major EU decisions.³³ The result: in modern nation-states the waging of war has led inexorably to the monopolization of coercive force and the centralization of fiscal extraction, whereas in Europe, as a whole, neither has occurred.

The Absence of a Common Identity

Citizens in the Member States of the EU share little underlying sense of distinct 'European' national identity, derived from a common history, culture, or philosophy. There is, as many have noted, no *demos* underlying European integration and, as fewer have noted, no common educational system aimed at bolstering such a sense.³⁴ To only a very limited extent, therefore, do Europeans view one another as part of a common polity to which all members are, as a matter of principle, assured equal consideration. Leaving aside basic civil rights—guaranteed, in the first instance, by the Council of Europe, not the European Union, and nearly universally enforced in the developed world—any rights have had to be justified functionally—as an adjunct to economic liberalization—or judicially—as the result of decade-long incrementalism by the courts—rather than on the basis of fundamental 'constitutional moments' similar to those that drove cooperation forward in the United States.³⁵ The result: the EU has achieved some progress in the areas of civil and political rights, even if this lags behind Strasbourg, but almost none in the areas of socioeconomic rights, despite the similarities among European national norms in this area.

³¹ One estimate of the precise role is set forth in Moravcsik, *Choice for Europe*, 473–9.

³² Weiler, 'Transformation of Europe'.

³³ Moravcsik, *Choice for Europe*; Milward, *European Rescue of the Nation-State*.

³⁴ Joseph Weiler, *The Constitution of Europe* (London: Oxford University Press, 1999).

³⁵ Bruce Ackerman, *We the People* (Cambridge, MA: Harvard University Press, 1991).

The Prior Existence of Strong Nation-States

The EU emerged late in the process of European state formation, after post-World War II constitutional revisions and policy innovations had established nearly all the broad functions of the modern nation-state. Any new European functions had to be justified, therefore, as an improvement on existing national policies, which already functioned on a relatively large scale. In the lack of any external crisis—depression or war—any such effort at centralization faced entrenched opposition from existing social and bureaucratic interests. The EU has therefore evolved within the constraint of a constant presumption in favour of national, rather than federal, policies—a presumption formalized through the rule of unanimity for any revision to the Treaty of Rome. It is striking, in this regard, that in the few remaining areas in which new issue-areas emerged after 1957, such as environmental and anti-trust policy, the EU has been relatively active—to the extent that it is sometimes criticized for going beyond the regulation of economic externalities. The result: the 'path dependence' of previous national choices privileges national solutions.³⁶ Member-State governments have tended to pursue national policies until clear policy failures ensued—as in the trade deficits of the 1950s, unilateral devaluation of the 1970s, industrial subsidization of the early 1980s, and upheavals in the Balkans more recently—before moving forward to common action.

3. The Normative Consequences of the European State Structure

Is the unique state structure of the EU democratically legitimate? What does it mean to say, as many do today, that the EU suffers from a 'democratic deficit'?³⁷

Current political and scholarly debates focus our attention on the need to justify the EU through greater reliance on electoral or legislative institutions—institutions that provide so-called 'input legitimacy'. From this perspective, the EU appears presumptively illegitimate, because it provides

³⁶ This argument differs from the claims found in leading historical institutionalist accounts, such as Paul Pierson, 'The Path to European Integration: A Historical Institutional Account', *Comparative Political Studies*, 29/2 (1996), 123–64. I disagree with Pierson's specific empirical conclusions about European integration—see Moravcsik, *Choice for Europe*, 489–94—but his microfoundational analysis offers the most coherent and persuasive theoretical starting point.

³⁷ This section draws on and extends two earlier analyses. See Moravcsik, 'Conservative Idealism and International Institutions', *Chicago Journal of International Law* (forthcoming) and 'Democracy and Constitutionalism in the European Union', *ECSA Review* (Spring 2000).

relatively few opportunities for direct public participation or for majoritarian decision-making by directly elected representatives. This can be remedied, so the argument goes, only if European citizens are granted a greater formal role in selecting its policies or, at the very least, in selecting those who select its policies. The more direct the representation and the more numerous the citizens involved are, the more democratically legitimate the institution is.

Critics of the EU's democratic deficit are, to be sure, ideologically varied and thus differ in their assessment of the ultimate consequences. Euro-federalists believe that much must be done to increase democratic accountability lest the EU stagnate or even collapse. Social democrats seek a generous European social policy to balance trade liberalization and monetary discipline. Eurosceptics—most notably those on the extreme right of the British, French, Italian, and Austrian political spectrums, but not absent from parties of the left—fear the creation of a 'superstate' in Brussels. They cite recent scandals and the Commission's efforts to promote certain sorts of regulation as evidence that EU officials wield their bureaucratic discretion in an arbitrary manner. All agree that European decision-makers are distant, technocratic, and ultimately unaccountable.

The lack of consensus as to the concrete implications of the 'democratic deficit' should immediately alert us as to the lack of precision in many such criticisms. Indeed, when we examine the arguments more precisely, they still fail to convince, for at least four independent reasons related to our discussion thus far. In contrast to the view of an autonomous, technocratic superstate, the EU is a weak state structure, it functions under direct and indirect democratic control, its departures from majoritarian decision-making fall into normatively justifiable categories, and there is little evidence of an overall policy bias. Let us briefly consider the normative implications of these facts.

The EU is an Exceptionally Weak and Dependent State Structure

Eurosceptical fears of a corrupt and arbitrary superstate run by an all-powerful Brussels-based technocracy are strikingly at odds with a simple factual description of the organization. As a first approximation, we have seen, the EU lacks nearly all the instruments required to establish such a despotism: a police force and standing army, powers to tax and spend, a large administrative bureaucracy, independent legal authority, broad administrative discretion, responsibility for policy implementation, and control over information. Nearly all the fears that give rise to classical arguments for liberal controls on the state are absent in the case of the EU. In sum, there are many ways to constrain and control a political institu-

tion, of which widespread participation in majoritarian decision-making is only one.³⁸ In comparative perspective, the EU is perhaps the least likely of all federations in history to establish despotic rule.

EU Institutions Remain under Indirect Democratic Control

The notion that the EU functions without democratic support is quite misleading. The most obvious democratic controls are those imposed on the European Parliament, which is composed of directly elected representatives. The EP is increasingly usurping the role of the Commission as the primary interlocutor to the Council of Ministers in the EU legislative process. While the Commission still initiates legislation, it is now the EP that, in the final instance, controls the agenda—that is, the EP can reject legislation or make proposals for amendment to the Council that are more difficult to amend than to accept. To be sure, European citizens do not cast votes for the EP on the basis of 'European' issues, but there are many reasons why this might be so, not least of which is the lack of an EU mandate in areas of public interest—a point to which I shall return below.

Yet the EP is, in the end, secondary. The Council of Ministers is far more important, and is itself also democratically accountable. The permanent representative of each country receives instructions from a national executive elected directly or through a parliamentary vote. Parliaments consider and comment on many EU policies. Even Commissioners and ECJ judges, though clearly more insulated, are named by directly elected national governments. But the Commission has relatively little discretion, compared with the Council and Parliament.

To be sure, national governments conduct EU policy through traditionally secret, non-participatory foreign-policy apparatus and networks of technocratic officials. This tends to strengthen national executives *vis-à-vis* powerful minorities within legislatures—much like many domestic mechanisms, such as 'fast track' provisions do so in the United States.³⁹ Yet the national governments represented in the Council are directly elected, clearly responsible for policy outputs, and maintain close super-majoritarian control over decision-making. Many insiders view even the Commission or Council as highly representative of citizen concerns—perhaps more so than the European Parliament. As British Prime Minister Tony Blair recently observed:

³⁸ For a related argument, see Majone, *Regulating Europe*.

³⁹ Andrew Moravcsik, 'Why the European Community Strengthens the State', Center for European Studies Working Paper (Cambridge: Harvard University, 1994).

The European Parliament is more directly democratic but it is more remote from people than their National Parliaments or their elected governments. The Council of Ministers is closer to people in the sense that the British Prime Minister is directly accountable to the British electorate in a very obvious way and yet, in terms of the European decisions we take, [the Council] is less directly democratic. That's the dilemma.⁴⁰

So the EU does not lack democratic checks per se. The question is instead whether these checks are significantly weaker—dangerously so—than those common in national systems. And the answer to that question is, at the very least, unclear and uneven. Moreover, where the EU does afford less direct democratic control, we are about to see, insulated policy-making may be normatively justified.

Limits on Direct Participation in EU Politics Fall into Normatively Justifiable Categories

Though the EU remains under indirect and sometimes even direct democratic control, there is good reason to believe that the scope of the EU, as well as its distance from individual voters, serves to insulate national and supranational officials from a measure of immediate accountability to legislative and electoral pressure. The scale of the EU is larger, and its institutions disproportionately involves not just a modest delegation of power to supranational judges and bureaucrats, but a significant empowerment of networks of national ministers, executives, and officials. The EU thereby 'strengthens the state' in the sense of increasing the domestic influence of national executives, ministers, and perhaps even ministerial officials *vis-à-vis* other social groups.⁴¹

Before we condemn such practices, however, we must recall that departures from direct majoritarian control by citizens are hardly unique to EU politics. National political institutions in advanced industrial democracies are far from perfectly majoritarian or participatory. No modern liberal democracy governs primarily by referendum or direct parliamentary activity, let alone collective deliberation among the citizenry. Instead, all modern governments delegate power to elected and non-elected representatives of various sorts: coalitions of parties, legislative representatives, judges, prosecutors, expert officials, central bankers, and so on.⁴² The reason is simple: it is intolerably costly—in time, money, information, and education—for all citizens to be involved in all decisions. A modern state

⁴⁰ Cited in Moravcsik, 'Conservative Idealism' (manuscript version), 21.

⁴¹ Moravcsik, 'Why the European Community Strengthens the State'.

⁴² Robert Dahl and Edward Tufte, *Size and Democracy* (New Haven: Yale University Press, 1970).

that sought to maximize popular participation in government would soon become ungovernable. The essence of modern constitutional design lies, therefore, in the designation of different processes of indirect representation and control—some tighter, some looser—for different functions. Though all functions of government are *ultimately* under control by voters or their immediate representatives, there is no expectation, in either the theory or in practice of democratic governance, that all such functions be immanently under such control. Constitutional architects regularly design strong non-participatory, non-majoritarian institutions, such as courts, independent technical agencies, diplomatic and military establishments, central banks, independent national executives, and complex arrangements for the separation of powers.

The trend toward non-majoritarian institutions has gained force in European domestic politics over the past generation, giving rise to an extensive literature on the 'decline of parliaments'.⁴³ Most of this decline in the influence of parliaments is generally believed to have little or nothing to do with European integration, but instead with the increasing technical, political, and logistical complexity of modern governance, as well as the constellations of interests in modern politics.

Individual and group participation in majoritarian decision-making is not, therefore, either the unique or the primary standard against which the legitimacy of modern democratic political institutions is to be judged. Democratic institutions should surely seek to address the core interests of major groups in society, but majoritarian participation is only one way to achieve induce representative policy-making. Limitations on majoritarian decision-making may be normatively justifiable, broadly speaking, if they increase the efficiency and technical competence of decision-making; guarantee political, cultural or socioeconomic equality—rights—against majority decisions; or offset imperfections in representative institutions.

Is this the case in Europe? There is good reason to believe so. There is a striking correlation between the use of non-majoritarian institutions at the EU level *among* Member States and their use in domestic politics *within* Member States. *The most autonomous EU institutions are found precisely in those areas—constitutional adjudication, foreign economic*

⁴³ On the decline of parliaments, see Sue Pryce, *Presidentializing the Premiership* (London: Macmillan, 1997), Patrick Weller, Herman Bakvis, and R. A.W. Rhodes (eds), *The Hollow Crown: Countervailing Trends in Core Executives* (London: Macmillan, 1997); R.A.W. Rhodes and Patrick Dunleavy (eds), *Prime Minister, Cabinet and Core Executive* (New York: St Martin's, 1995); Otto Kirchheimer, 'The Transformation of Western European Party Systems', in Joseph LaPalombara and Myron Weiner (eds), *Political Parties and Political Development* (Princeton: Princeton University Press, 1966); Herbert Kitschelt, *The Transformation of European Social Democracy* (Cambridge: Cambridge University Press, 1993).

diplomacy, technical regulatory administration, central banking, and criminal prosecution—where non-majoritarian decision-making is most widespread and legitimate in the domestic politics of the Member States. This suggests that the reasons for the relatively insulated quality of EU policy-making have more to do with the functional imperatives of modern democratic governance than with either the imperatives of globalization or the specific character of the European institutional construction.

Indeed, these areas of non-majoritarian decision-making arise primarily in areas where persistent imperfections in representative institutions create long-term threats to weak political groups. While we need not go so far as has Giandomenico Majone, who sees non-majoritarian institutions as legitimate where pure 'efficiency' considerations dominate, we can safely say that these are all areas in which insulated national executives and supranational officials act in the interest of diffuse majorities of consumers, citizens, and victims of uncompetitive behaviour and environmental degradation to overturn policies set to the advantage of powerful, particularistic interest groups.⁴⁴ On this reading, non-majoritarian decision-making is justified in democratic theory not simply because it may be efficient, but because, ironically, it may better represent the long-term interests of the median voter than does a more participatory system—in distributive conflicts as well as matters of efficiency. In other words, the EU performs much the same political function for European governments as a strong executive and 'fast-track' legislation has for post-war America: a function that could be argued to have a democratic result—that is, one favourable to the median citizen—precisely because it is non-majoritarian.

Why is this indirect procedure of overcoming powerful particularistic interests accepted by European citizens? In large part it is because the issues handled by the EU—agricultural subsidies excepted—are not those about which significant number of voters care most. The policies most salient in the minds of European voters—overall levels of taxation, social protection and pensions, education, and major military commitments—remain firmly in the hands of national governments. Widespread apathy and non-participation in European elections is often taken to be a clear sign of the illegitimacy of the EU, but it may instead reflect the lack of salience accorded by voters to the issues it handles.⁴⁵

⁴⁴ Majone, *Regulating Europe*.

⁴⁵ Jean Blondel, Richard Sinnott, and Pelle Svensson demonstrate that European voters doubt neither the efficacy of the European Parliament nor their ability to influence them. Nonetheless, they shun elections to the European Parliament. One plausible explanation would be the low salience of the issues that the EP handles. See Blondel *et al.*, *People and Parliament*.

In sum, the lack of participation in majoritarian decision-making does not in itself render the EU democratically illegitimate.⁴⁶ The existence of indirect democratic control, the lack of direct democracy in domestic institutions, the tendency of the EU to accrue functions that are already non-majoritarian in domestic politics—and, most fundamentally, the apparent legitimacy of insulated, non-majoritarian and non-participatory institutions—undermines any such critical conclusion.

There Is Little Evidence of an Overall Policy Bias in European Governance

Some critics of the EU, like critics of the strong US executive, insist that the EU's reliance on delegated power—whatever arguments might be made for its efficiency—imparts an illegitimate bias into European policy. Super-majoritarian decision-making, the strong judiciary and Commission, and the strengthening of national executives, along with the Treaty of Rome mandate for trade liberalization and the subsequent rise in economic interdependence, mean that the EU liberalizes trade and tightens monetary discipline but discourages labour organization and social spending. Fritz Scharpf and others have argued that tight controls on EU decision-making create 'joint-decision traps' that favour particularistic interest groups—notably industrial and agricultural exporters—at the expense of workers, consumers, and other broader groups in society.⁴⁷ In short, non-majoritarian EU institutions overrepresent neo-liberal interests.

This is indeed a curious claim for, if we consider national and EU policies as a whole, it is very difficult to conclude that European policy is radically at odds with underlying popular sentiment.⁴⁸ Scharpf's critique implies that there exists majority support, both within and across EU Member States, for different policies—for example, lower agricultural subsidies and higher social spending, which would prevail absent a joint-decision trap. There is little evidence for this. In the case of agricultural spending, as Elmar Rieger has shown, the claim is demonstrably false.⁴⁹

⁴⁶ This also calls into question the standard of input legitimacy altogether, which appears circular absent a strong theory of the cost-effectiveness of participation at achieving some normative or positive goal—but full consideration of this issue takes us beyond the scope of this paper.

⁴⁷ Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999); Fritz Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', *Public Administration*, 66 (1988), 239–78.

⁴⁸ For a response more firmly grounded in historical institutionalist theories of path dependence, see Moravcsik, *Choice for Europe*, 489–94.

⁴⁹ See Elmar Rieger, 'Agrarpolitik: Integration durch Gemeinschaftspolitik?', in Markus Jachtenfuchs and Beate Kohler-Koch (eds), *Europäische Integration* (Opladen: Leske+Budrich, 1996), 401–28.

High price subsidies for major agricultural commodities were not created by the EU, they pre-dated it. Prominent non-member states with similar economic structures, most notably and Switzerland, have long maintained *higher* agricultural subsidies than governments within the EU. As for social policy, most European governments realize the need to control government spending, often for reasons having little to do with interdependence.⁵⁰ If any majority emerged in the EU, Paul Pierson and Stefan Leibfried conclude in what is surely the most authoritative study of EU social policy-making, it would most likely support lower rather than higher social expenditures. There is, in sum, every reason to believe that the current structure of the EU serves primarily to strengthen, rather than obstruct, underlying tendencies in Member State policy.

4. Conclusion

I have argued that the EU is an exceptionally weak federation. So weak, indeed, that the difference in degree between it and national federations amounts to a difference in kind. The EU's narrow substantive range, modest budgetary resources, lack of coercive force, minuscule bureaucracy, constraining decision-rules within a multi-level system, and far more powerful competitors mean that it might well be thought of something qualitatively different from existing federal systems. The existence of these constraints on EU decision-making, along with the existence of indirect democratic control and normative justifications for delegating power, undermine criticisms of the EU as having a severe 'democratic deficit'.

This is not, of course, to deflect all criticism of the democratic legitimacy of EU institutions.⁵¹ Closer inspection may well reveal deep, unintended, or illegitimate biases in the multi-level EU system of governance. Yet any such critique must begin from two premises. First, the EU is not a 'superstate' in the making. It best understood as one level in a complex multi-level decision-making system or, more precisely, a severely limited international organization for bureaucratic and judicial coordination among democratic governments. At the very least, we need to ask whether the EU is more or less representative than the national systems it replaces, and whether its particular biases are legitimate.

Second, there is no necessary correlation on the margin between participation in majoritarian decision-making and influence over policy

⁵⁰ Stefan Leibfried and Paul Pierson (eds), *European Social Policy: Between Fragmentation and Integration* (Washington, DC: Brookings Institution, 1995).

⁵¹ Nor is it to deny that insights from theories of federal systems, or domestic politics more generally, may be useful in explaining EU policies.

outcomes—that is, between democracy and representation. It is far from presumptively obvious that simply because a political institution involves delegated power, it is unrepresentative of broad majorities—whether judged by the standards of democratic theory or by existing domestic practices. The European constitutional order, like any other constitutional order, inhabits the world of the second-best. In the second-best world of constitutional construction, there is no necessary correspondence between procedural equity, equal influence, fair policy outputs, responsiveness to the median voter, and normatively justified governance. Many forms of constitutional control may, under certain practical circumstances, prove responsive to broadly inclusive sets of public interests rather than to encapsulated constituencies with special interests—the ultimate goal of any democratic system.

This is a quite a different starting point from that taken by most participants—Euro-federalist or Euro-sceptical—in contemporary scholarly or public debates about the 'democratic deficit'. They argue almost entirely at the level of abstract democratic theory: Most European citizens neither deliberate nor participate in EU activities: therefore the EU is undemocratic. This sort of reasoning will not do. The EU must be judged not in terms of its adherence to some ideal of national democracy but instead as a particular sort of *limited, multi-level constitutional polity* designed within a specific social and historical context. It follows that any legitimate normative criticism of a European 'democratic deficit' must be grounded in a sophisticated analysis of how the EU system has emerged, how it actually works, and whose concrete interests it represents under specific circumstances. Moreover, if biased representation of interests can be properly identified and evaluated only after detailed analysis of the real-world institutional constraints imposed on EU institutions and policies by a complex multi-level system, the actual nature of governance in the Member States, and the varying patterns of politics in distinct issue areas, we must turn more of our primary attention to the social science and history of the EU before returning to a discussion of ideal political philosophy. Yet beyond a handful of prominent but isolated contributions, one looks in vain in the contemporary debate for such arguments spanning positive and normative theory.⁵² One can only conclude that controversy over the true extent of the European 'democratic deficit', and over the desirability of alternative constitutional orders for an integrated Europe, has only just begun.

⁵² Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards', *European Law Journal*, 4/1 (1998), 5–28; Scharpf, *Governing in Europe*. In a recent book, Joseph Weiler hints at the need for a more differentiated analysis by issue area. See Weiler, *Constitution of Europe*, 270ff.