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Comparative Federalism

The European Union and the United States in Comparative Perspective

Edited by

Anand Menon & Martin A. Schain

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ANAND MENON and MARTIN SCHAIN

OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
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New Delhi Shanghai Taipei Toronto

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Published in the United States
by Oxford University Press Inc., New York

First published 2006

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloguing in Publication Data
Data available

Typeset by SPI Publisher Services, Pondicherry, India
Printed in Great Britain
on acid-free paper by
Biddle's Ltd., King's Lynn, Norfolk

ISBN 0-19-929110-1 978-0-19929110-6

1 3 5 7 9 10 8 6 4 2

Preface

This book began as a collaborative project, Comparative Federalism (COMFED), invoking three universities in the United States (New York University, The University of Washington and the University of Pittsburg) and three in Europe (The University of Birmingham, Sciences-Po, Paris and the Universitié Libre de Bruxelles), supported by a grant from the EU–US Program for Cooperation in Higher Education and Vocational Education and Training.[1]

The collaboration, which lasted for three years, from 2001 to 2005, brought together both graduate students and scholars from the United States and the European Union. The European graduate students, generally specialists on the European Union, came to the three universities in the United States to take courses on American politics and federalism in the United States; their counterparts from the United States, students often interested in American politics, participated in courses and programs on the European Union at the three designated universities in Europe. Both the students and the scholars crossed the Atlantic twice, to participate in conferences on comparative federalism at the University of Birmingham (UK) and at New York University (US). This volume is a product of these two conferences, and benefited in important ways from the rich discussions involving both Faculty and students that characterized each occasion.

The project brought specialists on the developing federal system in Europe together with others who have worked on the federal system in the United States. Our objective was to focus on comparism, and our hope was that both students and scholars would learn from one another. Similarly, each of the chapters in this book emphasizes a comparative dimension of federalism in the United States and the European Union. We believe that this transatlantic project worked well in training graduate students and in bringing together

[1] European Commission EU/US Program, Agreement 20011281; FIPSE grant PII6J010020, EC–US Cooperation Program.

scholars who had not previously collaborated. The European Commission and the Fund for the Improvement of Post-Secondary Education in the United States have done a remarkable job in developing one of the very few transatlantic funding programs.

We are grateful to all of the students and scholars who joined with us in the courses and conferences of the COMFED project. We owe a special debt of thanks to our colleagues who worked with us: In the United States, John Keeler, the director of the Center for West European Studies at the University of Washington, and Alberta Sbragia, director of the European Union Center at the University of Pittsburgh; and in Europe, Renaud Dehousse, director of Centre d'Etudes Européennes at Sciences-Po Paris, and Eric Remacle, director of the Institut d'Etudes Européennes at the Université Libre de Bruxelles. We would also like to thank the talented administrative staff who made this project happen—Zoe Ragouzeos and Leah Ramirez at New York University, and Lucy Cross and Gareth Sears at the University of Birmingham. Finally, we owe a debt of thanks to Dominic Byatt, Editor at Oxford University Press, for his confidence, aid, and support throughout.

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Introduction

Anand Menon and Martin Schain

The Convention on the Future of Europe, which drew to a close in July 2003, served to galvanize debate about the nature and future developmental trajectory of the European Union. More specifically, it engendered considerable discussion about the relationship between this process and the one which had taken place in Philadelphia more than 200 years earlier; and, more broadly, over the extent to which the European Union does, or should, resemble the United States.

For some, the parallel was misplaced. Thus, a Finnish representative to the Convention, Kimmo Kiljunen, voiced criticism of proposals for the creation of a permanent EU president, for the very reason that 'we are trying to copy a President of the United States' (the *EU Observer* May 1, 2003). In contrast, Valéry Giscard d'Estaing, the (unlikely) President of the Convention, did little to discourage such analogical reasoning, calling at one point for an EU declaration of independence (*European Voice* Vol. 9 No. 13: April 3, 2003), and seeming, a couple of months later, to compare his role to that played by Jefferson at Philadelphia in 1787 (*The New York Times* June 15, 2003).

Partly as a consequence of such debates, comparative federalism is now a 'hot topic', with scholarly work comparing the US and EU 'proliferating rapidly' (Parsons 2003: 1). The present volume intends to contribute to this growing literature through a systematic comparison of the institutions, policies, and developmental trajectories of the European Union and the United States.

In so doing, it has three major objectives. First, and most simply, it aims to further our understanding of the two systems, and of the similarities and differences between them. Second, we intend to focus on the

dynamics that have driven developmental change in each system. Third, on the basis of this comparative evaluation, the contributors have attempted to draw broader conclusions about the functioning of multilevel political systems, their evolution over time, and the dynamics that drive their evolution.

1 The uses of comparison

The benefits for the social sciences of comparative research have been widely commented upon and are well understood. They are particularly marked in the cases of the EU and United States given the proclivity of scholars of each to emphasize the uniqueness or exceptionalism of their chosen area of specialization. In the case of the European Union, despite the comparative orientation of many of the early theorists of integration (see Caporaso in ECSA 1997), the marked tendency for many years has been for scholars to regard the EC/EU as a unique organization. Jim Caporaso summarized such claims neatly: 'It is possible to argue that the. . . . historical thrust of the EC is so novel that it truly represents a Hegelian moment, a novelty that, however prescient in terms of future developments, has no current analogies' (ECSA 1997: 1).

One consequence of such thinking was that, as late as 1990, ' ''regional integration'' was with few exceptions a discipline closed unto itself, uninfluenced and unable to influence rich theoretical developments in international and comparative politics' (Moravcsik in ECSA 1997: 5). It is only recently that scholars have come again to appreciate the potential benefits to be gained from comparison, particularly with the United States (see, e.g. Sbragia 1991; McKay 2001; Nicolaïdis and Howse 2001; Campbell Public Affairs Institute 2003; Ansell and Palma 2004).

While desirable, comparative research on two highly complex and in many ways dissimilar systems is, of course, problematic. Federal systems are always unique in many ways, in part because federal compromises derive from the unique historical dynamics that have driven their development. As Parsons (2003: 1–2) points out:

> . . . comparative US–EU scholarship often tries to do too much, and ends up with too little. Scholars with deep expertise on both sides of the Atlantic are few and far between. Even given such expertise, fitting the intricacies of two messy polities into one chapter is a tremendous challenge. Much work in comparative federalism thus seems forced to general characterizations that obscure the very complexities that make the subject interesting.

The comparative enterprise is not about the description of sameness, but about variance among similar variables that operate within each system. As Gary Marks has put it, 'the goal of comparison is to find intelligible patterns of commonality beneath apparent diversity' (ECSA 1997: 4)

Indeed, comparative analysis is an essential step in formulating, testing, or revising theoretical propositions. As one scholar notes, to 'be effective in developing theory, and in being able to make statements about structures larger than an individual or the small group, the social sciences must be comparative' (Peters 1998: 25). Nevertheless, taking account of the above injunction against attempting too much in order to end up with too little, we have not insisted that all contributors glean explicitly theoretical insights from their comparative undertaking. Rather, our intention has been to generate a systematic comparative exercise, the intention of which is to identify those elements of each system for which comparison will yield interesting broader insights, and thereby provide a useful basis for future comparative research efforts. Our emphasis, therefore, has been more on the development of a broad range of variables for comparison than on theoretical uniformity across chapters.

Of course, not all aspects of the two systems fit the criteria of dimensions that vary across both systems. Empirical support can be found for the contention either that they are remarkably similar (in the workings of their high courts), or vastly different (in their foreign policy capacities and activities). In some areas, the EU is far more similar to other federal systems—Canada, or Germany, or India—than it is to the United States. Indeed, it is striking to note the level of disagreement among scholars regarding the degree of approximation of the EU to the traditional notion of a federal state—even broadly conceived. Thus, while some argue that its competences do not differ markedly from those of such a state (McKay 2001: 10–11), others emphasize tremendous differences between the Union and domestic federal systems (Moravcsik 2001). Others still assert baldly that, if a 'state' is defined by having general competences, the EU is indeed a state (Ansell 2004: 229).

Therefore, we asked contributors to approach their task with an open mind. They were allowed considerable freedom in defining the nature and scope of their individual comparative undertakings. Thus while some chapters, such as that by Nicolaïdis, adopt an explicitly normative approach, the others are predominantly empirical in nature.

2 Federalism

Similarly, we have not tried to fit the various contributions within a narrow conceptual framework of federalism. Although all contributors were asked to compare the two systems as examples of different kinds of federalism, we have not attempted to develop some precise definition of the frontiers of the term. Indeed, definitional ambiguity has long been a feature of the debate, although, ironically, 'both advocates and opponents of a more federalist community tend to assume that such a definition, clear and incontrovertible, does exist' (Sbragia 1991: 258; see also McKay 2001: 8).

We broadly define federalism as systems in which centres of power and decision-making are dispersed among territorial units, but that leaves open the variations of relations among these units. Our own preference has been to focus on a variety of relations among political and territorial institutions in the spirit of Daniel Elazar:

> Using the federal principle does not necessarily mean establishing a federal system in the conventional sense of a modern federal state. The essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships among the participants in political life. Consequently, federalism is a phenomenon that provides many options for the organization of political authority and power; as long as the proper relations are created, a wide variety of political structures can be developed that are consistent with federal principles (Elazar 1987: 11–12).

In a similar vein, others have argued that the terms federalism and federation should be analytically separated: federalism being a genus of political organization encompassing a wide variety of types, ranging from federations and confederations to leagues and condominiums, while federation is one species of federalism, 'a compound polity combining constituent units and a general government, each possessing powers delegated to it by the people through a constitution, each empowered to deal directly with the citizens in the exercise of a significant portion of its legislative, administrative, and taxing powers, and each directly elected by its citizens' (Watts 1998: 120–1).

For understanding how different dynamics operate, we focus particularly on the distinction between federations and confederations, the latter implying a federal system in which:

The institutions of shared rule are dependent on the constituent [territorial] governments, being composed of delegates from the constituent governments and therefore having only an indirect electoral and fiscal base. By contrast with federations, in which each government operates directly on the citizens, in confederations the direct relationship lies between the shared institutions and the governments of the member states (Watts 1998: 121).

For us, this basic mapping exercise serves to clarify the nature of an EU system in which elements of federalism and confederalism are mingled, and suggests areas where different kinds of comparative research (whether based on most similar or most different designs) might be appropriate.

Alberta Sbragia engages this question by focusing on the question of dispersed power. Both the US and the EU disperse decision-making power so widely, she argues, that 'the term ''government'' is not used in the United States in the way that it is used in other advanced industrial democracies, while ''governance without government'' characterizes the EU.' In this context, the US and the EU tend toward '. . . the collective exercise of public authority rather than a ''government'', the power of which is based in the executive branch.' She also argues that in both systems territorial power and government are important for understanding the way that decisions are made and implemented. While the balance is different in each case, the concept of 'intergovernmental cooperation' remains important in the United States, although it is (arguably) dominant in the European Union.

Of course, there is always the possibility that the development of the Union resembles the developmental cycle of other federal systems; that is, the developmental dynamics tend to be interstate during the early period, and tend to cross state lines increasingly over time. In each case there has been a developmental process that moves generally toward national political interaction, but is certainly not linear in the short-run.

3 Politics over time: the developmental process

Thus, in addition to a cross-national comparison of the two systems, a second objective of the volume has been to identify and compare the dynamics that have driven their development over time. The point is not to try to draw simplistic parallels where none in fact exist—it has been argued that European integration has, after all, been 'the *reverse* of

the American process (Elazar 2001: 32–3, emphasis in original) in that its creation was enabled by removing what in other cases had represented the major incentive for the creation of federations—the quest for security. NATO, of course, prefigured not only the European Community, but also its predecessor, the European Coal and Steel Community (ECSC).

Moreover we are sensitive of the need to take account of the fact that, because the 'economic, social and political context within which federalization is currently taking place is so different from the context in which the older federations emerged, comparison is difficult' (Sbragia 1991: 265; see also Howse and Nicolaïdis 2001: 6). Such sensible cautions notwithstanding, our objective has been to identify comparable dynamics in each case, whether these stem from their similar multilevel structures (see Kelemen and Schain this volume), or the nature of their respective foundings (see Majone this volume).

A focus on development over time allows us better to address the dynamics at the heart of all multilevel political systems—those of the balance between territorial diversity and the advantages of centralization (McKay 2001: 14). The tension between the two plays itself out via the interplay of functional and territorial politics. Sidney Tarrow has argued that 'in mobilized political systems . . . there are two basic principles of representation: territorial representation based on the choice of officials through geographic areas, and functional representation based on professional, class and interest organization' (cited in Sbragia 1991: 280). In the United States, the decline of territorial politics occurred only in the second half of the twentieth century. The US system overwhelmingly favored the defense of territorial interests in its early years, with state legislatures remaining the focus of citizen attention, and with defense of the United States the responsibility only of state-controlled militias. Only in the twentieth century have American politics moved away from this fundamental pattern, as functional interests have crossed territorial frontiers (McKay 2001: ch. 3; Lowi this volume).

The governance system of the European Union, by comparison, is clearly at a different stage of development. Nevertheless, the dynamics that are driving both unity and diversity can be compared with those that have driven and continue to drive evolving federalism in the United States. These essays examine dynamics in two different ways: the dynamics of institutions and processes and the dynamics of output and public policies.

In a federal system, territorial claims can be both asserted and overridden. The role of the Council of the European Union can be compared with

that of the Senate in the pre–Civil War period of the United States. The Senate was the primary mediator of regional and territorial disputes in the developing federation, and increasingly, these regional conflicts were dominated by issues of slavery. However, other issues also divided one region from the other. The War of 1812 clearly separated the Northeast from the rest of the country, with other serious conflicts based on the differing approaches to economics as well as to the role of the central government.

The movement toward functional—as opposed to territorial—politics in the United States is usually understood in terms of the pressure of national interest groups attempting to deal with a similar problem-solving gap, and more generally, a movement toward a more unitary system (Sundquist 1969). On the other hand, the evolution of the 'new federalism' in the United States since the 1960s can also be understood as empowering *all* levels of territorial government. Samuel Beer's analysis is not dissimilar to much scholarship on the development of multilevel governance in the Europe:

> My thesis is that more important than any shifts of power or function between levels of government has been the emergence of new arenas of mutual influence among levels of government. Within the field of intergovernmental relations a new and powerful system of representation has arisen, as the federal government has made a vast new use of state and local governments, and these governments in turn have asserted a new direct influence on the federal government (Beer 1978: 9).

Of course, in the United States the emergence of the new federalism was closely related to the development of the modern presidency. As a number of authors in this volume emphasize, no functional equivalent to presidential leadership has emerged within the EU (Sbragia this volume). Indeed the lack of strong executive leadership is one key to understanding differences in dynamics in the two systems (Kreppel and Shapiro this volume). It is also a way of understanding differences in policy. The emergence of the strong presidency during the twentieth century in the United States also helps us to understand how important policies have changed over time (Schain this volume).

A key dynamic in the development of more functional politics in the European Union has been noted by Fritz Scharpf. What he calls 'the problem-solving gap' tends to exist' . . . in policy areas where the EU generates problems and constrains solutions at national levels, while effective solutions at the European level are blocked by political conflicts among member governments' (Scharpf 2004). Nevertheless, the gap between problems

created by union and the veto rights of the member-states can be a creative tension within which institutional change takes place.

Functional interests and power are much less represented in the EU, as compared with the United States, and are generally filtered through territorial representation, but there is some pressure for strengthening those institutions where they are less filtered through territorial considerations, such as the European Parliament (EP) and European Court of Justice (ECJ). Moreover, as in the United States, the most effective transnational (or national) interest groups are those that work best with their counterparts at the national (or state) level (Beer 1978).

In both the EU and the US, courts have emerged as important integrating institutions in the decision-making process. The ECJ tends to minimize the territorial dimension, and has transformed international law into European constitutional law. Judges decide by majority vote and free from national pressures (via the shield of collegiate decision-making), yet decisions are implemented by national courts. Most scholars agree, and Martin Shapiro's chapter makes clear that, like the US Supreme Court, the ECJ has established a key role for itself in the development of a European constitutional framework, even without a constitution. Perhaps more important, together with decisions of the European Court of Human Rights, the ECJ has empowered national judicial systems in shaping the contours of European federalism.

The relationship between functional and territorial politics is also potentially affected by the process of enlargement. Regional conflicts were exacerbated by expansion westward in the United States, and of course we might hypothesize that the same phenomenon will emerge in the EU—since enlargement always raises issues of representation and always alters the power (and the relative power) of the core states that have constituted the federation. After all, issues related to enlargement lie at the very core of many of the problems currently bedevilling the European Union. Perhaps this is not surprising because European enlargement has been motivated by 'peacekeeping objectives', at the expense of deeper unitary commitments (Scharpf 2004).

The enlargement of the European Union from 15 to 25—and the prospect of the promised, if highly contingent, expansion to include Turkey—has intensified a sense of crisis within the Union. Enlargement has made it more difficult to exercise territorial politics, by challenging democratic principles of equality. As in the United States in the early nineteenth century, enlargement has also altered the balance of intergovernmental

relations within EU institutions, effectively diluting the relative weights of largest countries at the same time that autonomy is constrained by common commitments.

In this context, the question of legitimacy is also important. In general, all modern democracies have been subject to similar trends that have strengthened executive independence and administrative decision-making. Levels of trust are generally higher at more local levels, even when respondents are aware of the powerful role of national institutions (Ambler 1975; Eurobarometre 2004: C-22, C97-109). Therefore, as decision-making flows to higher levels, trust declines. Thus, levels of trust ('satisfaction with the way democracy works') are on average 50 per cent higher at member state level than at the community level (60% vs. 40%).

Federal systems, however, have special problems of democratic legitimacy, in part because the dispersion of power and decision-making obfuscates political responsibility. As specialists in American politics have long recognized, the division between national and local decision-making has become muddied, as both have merged into shared decision-making power, which, in turn, has reduced clear lines of democratic responsibility (Lowi this volume). In both the EU and the United States, citizens and politicians alike tend to blame the unelected 'bureaucrats' for unpopular public policies.

The problems of 'democratic deficit' are really problems of legitimacy that cannot be ignored without paying the price of diminishing support. Lack of legitimacy brings into question the possibility of institutional development at EU level. Andrew Moravcsik has claimed that 'there is, in fact, little, if any, democratic deficit in Europe', arguing that democratically elected national governments dominate EU decision-making (Moravcsik 2004). However, what is driving most current discussions of the need for EU reform is the fact that European publics do not seem to believe that the democratic linkage through intergovernmental relations is real. On the other hand, even though they have considerable trust in European institutions (the EP and the ECJ in particular), European surveys indicate that European publics look to their own governments to protect those interests that are most important in the daily lives (Eurobarometre 2004: B59, B65).

Perhaps more importantly, even if in the past decision-making has taken place in areas where there has been relatively high support (or a permissive consensus) for integration in that policy sector, this is increasingly less true, as spillover effects resulting from successful integration push more

problems to the EU level, where institutional sclerosis makes decision-making more and more difficult. In other words, expectations are outrunning political capabilities.

4 Public policy

Finally, examination of specific public policies gives us an opportunity to look at many of these questions from a different perspective. Each of these 'case studies' examines policy as an outcome of a political process embedded in a federal framework. In each case, the dynamics of the federal process are different; and from each case we can gain greater understanding from the European–American comparison. We might hypothesize that the more centralized the policymaking process, the more effective the policy outcome (fewer veto points). However, this kind of analysis may be complicated by the increased difficulty of making policy at the center, and by decentralized enforcement, even in arenas of more centralized policymaking. This problem will be familiar to specialists on US politics, who are sensitive to the tensions between more centralized policymaking and more or less harmonized implementation because of decentralized administration.

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Thus, in this volume, we strive to go beyond an institutional comparison. We assume that Europe can be understood as a system, which in turn can be compared with other federal systems, broadly conceived. We examine the ways that institutions function, and how they influenced by the framework within which they operate. At the same time, we recognize that institutions develop over time, and respond to challenges that emerge from both their successes and failures. We then look at these dynamics from the perspective of specific public policies, and how they have changed along with institutional development. Finally, by asking our authors to place their analyses within a comparative framework, we hope to avoid stressing the exceptionalism of each case.

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Part I

Conceptual Issues, Principles, and Approaches

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2

The United States and the European Union: Comparing Two *Sui Generis* Systems

Alberta Sbragia

Can the study of both the EU and the United States be advanced by comparing the two? Does examination of one help us understand the other? The United States and the European Union display enough similarities and differences to accommodate both those who argue that comparison is futile and those who argue that it is necessary.

This chapter is based on the premise that, while both systems have typically been analyzed in a 'ghetto', comparing them, would advance the scholarship on both. While both are 'sui generis' in some ways, they look less like 'Fortress Europe' and 'Fortress America' when analyzed comparatively.

Such an approach does not ignore the problems confronting a rigorous comparison of the two systems. The United States is a full-fledged nation-state which has undergone over two centuries of development, suffered through a bloody Civil War which still marks the country's political geography, and is governed under the oldest written constitution in the world. Within the democratic world, it has the status of being a very old political system, and its citizens are known for their fierce sense of national identity.

The EU, by contrast, is not a nation-state, does not have an elected government, and is governed by treaties rather than a constitution. While it is an old regional institution in the world of regionalism, it is a young and still developing political system. Its democratic credentials are the subject of much debate, and it does not have much of either an

economic or cultural ('European') identity. Yet this regional organization exercises a great deal of public authority and has become the key actor in shaping the political and economic contours of the European continent.

The United States is studied with the tools traditionally used to analyze domestic politics in democratic systems while the EU, as Anand Menon argues in this volume, needs to be studied by scholars of international relations as well as comparative politics. The EU combines the management of 'unequal state power' with 'federal-like' processes leading to legislation as well as the judicial enforcement of such legislation. Precisely for that reason, many scholars of European integration and policymaking would argue that the EU is sui generis. It is not useful, they assume, to compare it to other systems.

By contrast, we argue that a comparison of the United States and the EU can be productive if we conceptualize them as two systems which both disperse power far more widely than do the political systems of other advanced industrial democracies. The United States and EU, while differing in many ways, are both outliers when compared with other advanced industrial democracies in that they deliberately shun the institutional concentration of political power. The dispersal of power is so striking in both systems and shapes policymaking to such a degree that these two systems would be situated in the same box of whatever matrix one cares to construct.

The dispersal of power, in fact, is a key contributor to the notion of American 'exceptionalism' (Lipset 1996). Among advanced industrial states, the United States is the only one with a separation of powers rather than a parliamentary system. Although federalism is an important feature of both the Canadian and German systems, for example, both have parliamentary rather than presidential systems. Thus, the institutional structure of the United States—and in particular the autonomous and roughly co-equal power of both the American Congress and the executive—has kept the United States apart from its democratic peers.

Parliamentary systems consolidate power in the executive (leading to what Canadians refer to as 'executive federalism') and thereby usually privilege the executive branch, including its public administration, vis-à-vis civil society. By contrast, both the United States and the EU deliberately avoid such consolidation of power. The executive is not privileged in either system in the way it typically is in parliamentary democracies. Section 2.1 of this chapter argues that such a similarity is key to thinking about the two systems.

However, the lack of consolidated executive power does not lead to the same pattern of winners and losers in the two systems. The elected leaders of the constituent units in the two systems fare very differently in the decision-making process. In the EU, they are privileged whereas in the United States they have become marginalized. Section 2.2 of this chapter explores how the dispersal of power in the two systems leads to different outcomes in the distribution of decision-making power and the implications for public policy.

2.1 Dispersal of power

Both the United States and the EU disperse power so widely that the term 'government' is not used in the United States in the way that it is used in other advanced industrial democracies while 'governance without government' characterizes the EU (Sbragia 2002). Both the United States and the EU are characterized by the collective exercise of public authority rather than by a 'government' which, as the executive, possess asymmetrical power vis-à-vis the legislature. In that sense, both the United States and the EU differ from the EU's member-states (as well as from other parliamentary systems such as the Canadian and the Australian).

In the United States, the executive—the presidency—must come to terms with an autonomous and coequal legislature. In a similar vein, executive functions in the EU are allocated to both the Commission and the Council of Ministers, the latter of which also exercises legislative power along with the EP. In both systems, a powerful independent court plays a critical role in the policy process.

To speak of 'government' in the United States is to speak of several institutions and, in a similar fashion, 'governance' in the EU is also grounded in several institutions.. In both systems, the exercise of public authority is done through a *collectivity* of institutions rather than being primarily concentrated in the executive. This collectivity is referred to as 'Washington' or 'Brussels' rather than 'the government' understood as the executive responsible to Parliament in a parliamentary system.

2.1.1 Dispersal of power in the United States

The United States disperses power through its separation of powers at the federal level, its constitutional protection of the role of state governments, and at the state level, the fragmentation of the executive coupled with the separation of power among the three branches of government. The three

branches of the American federal government—the Congress, the presidency, and the judicial branch headed by the US Supreme Court—all exercise significant autonomous power. However, the executive and the legislative branches must come to an agreement in order to adopt legislation, and the Supreme Court for its part must agree on its constitutionality for the legislation to remain in force.

Although it is possible for Congress to pass legislation in the face of a presidential veto or for a constitutional amendment to override a Supreme Court decision, it is a rare occurrence given the supermajorities required to do so. The system is therefore marked by an interdependence of the institutions—an interdependence which is particularly marked in the case of the presidency and the Congress.

The approval of the American legislative branch is not as easily forthcoming as it is in a parliamentary system. The president must always obtain approval from a completely autonomous body which routinely and constitutionally exercises the power to initiate and write legislation, decide the size of the federal budget as well as how to spend that budget, and independently accept internationally negotiated agreements. The US Congress constantly holds the key to lawmaking, public finance, and international treaties and trade agreements.

Dispersal is reinforced by the bicameralism of the US Congress. Each chamber represents markedly different constituencies, with the population of small states very disproportionately represented (Tsebelis and Money 1997; Lee and Oppenheimer 1999). The equality of representation for each state—regardless of population—in the Senate is one of the most striking ways in which power is dispersed even within the legislative branch. Given that only the Senate is involved in the appointment of Supreme Court Justices (as well as federal judges) and the ratification of treaties, the Senate is particularly important for foreign governments and the federal judiciary.

In sum, then, the process of decision-making at the federal level of government in the United States involves a great deal of interinstitutional politics and numerous actors. The adoption of legislation is nearly always a messy and usually protracted affair with policy consequences often related to the overrepresentation of smaller territorial units (Sbragia 2004).

STATE GOVERNMENTS

State governments, for their part, are constitutionally protected. Just as the composition of the Senate cannot be changed without overturning the

American Constitution, so the state governments cannot be abolished. States are free to structure decision-making power within their own state and in fact they have differed in their choices. For example, some states have very powerful governors (New York) and relatively weak legislatures while other states have weak governors and strong legislatures (while Texas has a weak governor and a powerful lieutenant governor).

State governments are even more unlike the European model of parliamentary government than is the US federal government. Public authority at the state level is more fragmented than is the federal government because executive functions are not all under the political direction of the directly elected governor.

State governments are composed of several independently elected office holders (including, in forty-three states, the Attorney General) who do not answer to the governor and may well belong to a different political party. In addition, numerous boards and commissions on which all the elected officials serve are important in many states—dispersing power even further within the states' executive branch.

The allocation of legislative responsibility (or competence in Eurospeak) in the United States is complex. In some areas, only state governments have jurisdiction whereas in others they and the federal government can both act; in the latter case, the federal government can preempt state action or can merely set a floor with state governments able to intervene more actively than the federal government. For example, the federal government sets the floor for the minimum wage, but each state can require a higher wage within its own boundaries.

The states have their own state constitutions, their own legal, judicial, and prison systems, tax codes, public bureaucracies, regulatory agencies, budgets constructed without any direct federal oversight, borrowing powers, police forces, and their own systems of subsidized public higher education (which educate the vast majority of American college students). While the federal government (understood as all three branches working together) has certainly increased its power over the states in the postwar period, it is striking how diverse the states still are in the level of social welfare provision and environmental protection, the acceptance and use of the death penalty, the use of statewide referenda, and the level of overall taxation as well as the type of taxation used.

The role of the states is in fact a complex one. The movement of significant decision-making authority to Washington has been accompanied by an increased role for state governments as they have intervened in areas previously off-limits to them. As the exercise of public authority has

expanded in the United States, both the federal government and state governments have increased their policy reach. They have also increased their capacity for policymaking and especially policy implementation as they have become more professionalized. Jon Teaford concludes that '. . . state expansion and federal expansion have proceeded simultaneously' (Teaford 2002: 10).

2.1.2 Dispersal of power in the EU

The unique nature of the EU's institutions and the dispersal of power among those institutions and *between* Brussels and national capitals are perhaps the EU's most striking features. Since the EU exercises governance without government, that dispersal is greater than it is in the United States for there is no elected executive—whether of the type found in presidential or in parliamentary systems. By contrast with the United States, there is no equivalent of the US presidency and in contrast with the EU's member-states, there is no elected executive responsible to the EP. The fact that the EU is not a state but does engage in a great deal of governance has been made possible by the existence of public authority which is dispersed throughout what Helen Wallace has termed a 'part formed political system' (Wallace 1989: 204).

The European Commission, which exercises both executive and regulatory functions, is typically referred to as the EU's 'executive'. However, it is appointed by national governments and is not elected. While it is a powerful agenda-setter in many policy areas, its reach does not include certain aspects of justice and home affairs or the area of foreign policy (with the exception of trade policy). Furthermore, the EP and the Council of Ministers amend its proposals in a way which is far more typical of the American system than it is of European national parliamentary systems. The Commission therefore is not functionally equivalent to the US presidency or to the office of the prime minister in parliamentary systems.

National ministers are key decision-makers in all EU policy sectors, but in many of those sectors the EP is now a co-decision-maker. The ECJ is a powerful judicial body with the capacity of overruling national judiciaries, member-state governments, and the EU's institutions while the independent European Central Bank (ECB) is in charge of monetary policy for eurozone members.

Institutional balance and the segmentation of policy sectors, some of which belong wholly under the EU's jurisdiction, others which belong partially under its legal jurisdiction, and still others which do not belong

at all to it are all features of the Union. Member-states have given the EU competence to act and legislate in some policy areas but not others; those areas cannot be expanded without explicit agreement on the part of national governments. Typically, a treaty revision would be required. Thus, the kind of internal political transformation brought about by the New Deal's extension of federal power in the United States—in which neither governors nor state legislatures had a say—would not be possible. While that extension did not require a constitutional amendment, such an increase in the jurisdiction of the EU would require a revision (agreed to by unanimity) of the treaty in place.

While the member-states are constitutive of the EU, the EU is constitutive of the member-states in a partial rather than comprehensive fashion. For example, each member-state is represented in the UN while the EU is not. In a federation the member-states and the federal level are mutually constitutive of each other, and the fact that the EU exercises so much power while not being a federation is confusing to those who associate the exercise of power with states rather than regional organizations.

But even within those policy areas which do belong in substantial ways to the EU, power is dispersed. Whether one thinks of the completely independent ECB, the ECJ, or the complex relationships between the Commission, the Parliament, and the Council of Ministers, power is divided among institutions as well as being organized in unusual ways.

The institutions themselves are territorially dispersed with the EP having three locations. It meets in Strasbourg as well as Brussels and has some of its administrative offices in Luxembourg, while the ECB is in Frankfurt. The ECJ and the Court of First Instance (CFI) as well as the European Investment Bank are in Luxembourg, while the various EU agencies are spread throughout the EU with the Food Safety Agency being in Parma, Italy, the Medicinal Evaluation Agency in London and the European Environment Agency in Copenhagen. The Council of Ministers, for its part, meets in Luxembourg in April, June, and December and in Brussels the rest of the time.

Given the geographic spread of both EU decision-making and regulatory agencies, Brussels is the 'center' of the EU but it is far from being a capital in the way that Paris or London or Rome is. Certain aspects of governance within the EU can be understood only within the framework of 'Brussels plus.' In fact, the spatial dispersion of relevant institutions—and the 'traveling' nature of both the EP and the Council of Ministers—could be seen as a symbol of the dispersal of power within the EU system.

Yet just as in the United States, the EU's institutions disperse power while simultaneously concentrating it at the EU level. That is, power is dispersed horizontally while it is simultaneously concentrated vertically. Even though the EU's institutions may be in different cities, they collectively concentrate power at the EU level.

2.2 Dispersal of Power: US and European Views

If one uses the template of national political systems in Europe to approach the American political system, one finds a dispersal of power which is surprising—but quite familiar to those sensitive to the dispersal found in the EU. Although the EU collectively is less powerful than the US federal government, both of them find it difficult to exercise power within their areas of competence and jurisdiction without a great deal of negotiation, consensus-seeking, and periods of deadlock. In fact, scholars of both systems find it necessary to analyze and explain how policymaking even manages to occur given the dispersal of power (Kingdon 1995; Heritier 1999).

2.2.1 EU politics

Nonetheless, scholars view such dispersal differently in the two systems. In the case of the EU, many scholars, especially those trained in the subfield of comparative politics, focus on the federal-like features of the EU system, often analyzing it in conjunction with the United States (Sbragia 1992; Nicolaidis and Howse 2001; Kelemen 2004; Fabbrini 2005). The centralization of power in Brussels is striking if one compares the organizational capacity embedded in the EU's institutions with those of a traditional secretariat in an international organization.

The existence of powerful supranational institutions such as the Commission (important in agenda setting and critical for the Union's administrative capacity), the ECJ (which gives the Union a powerful judicial system), and the EP (which now colegislates in many important policy areas) focuses attention on the centralization of power and authority which does exist in the system. The role of supranationality in balancing the power of the Council of Ministers—the collective representation of national interests—symbolizes the move toward 'Europe' on the part of the member-states.

As a highly institutionalized form of regionalism, the EU is remarkable, and scholars tend to emphasize the instititutionalization rather than the

regionalism which characterizes the EU. The lack of power in traditional international or regional organizations other than the EU is such that its concentration, however bounded, in the EU leads scholars to focus on that concentration. In fact, Vivien Schmidt has gone so far as to characterize the EU as a 'regional state.' (Schmidt 2004).

This view, however, tends to downplay or in fact ignore all those areas in which the EU is not powerful. The EU lacks power in many important areas—it is characterized by the exercise of (and the dispersal of) power only in selected areas.

Significantly, deficits exist even in the economic area, precisely the area in which the Union is the strongest. In spite of having created an extremely important single market, it does not yet have an economic identity: no product carries a 'Made in the EU' mark; an EU patent does not yet exist, and the Union is not even considering an EU postage stamp. It does not speak with a single voice in the international economic arena anywhere outside trade negotiations. For example, it has created a single currency but not the capacity to represent the interests of that currency in international fora (McNamara and Meunier 2002).

Leaving aside its relative impotence in the field of security and defense policy, it is especially weak in areas which involve either identity, coercive power, or international weight. Furthermore, it does not directly control its borders, exercises no coercive capacity outside that represented by judicial authority and legitimacy, and the emotional attachment of its citizens to the Union is tenuous at best.

The fact that the EU is a regional organization rather than a state accounts for these areas of EU weakness. The ability to create and instill identity, exercise coercion, and claim international recognition are the three critical features of a state. It is precisely those areas which a regional organization, no matter how well institutionalized, would expect to find problematic.

Scholars who study the EU nonetheless focus on those areas in which the EU is powerful because the existence of such power is in some sense counterintuitive. A regional organization is not expected to have the kind of power wielded by the EU institutions. After all, other regional organizations do not incorporate a supranational element. Thus, the existence of decision-making power at the EU level commands attention.

Yet while the EU is powerful as a *collectivity,* the exercise of power within its organizational and institutional structure is very dispersed. While the EU as an institutional whole wields power, no single decision-making institution can act alone. There is no equivalent to the American Congress

which at least theoretically can propose legislation and then adopt it in spite of presidential opposition. The exercise of collective public authority in the EU coexists with the dispersal of power within the collectivity of EU institutions which are interdependent and can wield power only when acting together.

The dispersal of power however does have costs. Given the different modes of governance across policy areas, the role of policy networks, and the existence of so-called comitology, the entanglement of policymaking power is such that it is nearly impossible to hold anyone accountable in the system. The mechanisms which have been developed to permit legislative action make the system even more complex than it is and thereby make it more difficult for anyone to feel responsible for legislation—as well as implementing regulations—which may have undesired or unanticipated impacts.

Furthermore, the segmentation of policymaking does not easily lead to a consideration of trade-offs across policy areas. The fact that sectoral ministers rather than a Cabinet legislate in any specific area leads to the insulation of one policy area from another (Hayes-Renshaw and Wallace 1997). For example, finance ministers are not at the table when environment ministers adopt legislation, making it difficult to introduce budgetary considerations into the formulation of environmental policy.

2.2.2 American politics

By contrast, scholars who study the United States tend not to focus on the *collective* exercise of public authority in Washington. Scholars of US politics tend to focus on the workings of a single institution rather than the system as a whole. For example, scholars study the Presidency, while others study Congress (often studying either the House of Representatives or the Senate), and still others the Supreme Court, with scholars of state politics forming a completely separate scholarly community. The US system is characterized by a far greater dispersal of power than are traditional parliamentary systems (including those of the EU's member-states) so that students of American politics are struck by that dispersal and focus on the individual institutions which act to disperse public authority.

The dispersal of public authority in the American system of government and the fact that sovereignty is located in the people through the Constitution rather than in any institutional arrangement per se has shaped the way scholars of American politics have thought about their federal system.

In brief, scholars of American politics hesitate to use the term 'state' with its connotations of concentrated power in the executive and the public administration.

It would be difficult, to paraphrase Kenneth Dyson, to think about the 'state tradition' in American politics (Dyson 1980). If one were to use that term, it is likely that potential readers would assume the role of state governments (a la Wisconsin or Colorado) rather than the state tradition as understood by Europeans was being discussed. Thus, scholars of American politics hesitate to discuss the concentration of power which does exist in the American system using the vocabulary of their scholarly colleagues who focus on European national systems.

This ambivalence about the American 'state' exists in spite of the very considerable power of the federal level of government. Not only can the US Supreme Court strike down any state statute, but the federal government also wields significant coercive power. The Border Patrol, the Department of Homeland Security, the Customs Service, and the Federal Bureau of Investigation (FBI) all wield a great deal of power in matters of internal security. Furthermore, the federal budget is huge, and Washington owns roughly 20 percent of the American land mass in the form of public lands, the American military is the most important in the world, and business is constantly complaining of overregulation.

As Dyson and Nettl have argued, the notion of the state has been developed in non-English speaking countries. Both Britain and the United States share 'a ''stateless'' quality' (Dyson 1980: 4–5; Nettl 1968). Both history and the tradition of social science inquiry have encouraged a reluctance to think about the 'state' rather than about 'government' or 'law' Whereas the state is central to the political discourse in France, it is absent in the United States.

The underpinnings of scholars' hesitancy to use the concept of the state is well expressed by Aaron Friedberg:

> In the American context, the term 'state building' refers to efforts to increase the size and strength of the executive branch. . . . Building a stronger state involves concentrating power: in the executive/administrative arm of government in relation to its other branches and in government as a whole in relation to its citizens. The American Constitution was meant to make such concentrations of power difficult, if not impossible, to attain. In this sense, at the same time as it established a new state, the Constitution also embodied a profoundly anti-statist doctrine. As its authors intended, the initial design of America's governmental institutions has served as an enduring source of constraint on state-building (Friedberg 2000: 10, 15).

Bartholomew Sparrow also points out the difficulty of studying the American state:

> While American political culture has been hostile to the concept of the state . . . social scientists . . . have increasingly used the notion of the state to refer to American government and political authority. This leads to a certain ambivalence on my part: on the one hand, I am aware of the difficulty of using the state as a handle for the intricate and frequently disconnected policies and administrative bodies making up the US government; on the other hand, the use of the state brings a focus and level of analysis to the study of government that goes beyond that typically afforded by separate studies of the presidency, Congress, public administration, political parties, interest groups, or the courts. This project is thus an experiment: only provisionally do I offer a definition of the state (Sparrow 1996: Preface xii–xiv).

Certainly, the EU can be placed in the group which does not exhibit a 'state-like' quality. Not only is it not a state but even in those policy areas in which it wields very considerable power such power is not exercised in a 'state like' fashion. Above all, it does not have the administrative capacity to impose its will in the way that a traditional state might well be able to do. In that sense, it is similar to the United States. Given that it does not have even the state apparatus and the administrative capacity which the United States undoubtedly possesses, the EUs dispersal of power is even greater than it is in the United States (Kelemen 2004: 164).

In many ways, both the United States and the EU can be thought of as exercising what Christian Stoffaes terms 'law without state'(ISUPE 2004: 138). In the United States, the lack of 'stateness' is largely due to the dispersal of power both horizontally and vertically throughout the entire system of public authority. The EU, for its part, is not a state but the dispersal of power both horizontally and vertically reinforces that fundamental lack of 'stateness'.

2.2.3 Dispersion of power: winners and losers

All actors do not benefit equally or in the same way from the dispersal of power. Dispersal does not necessarily lead to equality of access or influence: it can be asymmetrically distributed. Representatives of constituent units have had very different experiences in the United States and EU. In the latter, members of national governments (understood as the executive branch) have managed to retain key decision-making power both at the EU level and in their own countries. By contrast, state officials in the United State have not.

Governors for example play a very different decision-making role in the American federal system than national leaders play within the EU. While state leaders have become marginalized in the federal decision-making arena, national leaders play pivotal roles in the EU whether through the Council of Ministers or the European Council.

In the United States, state leaders used to be involved in both federal and state decision-making as well as the implementation of federal policy. Their present situation is very different. States have retained very significant power in the process of policy implementation, but their role in decision-making has become quite complex.

At the federal level, state leaders have become marginalized. They are lobbyists—and often not very effective ones—rather than decision-making actors who have a seat at the table and whose interests must be taken into account. As lobbyists, they are competing with other lobbyists rather than exercising decision-making authority.

At the state level, they have lost power due to total federal preemption in areas which once were subject primarily to state control. On the other hand, they have exercised new powers due to the pressures exercised by partial federal preemption in other areas. Partial federal preemption required them to exercise new regulatory powers in order that federal programmatic objectives could be carried out (Zimmerman 1991: 6).

In the EU, by contrast, national leaders have retained the power of implementation while also ensuring that their decision-making role is protected. When the EU has expanded its jurisdiction, national representatives have been either central to the process (as in IGCs) or have had a major impact due to their role in the legislative process. National officials have profited from the dispersed system in Europe while state officials have lost in the United States.

The initial structure of dispersed power was not set in stone in either system, but changes in the EU had different implications for national leaders than changes in the United States had for state officials. Winners and losers have appeared, and a comparison between the two systems highlights just how much the losers have lost.

Three factors help explain why leaders of constituent units have fared so differently: (*a*) changes in the initial institutional design (*b*) the role of public finance (*c*) the role of political parties.

The initial institutional design in both systems gave representatives of the constituent units a key role. In the EU, the Treaty of Rome created the Council of Ministers, composed of national ministers, which was the only decision-making body with the power to adopt legislation. In the United

States, the members of the United States Senate were selected by state legislatures. Tellingly, the EU's representatives came from the executive branch while those in the United States came from the legislative.

In the United States, the mode of selection was changed by the Seventeenth Amendment which, since 1913, has transformed the Senate into a body directly elected by state electorates. Senators therefore became federal officials tied to statewide electoral constituencies rather than representatives tied to state legislatures. They do not represent the institutional self-interest of the state's authorities.

The contrast with the evolution of the EU's institutions is sharp. The EU's Council of Ministers gradually brought together ministers from an increasing array of policy areas as the policy jurisdiction of the EU expanded. Furthermore, the Council of Ministers was complemented in the 1970s by the European Council which brought Heads of State and government into the EU process. Although the European Council does not pass legislation, it has evolved into the major strategic actor in the EU system.

Thus, while senators became decoupled from a state institution, the national ministerial corps became evermore important at the EU level. The EU retained indirect representation whereas the United States abandoned it in favor of direct representation.

The movement from indirect to direct representation is of tremendous importance to the representation of the institutional self-interest of constituent units. Indirect representation such as that embodied in the Council of Ministers, the European Council, and the pre-1913 Senate allows subfederal public authorities to maintain a direct link with decision-making taking place at the 'federal' level. Once direct representation is introduced, however, those same public authorities can be marginalized in favor of electoral constituencies. Whereas the notion of 'democracy' privileges the representation of voters, such direct representation can transform federalism to the detriment of the governments of constituent units.

Second, the federal government in the United States began to use both federal monies and partial preemption to encourage states to carry out certain activities. Although the burden on states of unfunded mandates increased, the federal government also used federal monies to entice states to carry out activities desired by Washington. The use of conditional grants in aid became striking in the first half of the 1960s (Zimmerman 1991: 38). States (and local government) were required to carry out certain actions in order to receive federal funds. In spite of various attempts to

lessen the conditionality of federal funds given to state governments, the power of the federal government to shape state actions has not been significantly reduced. In fact, under the Bush administration, the 2001 No Child Left Behind Act significantly increased the federal role in the area of elementary and secondary education, an area which had been largely under state and local control. That Act, in fact, perhaps best symbolizes the intrusive nature of the federal government in many policy areas which once were primarily under state jurisdiction.

Furthermore, after 1965 partial federal preemption became evermore important. In many areas, federal legislation both empowered states to act in areas where they had been absent but also structured the policy area in such a way that their discretion was limited within boundaries set by the federal government. Such preemption was accepted by the judiciary. Joseph Zimmerman concludes that partial preemption allowed states to 'retain primacy in terms of regulatory responsibilities, provided the states establish standards at least as stringent as national standards and enforce the state standards' (Zimmerman 1991: 106). In other words, the federal government set the 'floor' below which state regulatory activity could not go.

In the EU, the tiny EU budget effectively prohibits using grants in aid to encourage or force governments to act as desired by Brussels. The EU budget has been roughly €100 billion a year and most of those funds are designated for agricultural subsides and regional development. The EU exercises power far more through legislation than through money for the simple reason that it has very little money to spend.

In fact, the power to legislate has been the EU's key source of strength in creating a powerful regional organization. Such legislation has allowed the EU to engage in the rough equivalent of federal preemption—partial as well as total preemption. Legislation having to do with creating the single market has essentially involved the preemption of national legislation while social regulation—including certain types of environmental legislation not linked to the single market—involves setting a regulatory floor. The combination of regulation related to the single market as well as social regulation has been so pronounced that Giandomenico Majone has termed the EU a 'regulatory state' (Majone 1994).

The lack of funding accompanying such preemption, however, distinguishes the EU from the United States. Preemption in the EU does not bring with it the kinds of 'carrots' which the US federal government often offered to state and local governments. In the EU, national leaders, who control implementation even more firmly than do state leaders in the

United States, comply with EU legislation because they have been the ones to adopt it. In that sense, the decision-makers are also the implementers.

The third area which affected the role of state leaders in the federal arena was the restructuring of political parties. The relatively decentralized nature of American party organization helped mitigate the lack of indirect representation and maintained the power of state and local officials. The party in a sense served as the channel by which state officials were able to make themselves heard.

American parties however began to rely less and less on state and local-elected officials. Candidates raised their own funds and ran their own campaigns as primaries became increasingly important mechanisms for selecting candidates. Furthermore, in the post-1968 period 'far more authoritative national party organs emerged' (Walker 2000: 15). With the demise of the decentralized party organization, the nationalization of the American policy process moved forward very significantly.

In the EU, party is less important than the territorial representation of interest which characterizes the Council of Ministers and the European Council. National leaders, given their central role in EU decision-making, do not need to rely on party links to exercise influence. They sit 'at the table' by virtue of their belonging to a national government, not because of their roles in their national parties. The EU's institutional design has insulated national leaders from the kind of marginalization which state and local officials in the United States have suffered. National leaders essentially do not need to worry that the lack of effective transnational political parties will diminish their power in Brussels.

The role of national leaders in the EU and the role of state leaders in the United States is thus remarkably different. The former are key decision-makers. Even in those areas in which the EP is a coequal legislator, the Council of Ministers is a veto player. In those areas in which the Parliament is not important (certain aspects of JHA, trade policy, agriculture, regional policy, budget, and foreign policy) they are the only players.

In the United States, by contrast, state and local leaders have experienced a precipitous drop in their influence and political clout. As David Walker concludes, they 'are not accorded the deference—before congressional committees and national administrative bodies or in their respective national conventions—that was automatically theirs, at least through the midsixties' (Walker 2000: 15).

Although the Gingrich Revolution—which brought the House of Representatives under Republican control in the 1994 congressional elections—promised to decentralize and give more power to governors,

the result was a disappointing one as seen from state capitals. Republican governors hoped—and to some extent assumed—that they would have access to national policymaking. However, 'while the states got some items they wanted, they lost more than they won, and intrusive conditions attached to grant programs experienced no real declines. State spokespersons largely encountered closed doors with the 105th Congress' (Walker 2000: 15).

2.3 Conclusion: asymmetries of power

Although the US federal system has become far more centralized in the post-World War II period so that federal legislation has trumped state legislation in many areas, the actual implementation of policies adopted in Washington is largely the responsibility of state capitals. It is the states which execute much of the legislation adopted by Washington. A great deal of the literature on American federalism, therefore, is concerned with the kind of intergovernmental relations which can be conceptualized as 'intergovernmental management' (Agronoff 1986; Wright 1990; Cho and Wright 2004). Management rather than politics is often the defining term in American federalism, whereas in the EU politics rather than management defines the relationship between the EU and its constituent member-states. That such politics is best defined as territorial politics rather than partisan politics does not mitigate its essentially political character.

In general, the term 'coercive cooperation' (Elazar 1990: 13) may be used to define intergovernmental cooperation in the United States. The states cooperate with federal laws and programs, but the federal government is viewed as being able to 'coerce' (often by using funding) states as opposed to acting as their 'partner'. Power is dispersed vertically but such power at the state level involves implementation rather than state involvement in federal decision-making or the ability of state governments to legislate in important policy arenas within their own territorial boundary.

Member-state governments therefore are more powerful in the EU than in the United States, for they are represented as governments in two of the key decision-making institutions in Brussels (the Council of Ministers and the European Council) and they also are able to act relatively autonomously in many important policy areas. It is national political leaders who must deal with reforming labor markets (and pay the political costs), for example, even though they are put under pressure to do so from the budgetary constraints that accompanied the introduction of

the euro as well as from the competitive pressures emanating from new accession states with their lower wage and corporate tax rates on the other.

The type of indirect representation which characterizes the EU is a key reason for such a difference between the two systems. However such indirect representation does impose costs. Indirect representation privileges noncentral governments at the expense of electorates. As the 'no' votes in May 2005 in France and the Netherlands over the EU Constitution demonstrated, the participation of governments in 'federal' decision-making does not ensure the approval of electorates.

The trade-off between indirect and direct representation is clear if one compares the United States and the EU. In the EU, member governments are entrenched, and they are key decision-makers in Brussels. By contrast, state capitals in the United States are marginalized in Washington—they are mere lobbyists without any constitutionally based privileges. While both systems disperse power, the actors which benefit from that same dispersal are very different. The question however must be asked—in a triangle which includes federal/EU officials, state/national officials, and electorates, how do electorates view a system in which indirect representation trumps direct representation?

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3

The Limits of Comparative Politics: International Relations in the European Union[1]

Anand Menon

3.1 Introduction

As political scientists have become aware of the potential gains involved in comparing the EU with other political systems, more of them have come to use approaches employed to study domestic politics to examine its workings. Recent years have witnessed a particularly marked increase in the application of approaches utilized in the study of American politics to the Union. In part at least, this is explicable at an empirical level, a function both of the many similarities between the two systems, and (as is argued) largely misplaced assumptions concerning the similarity of their developmental trajectories. Because the EU does many things national political systems do, some observers have assumed the former has adopted the institutions of the latter and functions as they do. They have, in other words, extrapolated from function to form and functioning.

The intellectual self-confidence of those who have applied insights derived from the study of national politics to the EU is reflected in their growing ambitions, exemplified by claims not only that approaches derived from the study of domestic politics can help explore the nature and functioning of the EU, but also that they can do so in an intellectually more rigorous, useful, and effective manner than those formulated by scholars within the discipline of international relations.

The current chapter does not dispute that approaches from comparative government can bring added value to the study of the EU. Nor is its

intention to suggest that comparisons between the EU and nation-states perform no useful function—quite the contrary, the expertise of those versed in the politics of nation-states has contributed immeasurably to our understanding of often highly similar processes in the Union. Rather, it argues that, in order to gain a full understanding of the EU, observers must be conscious of the specific—international—nature of the politics that occurs within it. The EU contains elements that are irreducibly international, which makes the character of interactions within it fundamentally different from those within national political systems, even federal ones. Largely, though not exclusively, because of the unique nature of states as political actors, politics *between* them differs in numerous fundamental ways from the politics found *within* them. Comparative government approaches are often based on insights about the nature of politics that are not easily transposable from the domestic to the international realm. Their analyses, rooted in assumptions about the texture and nature of national politics, are simply unable to explain the development and functioning of the Union.

The chapter is divided into four sections. Section 3.2 discusses how and why it is that so many observers have been drawn to apply insights from domestic politics to the study of the EU and illustrates how certain of them have claimed that comparative government can be used to improve, or even supplant, International Relations (IR) as the discipline most able to explain the development and functioning of the Union. Section 3.3 examines three aspects of interstate politics in the EU that tend to undermine such claims. Section 3.4 briefly underlines the importance of these in understanding the Union's nature and development over time.

3.2 The Lure of Comparative Politics

Until the early 1990s, the study of European integration languished for the most part in an intellectual ghetto, divorced from examinations of other political systems, domestic or international. Over the last decade and a half, however, scholars have come to recognize the debilitating effects of the 'n = 1 problem' (ECSA 1997) and have taken steps to address it. In particular, students of comparative government have increasingly taken both to using the methods of comparative politics to analyse the Union (Hix 1994, 1999; Jachtenfuchs 2001; Sedelmeier 2001) and, more specifically, because of its multitiered nature, to comparing the EU directly with federal political systems in general, and with the United States in

particular (McKay 2001; Nicolaïdis and Howse 2001; Kelemen 2004). The rationale for such work is not hard to grasp. As Weiler puts it (2001: 56),'... the constitutional discipline which Europe demands of its constitutional actors—the Union itself, the member-states and State organs, European citizens and others—is in most respects indistinguishable from that which you would find in advanced federal states'.

Initially, it was European scholars who were the most enthusiastic proponents of a comparative politics approach to the EU (see notably Hix 1994), while Americans tended to deploy the tools of international relations (IR) (Jupille and Caporaso 1999: 430; Jachtenfuchs 2001: 256; Sedelmeier 2001). One possible explanation for this divergence is the fact that Europeans are directly exposed to the effects of European integration. Because, from a European perspective, the Union appears to do what states do, and with similar effects, it makes sense to compare the Union with a 'normal' polity (Jachtenfuchs 2001: 256).

More fundamentally, the comparative bent stems from a growing realization that students of domestic and international politics are increasingly confronted with converging empirical and intellectual trends, including globalization, the salience of domestic–international linkages and the role of institutions both domestic and international (Jupille et al. 2003: 10). As 'domestic society has elements of anarchy (contract enforcement and cheating are problematic)... the international system has substantial elements of governance and rule' (Jupille and Caporaso 1999: 438), or, as Milner (1998: 760) puts it, 'within states anarchy threatens, whereas the institutionalization of international politics beckons'. As the apparent overlap of concerns has grown, so too has the tendency to apply theoretical approaches from domestic politics to IR.

The application to the EU of theories and approaches formulated to explore and explain domestic politics has yielded numerous insights. For one thing, political scientists have helped compensate for the numerous 'blind spots' inherent in a discipline of IR often guilty of excessive introspection and a fascination bordering on obsession with the question of whether institutions matter, rather than how, and in what ways, they do (Martin and Simmons 1998: 742–3). Moreover, specialists on domestic politics have improved our understanding of 'normal' legislative politics in the EU by drawing on insights from the study of similar patterns and processes within the member-states. Examples include work on the role of interest groups (Streeck and Schmitter 1991; Mazey and Richardson 1993; Kohler-Koch 1994), public opinion (Eichenberg and Dalton 1993),

political parties (Attina 1990), analyses of the striking similarity of the judicial system of the Union with that of many federal states (Kelemen this volume; Shapiro this volume), or of the role of veto points in shaping policy outcomes (Scharpf 1988). The purpose here, then, is not to deny that comparative politics can make and has made a real contribution to our understanding of, amongst other things, legislation, implementation, and adjudication within the Union.

Increasingly, however, scholars have gone beyond merely exploring the merits of comparative government to dismissing the contribution IR approaches can make. At their least pernicious, such claims reflect a view that comparative politics in and of itself provides the tools needed to study 'policy' even within an international organization such as the EU, while IR approaches can be relegated to the study of institution building (Hix 1994; Jachtenfuchs 2001). More broadly, some have argued that IR as a distinct subfield is losing its intellectual relevance. Milner (1998: 759) has claimed that the separation of IR from other fields in political science has 'limited the field's ability to understand international relations even during the cold war period, let alone since its passage'. The remedy, it would appear, is for IR to turn to comparative politics for solutions in the form of a 'steady infiltration of analytical concerns from comparative politics into international relations . . . a brisk import trade where the common knowledge of one field comes to be regarded as path breaking research in another' (Jacobsen 1996: 95). Mark Pollack, in a survey of IR approaches to integration, comments that the importation of the new institutionalism into EU studies from the study of American politics has succeeded in 'enriching IR theory and reducing its traditional parochialism and exceptionalism' (2001: 238).

Such assertions raise several concerns. First, they seem based on a cursory and superficial understanding of the IR literature (Rosamund 2000: 157–86). Moreover, in abrogating, as many students of domestic politics do, the term 'comparativist', they overlook the comparative work undertaken not only by the early neofunctionalists, but also by more recent IR theorists (Mattli 1999—though one would be justified in bemoaning the relative dearth of such comparative endeavors in the subfield).

More substantively, even if one accepts the premise that the concerns of the two disciplines are converging, it does not follow that the consequent learning process should be unidirectional. In assessing two subfields that have tended to reify the distinctions between themselves, the question of which is exceptional, or parochial, is very much one of perspective. Students of domestic politics have recently come to realize the potential

advantages inherent in the use of the kinds of noncooperative game theory frequently deployed to study international politics (Martin and Simmons 1998: 739; Milner 1998). Moreover, if IR scholars have been guilty of, amongst other things, oversimplifying the state, the problem with much work on comparative politics is its failure to acknowledge a role for international factors in its investigations of domestic politics (Hurrell and Menon 2003). One illustration of this has been the paucity of attention paid by researchers on comparative politics to policy sectors highly sensitive to international conditions such as foreign and defense policy. In an era when globalization and interdependence are the themes of the moment, it seems somewhat bizarre to downgrade the relevance of the international for studies of the domestic.

3.3 International Relations in the European Union

Three aspects of international, as opposed to domestic politics, can be identified which serve both fundamentally to distinguish the international politics that occurs within the EU from those prevalent within stable, developed democracies and to call into question the ability of comparative government approaches alone to explain these.

3.3.1 States and international politics

The nature of international politics and of the predominant actors within it differentiates the relationship between member-state principals and international institutions from those pertaining within domestic politics. The states that make up the EU are motivated by factors specific to actors in the international realm. The centrality of considerations of power and security in international politics means that institutions are often viewed as tools to manage interstate relationships, themselves perceived through the prism of geopolitics. Traditional comparative politics explanations of actor strategies in policymaking thus 'cannot deal with a central motivation of much EU policymaking—namely the management of unequal state power and the desire to tie certain states within a structure from which they have the option to defect' (Hurrell and Menon 1996: 392). The genesis of two of the major EU initiatives of recent times—the euro and enlargement, cannot be understood except as a function of such power-related considerations (Hurrell and Menon 2003). Certainly, states differ widely and do not pursue the same interests or preferences even in

the sphere of geopolitics. European integration, after all, has been seen, depending on one's perspective, as a buffer against the Soviet Union, Germany, and the United States. Yet denying homogeneity is not to deny the importance of geopolitical concerns.

In terms of the relationships with those institutions states choose to create, the international context is again somewhat different from its domestic counterpart. Because they are sovereign political entities with significant resources, states do not find themselves in the position of mutual dependence that characterizes many if not most principal–agent relationships in domestic political settings. Congressional committees and executive agencies in the United States are, to a large extent mutually dependent: they need to work together in order to achieve their objectives. In contrast, dependence in the EU system is unidirectional. While the EU institutions rely on agreement between member-states in order to function effectively, EU membership represents only one of a number of relationships and institutional entanglements in which the member-states are involved (Hurrell and Menon 1994). Consequently, and unlike domestic political actors, they posses the ability to make choices as to the most appropriate institutional venue for their initiatives.

Member-states, moreover, enjoy the ability to act independently of institutional settings: they can have a currency without relying on the ECB, and a visa policy without joining Schengen (see Moravcsik 2004: 346). They can also turn to alternative international institutions in policy sectors where European integration does not seem appropriate—hence the continued reliance of European states on NATO for collective defense. The nonexclusivity of member-states' relationships with the Union has had important implications for the role of territory in shaping EU politics. Bartolini (2004) explains how the gradual replacement of territorial, in favor of functional, representation *within* European states was explicable in terms of the development of national boundaries:

> The more closed and reinforcing the various types of boundaries, the more likely that territorial issues will be in the long run incorporated within broader functional cross local alliances. The more open the territorial boundaries and the more loosely bounded the polity's territories, the more likely territorial alternatives will differentiate and become the focus of political conflict.
>
> (Bartolini 2004)

The control exercised by states over their borders prohibited exit strategies on the part of domestic actors. In contrast, member-states confront few EU-imposed boundaries on their activities and can rely on national,

European, or international fora to achieve their objectives. Partly as a consequence, the Union enjoys only weak territoriality (Ansell 2004), particularly in comparison with its constituent units, while politics within it remains dominated by territorial considerations. As Sbragia puts it (1991*a*: 274):

> The legacy of the European sovereign state is that national boundaries are extraordinarily important shapers of most aspects of life. The territorial claims that national governments represent, therefore, are exceedingly strong. . . . National identity, political party organisations, party systems, partisan ideology, interest groups, taxing and spending arrangements, educational systems, electoral constituencies, the internal organisation of the state, executive-legislative relations, the appointment of commissioners and European Court justices, the role of the judiciary, legal systems, and administrative apparatuses are all defined by national territory.

The contrast with the United States is instructive. There, the American Civil War effectively foreclosed exit options, and hence choices of institutional venues for the states (Fabbrini 2004), leading over time to the increasing prevalence of functional, as opposed to territorial, politics. Indeed, it is instructive in this regard to note how much recent discussion of the Philadelphia Convention as an analogy of its European counterpart some 200 years later took inadequate account of the foundational role of the Civil War in establishing the modern relationship between Washington and the states.

Moreover, not only are states autonomous and well resourced but also sovereign entities, and their sovereignty is crucial in terms of conferring on them both authority and a claim to be respected. The right of sovereignty provides a legal basis for their claim to privileged status. Internally, state power resources are reinforced by significant legitimacy. The survival of the nation-state as the dominant form of political organization in world politics is explicable to a large extent in terms of the legitimacy of nation-states, which has proved 'a more powerful determinant of the prevailing scale of government authority than either greater homogeneity of subnational communities or greater powers of supranational political units' (Scharpf 1988: 240). Member-states, unlike the Union are thus self-authenticating, deriving their legitimacy directly from their peoples.

This legitimacy has proved crucial in terms of shaping the relationship between states and international institutions, if only because populations have proved willing to accept sacrifices imposed by national governments, while their reaction to the partial impotence of governments in the face of

domestic and international pressures has been to 'cling to and if possible to reinforce the nation-state' (Hoffmann 1982: 23). The legitimacy of states means that populations may be willing to accept suboptimal outcomes as a result of autonomous policy choices, as long as these are national choices, while rejecting integrative solutions that are potentially more efficient.

None of this is to adopt an essentialist view of IR in which states are the only actors in an anarchic environment. International politics in Europe is more institutionalized not only than international politics in any other region but also than international politics at any other time. Yet even here, security and geopolitics still matter a great deal, and crucial differences exist between international and domestic contexts in terms of the dependence of the whole on the parts, and the nature and authority of these parts.

3.3.2 States as organizations

The second factor differentiating states from domestic actors are their organizational resources. It is here that the dangers inherent in importing insights from domestic politics are perhaps clearest. It has become common in recent times to apply principal–agent models as applied to US politics to the Union, on the basis of a simple premise, notably that:

> Although not a national political system, the Union has a number of characteristics . . . which make it analytically similar to the US political system, and hence a promising testing ground for American-derived theories of delegation and agency (Pollack 2002: 211–12).

Applications of the principal–agent model to American politics argue that political 'principals' constantly confront the danger of 'shirking' by executive agencies, because of the incomplete information at the disposal of principals concerning the possible actions of agents (Weingast and Moran 1983; Kiewiet and McCubbins 1991: 25). Information asymmetries lead to the possibility of agents exploiting 'the costs of measuring their characteristics and performance to behave opportunistically' (Doleys 2000: 537). On the basis of such insights, many have assumed that the EU possesses a crucial advantage over the member-states, because 'in the EU . . . information is largely controlled by the supranational Commission' (Aspinwall and Schneider 2001: 7; see also Pollack 1997: 108; Pierson 1998: 40).

However, we should be wary of assuming that lessons from the study of delegation *within* states are applicable to delegation in the international

realm *by* states. States possess characteristics that render the nature of their interactions with international institutions qualitatively different from those pertaining between actors and institutions in domestic political settings. West European states are powerful organizations, capable of mobilizing significant resources, including often-sizeable ministries, to monitor developments in all aspects of public policy, and provide a level of expertise that the relatively small staffs of international institutions cannot hope to match. As Moravcsik puts it (1999: 272), why 'should governments, with millions of diverse and highly trained professional employees, massive information-gathering capacity, and long-standing experience with international negotiations at their disposal, ever require the services of a handful of supranational entrepreneurs to generate and disseminate useful information and ideas?'[2] The simple fact that all the member-states have embassies to both the EU and the other member-states serves to emphasize the organizational resources deployed with a view to providing rapid and reliable information on developments within the Union.

Moreover, unlike in domestic political settings, the provision of information via the use of police-patrol oversight in a situation of multiple principals does not represent a public good (Pollack 1997: 111). Rather, in a context of nation-states competing for influence within the institutional setting of the EU, information is very much a private good, to be used in securing comparative advantage over one's competitors. Intelligence gleaned about the actions and intentions of supranational institutions is employed by states to steal a march over their rivals (Menon 2003). Unlike the actors in domestic politics, therefore, states have an incentive to ensure they are as well informed as possible, as the often complex mechanisms they employ to do so illustrate (Kassim et al. 2000; 2001).

None of this is to argue that problems of moral hazard and adverse selection are absent in international institutions—and one can assume that these will be more acute for smaller states, whose administrations may well lack expertise even relative to that within EU institutions. Nor is it to deny the analytical leverage provided by principal–agent models in the analysis of such relationships. The argument here is simply that the key variables dictating the nature of the principal–agent relationship in the EU take on different values than is the case within states. Member-state resources imply that informational asymmetries will be less frequent, and less severe, than the literature on US politics implies. Informational problems are mitigated in the international realm, and hence assumptions

utilized in a domestic context may need to be amended before being applied to an international organization.

3.3.3 International institutions

States, therefore, are unlike the kinds of actors one might find in a domestic polity. And their uniqueness has implications for the structure of the relationships into which they enter. For one thing, member-states can attempt to design institutional arrangements that minimize, if not preference incompatibilities, then at least the opportunity for agents to act opportunistically. Several pertinent strategies are open to them. Unlike in the American system, where the principal (Congress) may not enjoy the power of appointment (Moe 1987: 489), governments generally do enjoy this right over the staff of international institutions—including, in the case of the EU, over the appointment of judges to the ECJ and potentially also of some candidates for EP elections. While adverse selection problems still bedevil them, they are nonetheless in a position to be able to choose candidates whose preferences are close to their own. Governments 'will appoint people who have internalized the goals of the states rather than the organizations even when they are not officially there as representatives' (Nicholson 1998: 85). Almost as important, in order to avoid the danger of officials 'going native' in post is the power of reappointment, which can also be used to shape the behavior of national officials in international posts.

More fundamentally, principal–agent approaches in economics, and the variants used to study American domestic politics, assume that there exist fundamental incentive incompatibilities between principals and agents. This assumption has been transposed by many authors to the relationship between member-states and the EU. Thus:

> EC organisations will seek to use grants of autonomy for their own purposes, and especially to increase their autonomy. They will try to expand the gaps in member-state government control, and they will use any accumulated political resources to resist efforts to curtail their authority. The result is an intricate, ongoing struggle (Pierson 1998: 35 see also Pollack 1997: 108).

Yet is this really credible? Member-states are not only powerful in terms of their own resources, but also in the way they can use these to shape the actions of others. For one thing, they enjoy a striking ability to 'introduce

incentive structures into the agency relationship that encourage preference compatibility' (Doleys 2000: 537). Crucially, they can make full use of the control they exercise over the prospects of those who wish to return to work within the national administration. While it is reasonable to assume that employees of a US Federal Agency do not aspire to become Congressmen, officials in international organizations may well seek to prolong their careers in national administrations, or conceivably even national politics.[3] In this case—particularly for those on short-term contracts—the home government enjoys a significant ability to ensure loyalty. After all, where one's stands depends not only on where one sits (Allison and Zelikow 1999: 307), but also on where one wants to recline later.[4]

That those working for the EU institutions may well feel the temptation to aspire to senior positions back 'home' was clearly illustrated under the last Commission, as its President Romano Prodi was widely perceived to have neglected his duties in Brussels to focus on maneuvering for a return to Italian politics. It is hard indeed to imagine an analogous situation in the United States, involving a president intent on securing a governorship. And while one could imagine a situation in Europe where the structural equivalent of state governors—heads of state and government—focused on the ambition of high office at the European level, it is imaginable only in the case of smaller member-states. The point, again, is not to claim that similarities do not exist between domestic political systems and the EU, but that the assumptions generally used in studies of the former, especially in terms of actor incentives, may be called into question in the case of the latter.[5]

The ability of member-states to influence the officials who staff international institutions reinforces the arguments made above concerning the resources of the member-states. The presence of nationals within the institution concerned, nationals who may find it in their interests to cooperate closely with their home nation, serves further to diminish the problem of informational asymmetries confronting the member-states.[6] The nature of international politics, as well as the nature, resources, and organization of states makes for a different texture of politics between, as opposed to within, states.

3.4 International Relations and the Development of the EU

Those who compare the EU and domestic systems are drawn, perhaps inevitably, from claims regarding their comparability to arguments

implying the probable similarity of their developmental trajectories. Thus, the notion that the Union shares with federal systems like that of the United States 'a constitutionally defined . . . separation of powers between a central government and individual Member States' (Donahue and Pollack 2001: 95) leads to the assertion that the United States and EU:

> display similar alternations of centripetal and centrifugal impulses. . . . the centralising impulse is likely to reassert itself in both polities in the century's early years. The next period of predominant centralisation, moreover, should be somewhat sharper and shorter in Europe than in the US, as the asynchronous rhythms of the two polities—one a mature federation, the other not—move out of phase (Donahue and Pollack 2001: 116).

Less explicitly, much of the most influential work applying principal–agent models to the Union draws on a similar logic, applying, somewhat uncritically, the literature on the United States to emphasize the problems member-states face in controlling supranational agents, and the 'gaps' in their control that subsequently emerge (Pollack 1997; Pierson 1998).

Turning first to the question of structure, it is profoundly misleading to talk in terms of some kind of 'separation of powers' between the Union and the member-states (partly, it should be said, because the phrase is generally used to refer to the relationship between institutions at the federal level in the United States). The nature of politics between states has, from the first, been highly influential in shaping the institutional structure of European integration. Particularly in comparison to that of federal systems, this was reflected the desire on the part of the member-states to safeguard their authority over their creation. Consequently, and in stark contrast with the United States, the member-states designed a system in which their *institutional* interests are represented via the Council of Ministers (Sbragia 1991*b*: 2, 5; see also McKay 2001: 130–1). The Senate never functioned as a 'Council of the states', even under the short-lived, and ultimately unsuccessful 'doctrine of instructions' (McKay 2001: 133). Rather, senators represent their constituents. In contrast, in systems where state governments participate directly in central decision-making, it is the interests of these governments that are voiced.

Even here we can distinguish between systems of state representation at the center, such as Germany, where, the central government enjoys political identity, resources, and strategic and tactical capabilities of its own, and the EU, where the central institutions enjoy no such advantages over the constituent units. As Sbragia puts it:

> Community politics and national politics are institutionally intertwined rather than insulated from each other . . . one can discuss American politics and

policymaking without mentioning a single governor . . . the privileged status enjoyed by member governments in the Community's political system has no analogue in the US system. American state officials do not participate personally in national policymaking. For their part, American national politicians represent voters who happen to reside in states; they do not represent governors or state legislators. Thus, in the United States, the representation of the institutional interests of state governments in national policymaking is not constitutionally entrenched (Sbragia 1991*b*: 5).

Member-state representation, moreover, is more than symbolic. As argued above, their administrative capacities give them the ability to exploit to the full their privileged institutional position and to represent and defend their interests within the Union (Sbragia 1991*b*: 2).

The institutional system of the Community as a whole was designed in such a way as to facilitate the stolid defense of perceived national interests, should the desire for enhanced cooperation falter. Scholars who take their cues from a domestic analogy tend to emphasize the importance of the Commission's monopoly over the right of legislative initiative as a cornerstone of its influence (Pollack 1997). An alternative reading, however, would be that member-states ensured ultimate control for themselves by ensuring that they could react against any Commission proposals. Thus, Taylor commented, with reference to the 1970s, that:

the institutions of the Communities made it easy for national governments to adopt a defensive stand if they so wished; they were designed to allow a relatively undramatic, stonewalling approach if it happened that in practice the government's expectations of future compatibilities were unrealised (Taylor 1975: 339).

Elazar makes a similar point, noting that the 'EU's Constitution and common institutions have developed in such a way as to minimize the threat to the Member States' (Elazar 2001: 38). Agenda-setting power is crucial in any political system, but the influence of the agenda setter is dramatically curtailed in a situation when the core legislators are not interested in working together.

Member-states form the core of the EU decision-making system. Certainly, their role is not exclusive, and the EP, most notably, has seen its legislative powers enhanced considerable during the course of successive treaty revisions. Yet while the EP, acting in concert with coalitions of member-states in the Council, represents a more effective legislative body than many, if not most, national parliaments, it is, ultimately, the Council which is the crucial legislator in the EU system. A recent example was provided by the decision of the member-states to shelve the amendments

to the working time directive approved by the EP in favor of returning the issue to working groups for future discussion. And it is the member-states *qua* member-states that sit in the Council. In this sense, even in matters of core legislative activity, the EU is in no real sense separate from its constituent parts.

Moreover, and far from incidentally, it is the member-states, via the EC, that—as we have seen so vividly in the early summer of 2005—control the size and shape of the EU budget. As a consequence, this is limited to around 1 percent of the Union's gross domestic product (GDP), thereby severely limiting the ability of 'Brussels' to buy either loyalty or compliance, and ensuring the absence of a tool employed to powerful effect by many federal systems, notably the United States, where ''[c]oercive cooperation'' is underpinned by the cash Washington dispenses to state capitals' (Sbragia this volume).

Structural differences between the EU and federal systems help account for differences in their developmental trajectory. Here, it is important to differentiate between what Taylor (1975) refers to as the 'scope' of integration and its 'level'. On the one hand, it is clear that the attribution of tasks by member-states to the European level has continued, with ever more sensitive areas of public policy—immigration, cooperation on counterterrorism, and defense policy amongst them—being affected by the Union. Yet EU involvement or activity in a policy sector does not imply a shift in power from the parts to the center, given that the member-states themselves wield such tremendous influence over what occurs in 'Brussels'. Contrast this with an American system in which 'the exercise of federal government functions is formally independent of the governments of the American states, and those functions that have been taken over by the federal government are effectively nationalised' (Scharpf 1988: 242).

And if the 1990s witnessed a steady accretion of new competences at the European level, in the main exercisable by QMV in the Council, this was accompanied by persistent and consistent measures adopted to ensure member-state control. Crucially, the international character of the Union empowered the member-states in their attempts to claw back authority. Because the Union is based on a treaty rather than a constitution, member-states enjoy levels of control over its development that are unparalleled in national federal systems. For one thing, the treaty base uniquely empowers states as institutions to intervene between citizens and the Union in treaty negotiations (Chopin 2002: 43–8). Moreover, not only is no formal role given to the EU institutions in negotiations

over treaty change, but such negotiations uniquely empower the negotiators. While:

> amendments to a constitution resemble a continuing dialogue with previous political and constitutional developments, the formulation of new treaties can differentiate among whatever institutional innovations were made in previous treaties. Treaties allow for much greater discontinuity in institutional development, a disjuncture that permits national governments to control the timing and shape of institution building relatively closely (Sbragia 1991*a*: 273).

Thus the treaty base provides member-states with a large amount of latitude in shaping the nature of the system, for instance, by isolating some areas of policy from the ambit of the EC and limiting the power of the supranational institutions over them, as they did with the creation of the pillared structure in the treaty on EU. Finally, member-states ensure a large degree of control over the development of the Union by insisting that substantive changes to its nature and functioning be decided on via treaty amendment. In order that they be bound in new areas, a treaty revision must be unanimously agreed—in contrast, for instance, to the profound changes ushered in the United States by the New Deal without the need for constitutional amendment (Sbragia this volume).

The trend toward increasing member-state assertiveness first manifested itself at Maastricht, with the introduction of the principle of subsidiarity, explicitly intended to put an end to 'competence creep' (Majone 1998), and the creation of the pillared structure (possible because of the treaty rather than constitutional base), which distanced the 'supranational' institutions from the sensitive areas of foreign and security policy and justice and home affairs. As the decade progressed, member-states tightened their hold on developments within the Union in numerous ways, including via the increased prevalence of intergovernmental conferences, with progressively more detailed agendas, the growing dominance of the EC, and the introduction of new forms of decision-making, such as the open method of coordination, or the purely intergovernmental method adopted for the emergent European Security and Defence Policy. The unratified constitutional treaty merely reaffirmed and reinforced such trends, bolstering subsidiarity with the provision for member-state parliaments to express a formal opinion on (*inter alia*) the compliance of legislative proposals with the principle (Weatherill 2005). It also underlines the degree to which member-states remain anxious to preserve their position as ultimate drivers of the integration process via the creation of a president of the EC.

In sum, if analysts were able, in the early 1990s, to assert that the governments of the twelve exerted immeasurably more influence on Community policies than American state governments exert on federal policies within the United States (Sbragia 1991*b*: 2), this is all the more true after the events of the last decade. These have served to highlight the instrumentality of a Union system created and maintained to serve the interests of its constituent member-states and continually recast in order to reflect changing state preoccupations and purposes.

3.5 Conclusions

The purpose of this chapter has not been to claim that IR necessarily provides all the answers for those interested in studying the EU. Indeed, it is not difficult to find serious shortcomings in the IR literature on European integration, including the failure (ironically) to recognize the key role of geopolitics (Moravcsik 1998), and the obsession, referred to above, with the debate about whether institutions matter. Nor is its intention to claim that comparative government specialists should not engage in comparisons of the Union with federal states for, although 'the Community is unique, analysis is more likely to suffer from studying it in isolation from other systems than from using the comparative method in less than ideal circumstances' (Sbragia 1991: 268). Indeed, whatever the circumstances, they have, as acknowledged above, contributed greatly to our understanding of the Union.

There is, however, a danger in the overzealousness of some in assuming that comparisons with domestic political systems are the most appropriate, or indeed only, approach worth deploying. A fixation with the United States is particularly inappropriate given the fact that the United States itself arguably represents something of a *sui generis* system of highly centralized multilevel governance and one which, for some, is not consistent with the federal principle at all (Chopin 2002).

There is behind all this a striking irony. While, in the 1960s and 1970s, scholars rooted in the study of domestic politics were those least deceived by the optimistic neofunctionalist prediction that power would progressively be transferred from the nation-state to a new European center (Wallace 1982: 64), the newer brand of comparativists, in their haste to apply their insights to the Union, themselves risk failing to appreciate the unique nature and role within the EU of the institution most central to their substantive concerns.

Notes

1. The author would like to thank Elizabeth Edgington, Dionyssis Dimitrakopoulos, Jo Jupille, Hussein Kassim, Ed Page, Martin Schain, and particularly Dan Kelemen for comments and suggestions on earlier drafts.
2. Clearly, this is a question of degree. Larger states enjoy larger resources, and the European Union, since the enlargement of 2004, now contains a significant number of small states
3. Certainly, promises of future advancement, especially when these are political rather than purely administrative, might be dependent upon relative stability in the partisan composition of government. On the other hand, this is not the case in the context of apolitical administrative systems. Moreover, the partisan nature of government has had relatively little impact on what have been markedly stable member-state preferences about European integration over time.
4. The phrase was suggested to me by Dan Kelemen.
5. The contrast has not always been so clear cut. The United States of the eighteenth century was one in which the relative attractions of state and federal levels were perceived to be more equal. Justice John Rutledge resigned from the Supreme Court in 1791 to become Chief Justice of South Carolina. John Jay, chief justice of the Supreme Court, was elected governor of New York in 1795, declining to return to the Court when asked to do so by President John Adams in 1800. My thanks to Dan Kelemen for informing me of this. Moreover, the ECJ is arguably highly similar to its American counterpart in terms of the prestige implied by appointment to the bench. Yet while the argument presented above applies most clearly to the EC, the ECJ also has many features that reflect the entrenched power of member-states within the EU system: judges are selected from national judges nominated by governments; all member-states are represented on the court, and national courts are 'coordinate' rather than inferior courts (Ansell 2004). Moreover, unlike the Supreme Court, the ECJ cannot invalidate a member-state statue or act, but has to rely on the state itself to do so, and there have been instances where this has not occurred (Shapiro 1991: 125).
6. In addition to interest-based motivations, it is interesting to speculate as to whether notions of loyalty or identity condition the behavior of member-state nationals in the EU institutions.

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Part II

Developmental Perspectives

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4

Constitutionalizing the Federal Vision?

Kalypso Nicolaïdis

In March 2003, after a year of intense debates, the conventioneers drafting the new EU Constitution gathered up their courage to state in its first Article that the Union '. . . shall administer certain common competences on a *federal* basis': Mrs Thatcher's dreaded F word was once again out of the bottle. A few weeks later, Tony Blair and Valery Giscard D'estaing, the president of the Convention had dinner together and the genie was bottled back in—replaced by a tautological reference to the 'community way'. When EU governments vetted the final draft in their June 2004 Summit, they were relieved not to have to reopen the issue which had plagued their debates more than a decade earlier at Maastricht. Had it been adopted, the first European Constitution, a blueprint for a unique kind of federal union, would not have spoken its name. Like Molière's Mr Jourdan who spoke prose unknowingly, EU citizens will continue to live under a novel brand of federalism, without calling it as such.

In *The Federal Vision* (Nicolaïdis and Howse 2001), we offered a collective take on this European brand of federalism in contrast with that of the United States. We were struck initially with the many similarities in the debates which took place during the 1990s over what Europeans call subsidiarity, specifically over the criteria and methods used to change levels of governance on both sides. Our contributors analyzed the evolving federal contracts of these two polities from a variety of angles, in what we initially thought would be a microlevel empirical analysis. It became clear, however, that asking who does what at what level could not but be embedded into the broader question of legitimate governance in general which federalism in its various guise has long tried to answer. What we referred to then as the 'federal vision'—a noncentralized dynamic and empowering

vision—was part analysis, part prediction, and part utopia. The features of federalism that we highlighted were sometimes incipient, sometimes dominant, sometimes yet to come in either or both polities. While in their many variants they have long been debated by scholars and political figures, we did not seek to revisit the perennial debate on the essence of federalism in the United States and around the world. Nevertheless, the contested nature of what 'federalism' actually means both as an ideal type and as a reality provided the backdrop for our analysis.

This book can be perhaps considered as an extension, deepening and updation of our enterprise. In this spirit, my chapter seeks to update *The Federal Vision* in the light of the draft EU Constitution and asks to what extent the blueprint, albeit without using the term itself, brings the EU closer to the variant of federalism we sought to analyze and promote then. In other words, is its formal constitutionalization moving the EU closer to the US version of a *federal state* or is it remaining a *federal union* faithful to the spirit of a noncentralized, transnational type of federalism that has been its wholemark since the 1960s? Does this Constitution reinforce or weaken the spirit of our European third way between a federal state and an intergovernmental entity? I argue that the new draft constitution did represent such a third way, albeit all too implicitly. It does it better on the vertical dimension of the relationship between the Union and its member-states than on the horizontal dimension of the relationship among the member-states themselves. And as a result it has more to teach the United States on the former front and can learn from it on the latter.

4.1 Naming the beast

The EU has long become part of the comparative federalism family, undergoing its metamorphosis from treaty-based cooperation between states to a federal polity. Nevertheless, the exercise of writing it all down *qua* Constitution cannot simply be presented as mere simplification or consolidation. In fact, this Constitution lays out the three basic principles of federalism as constitutional lawyers would have it and as we find in the United States.

- Structurally, it describes a *multi-tier governance system* where the member-states are units which both constitute and belong to the federal whole, while remaining autonomous from it in a broad range of areas from the welfare state to defense or migration.

- Functionally, it establishes an explicit *division of power* between the constituent states and the federal whole, la grande affaire of federalism, and sets out the way in which the functional boundary between them can be changed and enforced, both by the ECJ and by national parliaments.
- And in terms of process, it organizes an intense *mutual participation* between the respective legal orders involved—states shape the substance of federal supremacy while the federal level cannot be indifferent to the exercise of state autonomy.

An infinite number of constitutional variants can be constructed around permutations along these three dimensions which would all fall under the label of 'federalism'. But of course, as we all know, politics does not follow the logic of political science and legal reasoning. Instead, the politics of labeling within the European Convention catered predictably to the common prejudices of a number of its member-states, starting with the UK where the word federalism itself has always been a 'red line'. The British resistance to the very idea of federalism applied to the EU however, should not be dismissed so easily. In fact, I believe there are indeed forms of federalism that would be acceptable for the EU and others that would not.

Against this backdrop, the debates that took place on the Convention floor regarding the F word were exemplary (Nicolaïdis 2003). To be sure, these debates were not widely publicized—although transmitted on the Web for the aficionados. Nevertheless, they reflected broader splits in European public and elite opinion, and can serve as useful starting point for an analysis of the Constitution's 'federal character'.

To do the Convention justice, the debates did reflect the complexity of the issue. Obviously, the British government led the campaign to delete the word 'federal' from the draft. As Giscard, the French Convention president, was keen to point out, these dissenters only represent 15 percent of the Conventioneers. We have to assume, he said, that those who did not express themselves against, actually support the term federal. Giscard may have been right about numbers. But his silent majority often supported the label 'federal' for the wrong reasons. And conversely, I would argue, perhaps a touch provocatively, the naysayers were generally more attuned to Europe's public opinion. That is precisely because their vision is the most 'federal' of the two in the original sense of the word.

For a start, everyone agreed on one point: because the EU is *sui generis* there is no definition of the nature of the beast in manuals of public law. So, argued the British why not avoid the use of such a politically loaded

expression altogether, and simply state the EU's *raison d'être*—that we can achieve more by working together than working alone? Because, retorted others, its originality makes a label all the more necessary—and federalism is the best we have.

For many of the yea-sayers at the Convention the federal reference was a must simply because it was common ground to 'European circles' in the Union, circles to which most of them belong. One Convention member exclaimed that the younger generation of Europeans 'would not forgive us' if the F word was out. The cries for 'more Europe' by those who marched in their millions against a war in Iraq were also invoked. Proponents argued that dropping the word federal would not convince opponents of the EU and would only disappoint its supporters. Not that simple, countered with gusto Conventioneer Hololei (an Estonian who at thirty-three prided himself as representing the younger generation at the Convention); to stick to traditional concepts would be the real betrayal. Did the US founders in Philadelphia hang on to obsolete labels?

But the EU is not in its infancy, as the United States was at Philadelphia, replied the federal camp. The term simply describes what is—the existence of a federal level of governance in Europe articulates the common interest of all the member-states. We should call a spade a spade, or, for Andrew Duff, a British liberal democrat representative, speak the truth in the clearest possible way. Moreover, supporters noted, the word federal would be used in Article 1 of the Constitution to describe a decision-making process *not* the Union itself—for example, a Union of States administering the objectives they have in common 'in a federal way'. As such, the reference to federalism would cover only some of the Union's activities, like money, competition policy or external trade, and not others, like foreign policy or economic coordination. The latter would continue to be conducted under the so-called intergovernmental method, where the member-states have the first and last word (this argument lost its potency once the pillar structure of the EU was abandoned in the Constitution). Federal in the European context would not mean that the euro and the dollar are managed in a similar way, not that the EU looks like the United States—and indeed there was no backing inside the Convention for changing its name to the 'United States of Europe'. But if federal is neither the best description of what is nor even the dominant way in which things get done, why bother?

Conventioneers offered two types of responses. The most egregious is that intergovernmentalism is simply an interim stage of European

integration and that the 'federal' *telos* should thus be inscribed in the Constitution. What a strange thought, when actually the originality of Monnet's community method lies precisely in combining cooperation between governments—an intense and continuous form of diplomacy—with supranational management of the whole affair. Nevertheless, the idea of the community method as having served its transitory purpose *en route* to a more integrated 'federal' EU was not confined to the confines of the Convention.

The other response was to assert that the virtues of federalism are precisely those prized by the no camp. Yeses insisted that federal is not, emphatically not, synonymous with centralization. Indeed, it is synonymous with the principles of subsidiarity (which states that decisions need to be taken as close to citizens as possible), decentralization and equality between states. Look at Germany they say, not the United States! But this version of the profederalism argument is not necessarily reassuring for the skeptics. Is that what EU federalists want then, they ask, an EU where the member-states have become as integrated as German Länders?

Even the European socialist group acknowledged in its official statement at the time of the debate that the term raises a problem of 'vocabulary'. As a way out of the dilemma, suggested Finnish parliamentarian Kiljunen and others, let us refer to a *supranational* basis, or *community* basis for administering EU competences, rather than a federal one. But who could argue that these labels would speak more clearly to the citizens?

Does the semantic solution then lie with composite terms, qualifiers for the federal label? This was the line taken in the Convention by the Franco-German couple which, true to expectations, came to the rescue. Fellow conventioneers-cum-foreign ministers de Villepin and Fischer lobbied for Delors' 'federation of nation-states' as conveying the synthesis of Union of peoples and of sovereign states. Instead of the old mantra that the EU is more than a confederation and less than a federation, let us simply acknowledge that it is both. Somehow however, most of their colleagues seemed to read this new grand compromise as another 'cut-and-paste'.

Anti-EU federalists are likely never to embrace any version, composite or not, of a federal vision for Europe. To some extent, they are right, as the history of federalism seems to be one of its unavoidable high-jacking by statism. But they are also wrong, because the spirit of federalism is the best warrant of state autonomy in the EU. In truth, as we argued in *The Federal Vision,* the notion of federalism is as old as human society. It is one hundred thousand years ago, say the anthropologists, that human clans established

cooperative agreements among themselves according to its basic principle: that neither the unit nor the whole should have primacy over the other. Federalism is such a universal and resilient principle precisely because it does *not* resolve the tensions which exist between the two poles, the One and the Many. In a federation, each part is itself a whole, not a part of a whole, and the whole itself is more than its parts. Neither is the One a simple expression of the Many (Capreletti et al. 1986)—collaboration—nor are the Many simply components of the One—hierarchy. Instead, like fractals in our mental and material maps, each exhibits in its own scale its own version of a familiar pattern; each level operates as a whole albeit with multiple and subtle connections with other levels. Federalism does not mean bringing different polities together as one, however decentralized. It means instead retaining what is separate *in spite of* all that is common.

It is not because the practice of federal or quasi-federal polities in the modern epoch has greatly diverged from this ideal type that we must ignore its pregnancy. When in the seventeenth century Althusius developed his model of republican federalism, he did so *against* Bodin's vision of the state. Statism, he argued, was a modern version of Monarchy. A more radical departure from the rule of kings would be to share power among communities of different types, and to do it in such a way as to accommodate a European reality of four or five arenas of governance, not all territorially defined. The history of federalism is that of the progressive demise of the Althusian vision and its subversion by Bodin's paradigm of the state. By the end of the 1800s, would-be federations had all turned into 'federal states'.

To be sure, as Lowi reminds us in this volume, it took the United States until the New Deal to give the federal level the kind of competences (regulatory and allocative) that we associate with a 'state' today. It is not surprising therefore that none of the pre-Civil War American thinkers on federalism—not even Daniel Webster—saw the United States as a 'federal state'. For them the word 'state' still denoted not the whole but the parts of the union (Forsyth 1981). They did disagree—and debates continue to this day—on whether the Constitution established a consolidated government, simply a compact or federation of sovereign states or, as James Madison suggested, 'a compound of both'. But to the extent that the seeds of 'statehood' had been planted in the American construct, it is precisely because the Founding Fathers, like all other men at the time, and perhaps all other men up to that time, regarded federalism not as a kind of government but as a voluntary association of states which sought certain advantages from that association. And it is for this reason that, in their

majority behind Madison, they considered their construct as a combination of both 'federal' and 'national' (e.g. state level) government. Calhoun's attempt to rescue the vision of a 'genuine' American federation, half a century after its foundation, was doomed to fail posthumously under the combined assaults of the Civil War, the New Deal, the antiprogressive bent of 'State rights' advocacy in the 1950s and 1960s and managerial approaches to governing in the twentieth century. Already, as of 1870, war had imposed the supremacy of the 'whole' over the 'parts' in the United States but also in Switzerland and, most significantly, in the new German empire. European, and above all German, writers at the nineteenth century's end gave the final momentum to the shift to a statist paradigm of federalism. Witness Max von Seydel, founding father of European federalism, quoting a French contemporary in 1872: '*il ne peut y avoir deux unités, car l'essence de l'unité c'est d'être une*'. A far cry from the fractal mental map of federalism. In short, the 'federal' emerged prior to or in contrast with the 'state' before the two converged; only by questioning the attributes of nation-state that federalism inherited in the course of its history can we recover the federal vision.

And yet today, whether *for* or *against*, most people fail to understand the notion of a federal state as an oxymoron. Were the British representatives true to their own vision of the EU as a neomedieval, noncentralized, postmodern entity, the very opposite of a super-state, they would have made it their mission to rescue the federal baby from the statehood bathwater. The federal vision must be reconstructed *beyond the state*. What a tribute to Althusius if we could all agree to call the EU a federal union of nation-states *as opposed* to a federal state.

4.2 The language of European Demoi-cracy and the constitutional promise

In the end, however, and beyond the inclusion of the word itself in the constitutional text, the real question that constitutional lawyers, political scientists, and politicians have been debating for some time is whether the very adoption of a formal EU Constitution itself would have changed the character of the EU, whether it is bound to do what constitutions do: proclaim the creation of a political community where the One (henceforthed 'constituted') overrides the Many, where the direct relationship established between citizens and the highest level of governance not only takes on a life

of its own but supersedes national state–society relationships. Is the difference between the prior constitutionization of the treaties and a formal Constitution—what Miguel Maduro calls 'low density' and 'high density' 'constitutionalism'—one of degree or is it more fundamental than that (Weiler and Wind 2001)? In *The Federal Vision,* Joseph Weiler argued that the advent of a formal Constitution would likely shatter the fragile equilibrium arrived at in the EU over five decades between confederal type institutions and a federal-type legal system since this equilibrium rested on what he coined 'constitutional tolerance' (Weiler 2001). Indeed, since 1958, the national constitutions of the member-states and the courts protecting them have coexisted without the need for an overarching umbrella. Instead, Europeans have chosen to constantly and willingly renew their commitment to their common rules while conducting an ongoing dialog on their implications. A formal Constitution, in this view, threatens to deny this precious spirit.

As many have argued, and as I did in *The Federal Vision,* there is a flipside to this coin. The writing and adoption of a formal Constitution is a unique occasion for Europeans to renew the bounds that bind them together and adopt a language for their common project. Beyond the debate over the term 'federalism' itself, why not imagine a new language for a federal union rather than a federal state? And through this new language, could there not be a renewal, not a betrayal, of the project itself? A Constitution consists in 'putting into form' (simplification, consolidation) as well as 'proclaiming' what a given political endeavor is about. The spirit of constitutional tolerance may have been the beautiful thing about the EU that we had, but which European publics were able to connect it with political forms they could relate to? The preconstitution EU had no answer to this problem. And it there is a problem with the EU—clumsily captured under the label of democratic deficit—it is that Europeans do not *recognize* it as a democracy, a political animal they can make their own.

Did the draft Constitution fill this gap? I have provided elsewhere a political assessment against a normative benchmark inspired by the insights contained in *The Federal Vision* (Nicolaïdis 2003, 2004). Accordingly, it is possible to view the European polity as we have it as a third way between a *Union of democracies* and a *Union as democracy,* which partakes in its core ideologies of supranationalism and intergovernmentalism yet cannot simply be reduced to something 'in between'. Under this vision, I argued, sovereignists must accept that the EU is a community of peoples, not only of states—peoples who can take on an unmediated role in European politics. Supranationalists on the other hand must accept that democracy in Europe does not require that this community merge into

a single *demos*, its will aggregated through Euro-wide majorities and expressed through traditional state-like institutions.

In my view, today's EU provides all the ingredients for such a third way. The draft Constitution is at its best when it recognizes and builds on what we have: a European demoicracy in the making. It falters otherwise.

A Constitution starts by telling a story about who we are or what we are about, *the story of the polity*. A demoicracy is founded on the realization that the old equation (democracy = a demos = a common identity) does not need to hold. The Constitutional challenge therefore lies in recognizing that Europeans are part of a 'community of others' who feel at home abroad anywhere in Europe (Weiler 1999). This idea is more radically pluralist than its American multiculturalist counterpart in that it acknowledges the stable existence of peoples (bounded imagined communities) rather than groups. It was in some ways contained in the founding fathers' intuition: the call for an ever-closer union between the peoples of Europe—an 's' for *peoples* supranationalists often chose to ignore. Indeed, the draft Constitution nowhere calls for a homogeneous community, its law grounded on the will of a single European *demos*. It makes respect for national identities, 'inherent in their fundamental structures, political and constitutional' one of its foremost principles (Article I.5). It therefore seems to accept—if not embrace—the fact that a European demoicracy is predicated on the mutual recognition and evermore demanding sharing of our identities—not on their merger. This means not only proclaiming the respect for differences in the classic communitarian sense, but also urges intense engagement with one another. We do not need to develop a common identity if we become utterly comfortable borrowing each other's. An apt metaphor is provided by the clause originating at Maastricht stating that we can benefit from each other's consulate services outside the EU. Abroad, I can be a bit British, a bit Italian—more than European *per se*. I have nothing to gain by spinning the rainbow white.

If the European demoicracy is not predicated on a common identity, then it does not require its citizens to develop a singularly European public space and political life; it asks only that they have an informed curiosity about the opinions and political lives of their neighbors and that their voices be heard in each other's forums. In time, multinational politics and trans-European citizenship should emerge from the mutual accommodation and inclusion of our respective political cultures. As the Constitution recognizes, trans-European political parties and nongovernmental organizations (NGOs) have a key role to play in this regard.

Moreover, while Europeans must continue their critical reflection on their intertwined past, they do not need to invent a common European history if they learn to borrow each other's past; even to identify with the victims of their own nations' crimes (Ferry 2000). Interestingly, the Constitution's preamble starts off with a nod to Europe's 'bitter historical experience'—a crucial addition owed to the Intergovernmental Conference (Conventioneers had been too much in owe with their president's flowery style in writing the preamble). But it fails to recognize that an inclusive union must also include the constitutional recognition of regional identities in the European mosaic.

If not a common European identity, the glue that binds the EU together in this view is shared objectives, shared projects, and shared ambitions. This spirit is enshrined in the Constitution's very first article, in which 'the citizens and States of Europe' confer competences on the EU 'to attain objectives they have in common'. The sense of belonging and commitment to the European Union is to be based on what they can accomplish together, not what they are together—the *doing* more than the *being*. A community of project is not necessarily less demanding than a community of identity; but it is voluntary and differentiated rather than essentialist and holistic. The *Europeanization* of national citizens does not necessary require or lead to their *Europeanness*. Witness for example the EU's defining projects to date—the single market, the euro, enlargement—as well as the ambitious list of objectives listed in the Constitution—from the promotion of peace and social justice to gender equality and childrens right, sustainable development, and a highly competitive market economy (Article I-3). Likewise the Constitution's proclamation of common values, including the respect for human dignity and for the rule of law (Article I-2) should not be read as a statement of some unique European essence or some European claim to have invented or incarnated these values (although this is exactly what many Europeans have in mind). Instead these values should be read as a guide for action, inside as well as outside the EU. They are indeed 'actionable' since they can serve as the basis for suspending a member's membership right, and perhaps, ultimately a member's membership *touts court*. The latter, of course, has never been tested.

4.3 What difference does a Constitution make? *The Federal Vision* revisited

How does such a version of the European polity translate into specific rules and institutions, in short the story of politics? In *The Federal Vision,* we

argued for a version of federalism—federal unions—based not on a hierarchical understanding of governance, with supranational institutions standing above national ones and European constitutional norms trumping national ones. Instead, we argued, a federal union ought to be premised on the horizontal sharing and transfer of sovereignty and it ought to encourage dialog between different legal or political authorities: constitutional courts, national and European parliaments, national and European executives. A federal union should translate the spirit of demoi-cracy into political frameworks which are neither national nor supranational but transnational. It must remain multicentered rather than simply multilevel with decisions made not by Brussels but in Brussels, and elsewhere around Europe.

More specifically, we argued that federal contracts could be examined along five dimensions, each central to fashioning a 'federal' response to the challenge of legitimacy in the spirit of subsidiarity. Here, I assess the changes brought about by the Constitution against this benchmark (Table 4.1).

Table 4.1. Paradigm shift and *The Federal Vision*

Shift	Keywords
1. From allocative outcomes to the process of change	*Process subsidiarity* Flexibility, open-ended dynamics
2. From distributed to shared competences	*Disagregated subsidiarity* Networked cooperation, proportionality, forms of governance
3. From separation of powers to power checks	*Procedural subsidiarity,* structures of governance, mutual control, constitutional constraints, federalism safeguards, agency ties, forbidden interfaces, asymmetric federalism
4. From transfers of power to empowerment	*Proactive subsidiarity,* mutuality, capacity building, positive sum allocation, managed competition
5. From multilevel to multicenterd governance	*Horizontal subsidiarity,* transnational federalism, nonhierarchical models of governance, constitutional tolerance, mutual recognition, mutual inclusiveness, shared projects, shared identities

Source: *The Federal Vision* (2001).

1. *Change and Flexibility*: *The Not-so-solemn Constitution*

'A Constitution', according to Jon Elster, 'is a way for the dead to tie the hands of the living'. If he is right, a Constitution not only is meant to create rights and obligations along side institutionalized power structures that are meant to outlast political cycles and struggles; it also grants the 'guardians' of such a Constitution ultimate authority over the constituent

parts. Increase in hierarchy, constraint and permanence is inherent in the shift from 'low density' to 'high density' constitutionalization. Whether by design or by fiat, this draft Constitution, I argue, compensates for this trend through widening the scope for exit on the part of member-states.

Indeed, that a Constitution should tie the hands of the living was certainly what Giscard D'Estaing had in mind when he declared that the Constitution should define the EU for the next fifty years. This perception is also what proponents of the Constitution in countries like France seemed to have in mind when they argued that it should not be considered as a Constitution but as a Treaty. Their rationale in this case was to quell the fears of those for whom the very solemn nature of a Constitution would make it harder to revise, and therefore for many of them (e.g. in the French left for instance) harder to correct its 'neoliberal' bias with more social clauses. The reverse argument of course was used by opponents who argued that its quality as a Constitution gave this blueprint a solemn quality that was lacking in the previous Treaty, its flaws as well as qualities therefore set in stone.

In fact, while there are reasons to debate the legal significance of the draft Constitution over the constitutionalized treaties of the last forty years, I argue throughout this chapter that there is little doubt about the political significance of a formal Constitution. But there are several reasons for doubting its 'solemn' character.

For one, it is unlikely to command the kind of loyalty of its US counterpart, precisely because it does not purport to proclaim the making of a nation. Practically, this Constitution is actually easier to amend than the treaties that came before it. For one, revisions could now follow an initiative of the EP and not only of member-states and the Commission. Second, the text included a simplified revision procedure (Article IV-445) which allowed the European Council to revise Part III, title III (internal policies of the Union) without convening an IGC and a Convention. Moreover, a so-called 'passerelle clause' was included in these cases (Article IV-444) which would have allowed the Council to decide unanimously that an issue area was to fall under majority voting (unless a national parliament objects). In addition, unanimity for revisions itself was tinkered with under Article IV-8 which allowed for a decision of the European Council in cases where less than one-fifth of member-states fail to ratify a proposed revision. What kind of pressure these states might come under was left undefined by the Constitution. But the most important point here is that the Constitution retains the fundamental characteristic of a Treaty in that numerous safeguards still existed against imposing any new Constitutional settlement on any member-state.

Such faithfulness to the principle of federal liberty is spectacularly demonstrated through one of the most innovative clauses of this Constitution, namely the new right of withdrawal for individual member-states. This right could be exercised at any time at the initiative of the member-state itself (including presumably if that state fails to ratify a Constitutional change and decides it does not want to force the others to also remain with the status quo). If such a right was to be exercised the Constitution also created a new status of associate member that should smooth the conditions for exit.

Ultimately, the new right of withdrawal testified to the nature of the bond that unites the peoples of Europe. It firmly established the EU as a federal union rather than a federal state, which—as American school children know from studying the story of their own nation—is defined by the denial of such a right. This is not (or not only) a concession to sovereignists. Its inclusion testifies to the widely shared intuition in the Convention that the peoples involved in the EU adventure are together by choice, a choice repeatedly made, and would continue to make sense apart. It should be defended as the sign that the EU has become mature enough to formalize what is the ultimate mark of a demoicracy.

Short of this most radical version of the exit option, the EU has long invented temporary or sectoral forms of exit (or opt-outs) which come under the generic name of enhanced cooperation. The Constitution sought to ease the recourse to this option therefore increasing the scope for exit in various ways. First through two modifications of the general principles. For one, the scope of enhanced cooperation was extended to the whole of EU competences including defense. Second, the minimal number of states was to become one-third (in the Nice Treaty it was set at eight—half the member states). Even though the absolute number increased, given the arithmetics of enlargement, enhanced cooperation was made more likely. The Constitution also introduced the applicability of the *passerelle* clause in this field again making it easier to move ahead by using a QMV within a smaller subgroup of states (although one may question why a state would accept to be voted down while part of a group that is itself an option). Finally, the Constitution introduces new forms of enhanced cooperation in the area of foreign and security policy, including permanent structural cooperation (Article I-41) for defense, which does away entirely with the requirement for a minimum number of states. The same goes for the new European defense agency (Article III-311).

In short, the draft Constitution may not have been as 'solemn' or unchangeable as either its detractors or some of its promoters claimed,

but at the same time exit options were created—on an ad hoc sectorial basis or simply by withdrawing from the Union—to allow individual member-states to retain their autonomy. Federal liberty is upheld more stringently in this constitution than in its state-bound counterparts.

Within this structural context, however, the question remains: did the Constitution reflect or at least induce a new and durable equilibrium in the EU when it comes to the division of power between the union and the member-states? Did it denote the stable end point at least of a period of integration, where a given constitutional settlement has been reached on the division of powers between the federal and state level? We argued in *The Federal Vision* that the quest for legitimacy should focus less on places or actual levels of governance and more on the process of change in levels of governance. A Constitution for the EU should *not describe an end-state, or even a series of equilibria, but a process*. In fact, we argued, there is no *teleology* of federalism, a centralizing or decentralizing trend, or even the possibility of finding a stable status quo for a significant period. Instead, political communities will oscillate endlessly between the poles of unity and autonomy as they search for the appropriate scale of their collective endeavor. For one, it is a fact that numerous exogenous and dynamic factors such as crisis situations, social demands, internationalization, and changing technology lead to shifts in the exercise of policy responsibilities either suddenly or over time. A rigid delineation of competences is simply counterproductive in this context. And, as is the claim of most theories of integration, endogenous dynamics also drive the wheels of change, which create new reasons and incentives to shift the exercise of competence. Obviously, part of the question here is to what extent and how constitutional design should constrain these endogenous dynamics and the responses to exogenous shocks.

A view inspired by a cyclical account of the history of US federalism suggests that it is fruitless to seek to excessively constrain *ex ante* since 'the natural starting point for that search for an appropriate scale is in the opposite direction from the most recent round of reform' (Donahue and Pollack 2001). In other words, a well-functioning federal system is one which is always to be a candidate for change, a system in continuous disequilibrium, where the challenge is to smooth out and 'legitimize' the cycles of changes in levels of governance. Allowing for such cyclical shifts would seem the best way to preserve and even take to its ultimate logic the project-based approach to European integration which consists in mobilizing competences around specific objectives.

During the Convention, and in spite of these arguments, the debate over governance, competences, and subsidiarity continued to be framed

as one of optimal allocation of powers between levels of government. After all, sorting out this issue was perhaps the most urgent task defined by the 2001 Laeken declaration, a goal championed by German Länder and a big part of European public opinion. Arguably, precisely in order to allow for sustainable change, a federal vision calls for embedding flexible adjustment within a context of 'constitutional' stability—whether one values constitutional stability like Hamilton because of the 'reverence that time bestows upon all things' or because it provides for credible precommitments to sustain societal bargains. Meaning borrows from both the mystery and the reliability of time. If constitutional rules change too quickly, the context they provide in which a conflict of interests could be waged disappears and the constitutional rules instead become part of the conflict itself. At the same time, successful federal arrangements develop forms of flexible governance exactly to allow the federal balance to shift with various social, technological, economic, or ideological trends over time, without the need to remake formal constitutional rules. A constitution is not in and of itself anathema to flexibility: it may even be possible to imagine such a document that would enhance the way the Union orchestrates changes in allocations of powers.

This was not to be. The blueprint that we have falls short of this ideal. On one hand, it does yield to the demands for a *Kompetenzkatolog*, or 'charter of competence', both as a means of providing greater clarity for citizens and as a break on expanding Union competence. To be sure the list is only indicative and nonjudiciable. It is divided between those competences that are (i) exclusive, (ii) shared and (iii) to support, carry out or coordinate the actions of the member-states. Moreover, the Constitution introduces the issue of competences through an article which enumerates and defines the major principles governing competences, for example, attribution, subsidiarity, and proportionality (Article I-11). At the same time a flexibility clause is introduced to allow for a unanimous decision to act in cases where the Constitution has not given the Union the power to do so. The British government has interpreted this clause as also allowing for the repatriation of competences downwards—in the spirit of the cycle of federalism—although the text itself is far from making such an option explicit. Clearly the draft Constitution lacked the language of demoi-cracy when it comes to countering the fear of creeping competences so prevalent with its public opinions.

2. *Shared Competences*: *The Undemocratic Character of a Fine-Tuned Division of Labor*

The second shift of emphasis highlighted in *The Federal Vision* had to do with the observation in most federal systems of the prevalence of shared competences rather than distributed competences between the state and federal level. We noted that 'cooperative federalism' prevails not only on the assumption that only on an ad hoc basis is it possible to know whether a particular topic or area in a given time and place is more properly regulated at one level of governance but, furthermore, that, even then, most tasks will need to be undertaken jointly, through an increasingly fine-tuned division of labor between levels of governance. In other words, the sharing is not only of the competences themselves but also of their *exercise*, even in instances of so-called exclusive competences. Thus, in practice, considerations of subsidiarity blend into considerations of proportionality. And governance, in the United States as well as in the EU, needs to be analyzed as a multilevel phenomenon *within* as well as *between* issues (Hooghe and Marks 2001).

The debates during the European convention illustrate the legitimacy problem arising from concurrency. Part of the initial goal of convening such a convention in the first place had been to set out some sort of list of competences to make clear to the citizens who does what in the EU. The classic approach, to spell out shared competence *by default* as those competences not exclusively attributed or reserved and then to infer them further from the texts through expansive interpretations of market integration clauses—was simply not sufficient from the standpoint of transparency. On the other hand, listing areas where the EU is generally *not* involved but might have a subsidiary role—such as taxation, social welfare provision, defense, foreign policy, policing, education, cultural policy, human rights, and small business policy—certainly would give citizens a wrong impression of centralization.

The Convention adopted a middle ground. For one, it created a difference between shared competences and areas of 'supporting, coordinating, or complementary action' (industry, health, education, and civic protection). Shared competences were defined by default—as neither exclusive nor supporting—against the wishes of the *Länder* who had been clamoring for an exhaustive list. At the same time, the text provided an illustration of the 'principal areas' of shared competences (e.g. internal market, freedom–security–justice, agriculture and fisheries, transport, energy, social policy, cohesion, environment consumer protection, and public health). This meant that in Part III of the Constitution one could find specific areas not listed in this enumeration such as customs cooperation. Thus, there

was no substantive innovation (aside from adding territorial cohesion) but for the first time EU citizens were told what competences were shared.

The real problem during the Convention arose from two broad principles connected to shared competences. First, and for the first time, the principle of primacy of EU law was stated explicitly in the text (Article I-6) : 'The Constitution and law was adopted by the Union's institutions in exercising competences conferred on it shall have primacy over the law of the member-states.' As a great majority of delegates pointed out this had always been part of the ECJ jurisprudence and questioning it could have been interpreted as questioning the jurisprudence itself. Nevertheless, the British government may have had a point in objecting to its inclusion in such an overarching way when it had been subject to much less 'structural' interpretations including simply as a device for settling concrete conflicts between community and national law (Dalgan 2005).

Second, the draft Convention's a *pre-emption clause* states '. . . the member-states shall exercise their competence to the extent that the Union has not exercised or has decided to cease exercising its competences.' Reference to the 'ceasing to exercise' was added at the express wish of Germany and helps convey a sense that shared competences are not only irreversibly growing. Nevertheless, the least that can be said is that this article is badly written. For readers who might not be familiar with the intricacies of EU law it gives the impression that it is about 'field pre-emption'—if the EU acts in the transport area for instance, member-states can no longer act in this area. Instead, an alternative wording could have alleviated misconceptions that once the Union acts in a field the member-states can no longer act: 'When the Constitution confers on the Union a competence shared with the member-states in a specific area, the member-states shall each retain the power to legislate and adopt legally binding acts in that area, but only to the extent that such exercise is compatible with the Union's exercise of its competence' (Making it Our Own 2003). In truth, to explain what pre-emption really means, the Constitution would have required statements as to when various components of 'shared competence' are activated and under what conditions—for example, in the EU: welfare provision are taken at the state level except for regulation related to trans-boundary movement of workers. It is no surprise therefore that the pre-emption clause became one of the main arguments of the Constitution's opponents.

More generally, I pointed out in *The Federal Vision* the paradox or at least tension between an emphasis on change and cycles of federalism and the assumption that federal dynamics are increasingly about the minutiae of

dividing tasks. I asked how we could argue both that legitimacy in such systems is bound up with finding ways for allowing the periodic reassertion of State or federal primacy and, at the same time, that federalism is above all about the implementation of an ever finer institutional division of competence. One way of (partially) resolving this tension was to point out that the object of change may itself change and that what may come to matter most is the way in which collective *forms of shared governance* evolve over time. As a result, 'subsidiarity concerns variations along dimensions such as the degree of discretion left to the States or lower levels of governance in the interpretation of common policies, the extent to which Union objectives are binding to lower levels, or the relationship between who formulates and who implements policies. Moreover, given that competences are not just about the power to legislate but rather the power to act in general, through framing policies, statements of objectives, financial decision, the delivery of services, various kinds of regulations, judicial rulings, norm creation as well as publicity and communication, then subsidiarity is also about making the appropriate choice between different instruments of action rather than only whether or how much to act. Different areas of competences—market liberalization, monetary policy, migration, and environment—warrant different types of instruments over time, more or less intrusive depending on the federal claim to relevance, with different functions exercised by different actors' (*The Federal Vision*, Conclusion).

The way in which the Convention dealt with the 'Open Method of Coordination' (OMC) illustrates the paradox involved in promoting subsidiarity in a context of reigning shared competences both in the United States and in the EU. The Convention as a whole was indeed very ambivalent about the OMC. On one hand, there may have been a recognition that it was part of a subsidiarity agenda which meant for the Union to adopt less intrusive methods of joint governance, acting in ways deferential to lower levels of government, whether early at the policy formulation stage or late at the implementation stage. As a result, articles were included invoking the OMC in four areas of EU action (employment, social, industry, and research). At the same time, however, there was also great reluctance to adopt a generic article on the OMC as a new form of governance in the EU. In the end, after three attempts by the Secretariat, the idea was dropped. Indeed, it could be argued that 'softer' methods of intervention are ways of 'doing more better', 'buying' less painful central intervention, extending the scope of Union competences—albeit softly exercised—under 'false' pretences. It matters therefore to ask how the

forms of governance associated with *new* Union competences tend to 'harden', and whether methods such as the EU's OMC are introduced only in the context of expanding EU competences or whether they are applied to decentralize the exercise of existing competences in other areas.

In the end, the Constitution does not address the underlying problem of legitimacy created by shared competences whereby citizens face a system of governance where lines of accountability are blurred and available channels for expressing voice unclear. How is one accountable for what one jointly does? As stressed in *The Federal Vision* when considering the implication of shared competences on democratic legitimacy, the state versus union dichotomy gives way to the more fundamental dichotomy—between the sovereign 'peoples' and the various loci of governance 'sharing' competence—and to how the former may control the latter. This theme is taken up in the next section.

3. *Power Checks*: *The New Constitutional Safeguards of Federalism*

The third shift emphasized in *The Federal Vision* was that from eighteenth-century concepts of separation of power as the best protector of democracy to power checks or what US constitutionalists call 'the safeguards of federalism'. The classic question is how to design a federal system to best safeguard the interests of all levels of governance. But ultimately power must be checks by individuals themselves. In fact, the question posed by the adoption of a formal Constitution in the EU is to what extent the very fact of such adoption contributes to creating a direct link between citizens and the union so that their voices would require less mediation by individual member states.

This question brings us back to the very foundation of both constitutionalism—as an exercise in limiting power—and of federalist thinking—as an exercise of limiting power through competing jurisdictions: that, however powers are allocated between levels and branches of government, the real issues are whether these powers are checked by and between these levels, how to prevent their perennial abuse, and, in doing so, how to ensure accountability in their use to the ultimate sovereign, namely in this case the peoples of Europe.

The broad principle espoused in *The Federal Vision* was that in a world of cooperative or competitive partnership between levels of governance, modes of interaction and institutional design rather than allocation of powers between levels are the key to the legitimization of the power exercised (Wessels 1997). What matters, as Elazar (1984) put it, is not the fact of cooperation 'but the degree of coercion involved in the

relationship'. In fact, if there has been not only a real divergence between the legal and the political planes of integration but also a constructive tension between them—above all in the EU but also in the United States—it is because judges, political leaders, and lawmakers hold conflicting views—and change their views over time—of what it is that most needs to be held in check: discretionary State power or expansive Union jurisdiction.

Debates at the Convention demonstrated how the need to agree on adequate approaches to power checks elicits a broad range of responses and how learning to think about them seems to follow a familiar pattern of fine tuning, from subsidiarity to proportionality, from the 'where' of power to the 'how', from first-order rights, responsibilities, or functions to the safeguards that are crafted on to them. It is telling for instance that the protocol on subsidiarity changed its name to 'subsidiarity and proportionality' as the discussions evolved inside the Convention.

Most importantly, as mentioned in the previous section, and discussed extensively in *The Federal Vision,* beyond the issue of 'State rights' per se, power checks refer to all forms of democratic control, including on the States themselves. The challenge here is to think together the checks exercised on each other among levels of governance *per se* and the checks exercised by 'the peoples' *on* governments acting individually or collectively: the democratic imperative. In short, the question is not just who is to police the boundary between State and Union but whether the boundary itself is the relevant place to look. How then does the Constitution affect the way in which the different safeguards are crafted in the EU?

The core safeguard of federalism (referred to as a structural safeguard) is of course to constrain the exercise of power at the federal level itself through state representation at that very level. The single clearest indication of the EU as a federal union rather than a federal state may be that, in the EU, state representation *is,* to a great extent, the center. And the clearest manifestation of this presence is and remains the use of the veto by a single state. There is indeed a 'principled' defense of the national veto which argues that no EU majority should be able to tell the majority of citizens in a given state what to do about matters that require the kind of reciprocal sacrifices appropriate within single demos. It may have been with this principled defense in mind that several member-states resisted to the bitter end, the Convention's attempt to extend QMV to areas where they believed they ought not to be forced in an outcome against the will of their national majority (fiscal issues for Britain, immigration for Germany, the cultural clause for France). In these areas, the method of consensual bargaining helps curb centralizing tendencies by ensuring that European

initiatives are Pareto-improving over the status quo, or, as Neil Komesar (1994) puts it, that the 'fear of the few'—fear of vetoes—should not always prevail over 'the fear of the many.' Legitimacy in this context crucially depends on adequate indirect accountability (e.g. is Germany really expressing an 'intense preference' of the German population over immigration?).

A great deal of the Convention's energies and indeed media coverage had to do with the contours of this structural safeguard, the weight of the Council among EU institutions and the weight of individual states within the Council. A detailed account of this part of the story has been provided elsewhere (see Magnette and Nicolaïdis 2003, 2004). Suffice to say that if the US is any guide, power 'at the center' as a mode of control by the states themselves seems inevitably on the decline with the maturing of the EU and with the need for effective decision-making. At a minimum, states in the EU will increasingly need to exercise their control at the center through coalitions rather than individually; and relative control will increasingly reflect population weights. Yet the bare basics of democratic theory tell us that formal or informal state vetos will not disappear without prejudice to legitimacy before citizens can be reassured either that they will most likely belong to cross-states majorities or that citizens and decision-makers of other member-states will have sufficiently 'internalized' their concerns. It seems misguided in this light to oppose European 'intergovernmentalism' to the 'federal' aspirations of the Union when the former is an inherent part of a genuine federal vision (Moravcsik and Nicolaïdis 1998). The real issue is not that intergovernmentalism is *not necessary* in a federal EU but rather that it is *not sufficient*. Other actors than states and other mechanisms of control must be entrusted with upholding the values of federalism.

Indeed, the Conventioneers did convey a widely shared conviction that the most fundamental alternative focus to representation at the center is to emphasize the *procedural* dimension of subsidiarity, the question of 'how' powers are exercised beyond the formal structures through which they are exercised (procedural safeguards imply that the checks on the actor concerned—the federal government, agencies, and states—consist not only in limiting its sphere of action but, within this sphere of action, limiting its freedom of action). In one of the Convention's boldest moves, and for the first time in EU history, the legislative expansion of community powers is made subject to an 'early warning system': under the proposed *new protocol on subsidiarity*, at least a third of national parliaments can send a proposal back for review on grounds of subsidiarity thus policing the boundary of Union competences in the name of their national majorities. Importantly, the threshold adopted here does not refer

to a proportion of the European population but to a number of parliaments. The message: that the exercise of competences cannot override the wish of a plurality/rather than a majority of national majorities. Not surprisingly, supranationalists felt uneasy with this experiment in transnational parliamentary empowerment. They successfully resisted going all the way to making such a position taken by a plurality of national parliaments binding (e.g. a 'red light'). Instead, their warning would constitute an 'amber light' leaving the Commission free to decide what to do next. However, it would seem rather improbable politically however for the Commission to override such an early warning if and when it came to be expressed.

Beyond this promising procedural safeguard the Convention did not innovate much. Economic and Monetary Union's (EMU) 'stability and growth pact' has not been revisited at least at the constitutional level; no clause was introduced to prevent 'unfunded mandates' for those actors of governance who are neither as well endowed nor as 'plugged in' as the member-states: regional and municipal authorities (including through systematic 'financial impact assessment' of EU laws and regulations'); no EU equivalent of the United States's Administrative Procedures Act (APA) was put in place, although the commitment to transparency of EU decision-making was reiterated.

4. *Empowerment*: *From Rights to Civic Empowerments*

But in the end, the ultimate power check is of course, the demos itself. What does this mean in an EU of many *demoi?* In a European *demoi-cracy?* Let me refer back again to *The Federal Vision*:

> 'The fourth shift . . . constitutes as it were the positive counterpart of federal safeguards, namely, a shift towards a more proactive understanding of subsidiarity which implies enhancing the scope not only for mutual containment but also for mutual empowerment between levels of governance. In other words, if we are to reinterpret subsidiarity and devolution in light of the reality of shared competence and therefore shared governance, we need to move away from a zero-sum apprehension of power distribution. How? Through the presumption, to start with, that if the centre or higher level of governance is to act, it need not be as a result of a wholesale transfer of competence but in order to contribute to the better exercise of their own competences by the States and local levels. This presumption would be in keeping with the broader principle of mutuality, that is . . . the obligation of each level of government as it participates in joint decision-making to foster the legitimacy and capacity of the other'. If legitimacy is indeed enhanced by the sense that governance takes place as close to the people as possible, then we need to probe into the conditions that make such 'closeness' more likely.

Subsidiarity as traditionally viewed takes these conditions as exogenous: levels of governance are determined by the scale and boundaries of the problems. Mutuality indigenises them: governance is about making it possible to deal with problems at the level commensurate with people's expectations. Rather than asking 'Is this an intrinsically local or supranational issue', we need to ask 'What conditions are necessary to enable state or local government to effectively contribute to the overall management of this task?' And 'how can the 'Union' foster those conditions?: a kind of qualitative interpretation of the principle of proportionality.'

While the draft EU Constitution does not embrace a language of empowerment, it contains elements that can be interpreted as such, to start with if we are to understand empowerment as that of the individual vis-à-vis its own state. Here one of the crucial challenges is to distinguish between collective empowerment through classic democratic schema and a kind of collective empowerment which does not fall prey to the majoritarian rule, *as if* there was a single European *demos*. The emergence of a Constitution raises these questions with great accuracy precisely because the very fact of a Constitution establishes the presumption of a direct link symbolic and political between individual citizens and EU institutions. How can such a direct link be strengthened without *aggregating* the voices of European citizens into a pan-European majoritarian voice?

One first response lies in the strengthening of political liberalism in the EU, which amounts to empowering individuals through the EU in their dealings with their own state. In this vein, the incorporation of the Charter of Human Rights as Part II of the Constitution is a crucial move which arguably would not have been possible without a constitutional ambition. How is it that at the end of the Convention, Britain accepted what it had adamantly refused two and half year earlier at the Nice Summit (December 2000)? Some would argue that the safeguards clauses included therein (Article II-52) did the trick by clarifying the scope of application of these rights. In fact, the clarification is formal since it was always the fact that the Charter is relevant only when implementing EU law. The real reason for British acquiescence lies in the pull of formalism attached to the adoption of a Constitution. As a result, this draft Constitution delivers on one of the foremost values of federalism—to provide individuals with rights, claims, and opportunities at least partially lacking within the confines of their own polities.

Hopefully, and combined with EU directives (or now 'laws' according to the Constitution), the Charter would enhance the voice of individuals in various arenas of life in Europe (not only politics, but work, militancy, schools, and public space). But the Constitution does not go far enough in

spelling this out. There is no denying, of course, the tensions that do or may arise by seeking to empower individuals alongside states, executives within states, regions, cities, and NGOs. In some cases, state actors are likely to be empowered at the expense of civil society and vice versa. The suggestion we formulated in *The Federal Vision* is that such tensions be mitigated by thinking more systematically of ways in which citizens and groups within the state can be empowered to better engage with rather than bypass the state. In this light, the Constitution has stopped short of advocating a kind of subsidiarity consisting in creating process obligations at the national and subnational levels that ultimately empower both states and citizens at the expense of the Union. This implies for instance that the federal level creates duties and responsibilities on the states themselves to inform, involve, and negotiate with those that lay claims upon it. Rather than encourage labor unions, minority protection associations, or consumer associations to bypass the state, invoke federal laws, or negotiate directly at the union level, the Union should lay emphasis on the state's duty to negotiate with its citizens (Chalrreos 2000). In the end, such an approach is certainly not less intrusive upon state sovereignty than substantive obligations but it is certainly more likely to foster a participatory culture at all levels of governance.

Which leads me to the second response provided by the draft Constitution in order to strengthen the voice of individual citizens in Europe: the proclamation of the importance of 'participatory democracy' in the EU alongside representative democracy. Participatory democracy in this context refers specifically to EU institutions and the obligation that they 'give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action (Article I-57). This formalises an obligation for the Commission to conduct ad hoc consultations, organize numerous fora and NGO meetings as well as provide a great deal of transparency through the Web. Going one step further, the text proposes politicizing this obligation to consult through a new right of petition whereby citizens can ask the Commission to initiate laws if they can gather one million signatures from a 'significant' number of member-states, number to be determined in a subsequent law. This new clause is remarkable in several ways. First, it constitutes the first concession to some form of direct democracy since the Community's founding. Second, as with the role of national parliaments in policing subsidiarity, the right of petition is not based on majoritarian thinking but rather on *pluralism*—the emergence of pluralities of national voices. Most probably, the significant number alluded to will be one-third.

Ultimately, the new emphasis on participation points to the fact that genuine empowerment is not mainly about distributed benefits or even rights; it is about distributing means of action and beyond encouragement to discharged one's civic duties.

As stressed in *The Federal Vision* there are undoubtedly powerful counterforces to the self-limiting commitment of empowerment on the part of the EU. They converge in what we may call the demand for 'integrated governance': the need for any political community to generate the institutional underpinning for making interissue tradeoffs at the center—the balancing of priorities, and thus of investment and policy choices, interests groups, beliefs, and arguments—and its capacity to deliver on compensatory mechanisms: if obligations are undertaken by parties that might stand to lose from such implementation, costs ought to be born by the whole community. It is this kind of issue-integration more than anything that distinguished a federation-in-the-making like the EU from issue-specific international regimes like the World Trade Organization (WTO). And yet EU decision-making structures and processes have long been themselves highly fragmented in comparison with the United States for instance. The Convention sought to remedy this state of affairs by creating a legislative Council which was to replace the sectorial councils when and if these were considering legislation. Such a Council would have met in public and been accountable and would have provided such an integrative function. Unfortunately, the proposal made by the Convention was rejected at the IGC precisely by those who feared that the legitimacy and effectiveness thus conferred to such a legislative Council might allow it to bypass Union obligations of loyalty to the states. Surely, such a chamber of Europe ministers would be less concerned with issue-specific constraints at the state level.

5. *Mutuality, Recognition, and Cosmopolitanism in the Constitution*:
In the end, the main message of *The Federal Vision* was that rethinking federalism ought to mean thinking beyond the traditional Weberian hierarchy of the state federalism, an interstate polity which takes the liberal democratic imperative seriously—that submission to power should be a voluntary and contractual. Accordingly, a federal project ought to shed its image as a device for vertical division of labor, with does and don'ts focusing instead on horizontal division of labor, cooperation, and competition among states, regions, and peoples—and so recover a concept of horizontal rather than vertical subsidiarity. This challenge has mainly been lost in the US. Does it fare better under the new EU Constitution?

The answer should be: to some extent. As Daniel Halberstam has brilliantly discussed, the ultimate mark of liberalism lies with the propensity and capacity of a system to temper power with responsibility (Halberstam 2004). In this light, the notion of loyalty is at the core of the federal contract: loyalty of the constituent parts towards the whole, of the whole towards the constituent parts and of the constituent parts towards each other. In other words, top-down, bottom-up, and horizontal loyalty. Halberstam contrasts the *entitlement approach* prevalent in the US whereby each level of government exercises its entitled power without regard to other levels with what he calls the *fidelity approach* which insists that each level of government must always act to ensure the proper functioning of the system of governance as a whole. Furthermore, he distinguishes between a conservative notion of fidelity bent on harmonizing interests and approximating a unitary system of governance and a liberal vision of fidelity promoting productive democratic conflict throughout the federal system. Conflict in turn is pervasive and productive in a system where no *a priori* hierarchy of laws and institutions has been set, where neither the whole nor the parts are entitled to 'have the last word'. Loyalty or fidelity are therefore the flipside of shared competences and conflict regarding the responsibility associated with such competences in a nonhierarchical system.

I argue that a general duty of loyalty constitutes the foundation for empowerment vertically and mutual recognition horizontally. How much then does the Constitution rely on or contribute to the fostering of loyalty in the EU? And what exactly are the ramifications of this concept in the EU context?

The Constitution does make loyalty one of the foundational principles of the EU under the label, 'sincere cooperation' ('Pursuant to the principle of sincere cooperation, the Union and the member-states shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution (Article I-5, al 2)'). But it does so within limits. For one, the wording of the clause itself reveals the reluctance of the member-states to accept a reading of this principle that would imply any kind of automaticity or implied power for the Union in translating such a loyalty into deed. Hence, while the Convention had referred to this principle as 'loyal' cooperation, the IGC replaced the term with a term previously used in the Nice Treaty, the notion of 'sincere' cooperation which bares no implication with regard to an outcome but only with regard to the intention of the actors themselves. Presumably a State may have sincerely sought to cooperate but ended up with a disloyal outcome. More importantly

perhaps, the article does not recognize (at least explicitly) that this obligation should apply horizontally between the member-states themselves (the Praesidium even rejected an amendment to this effect).

More broadly the EU's loyalty to loyalty must be assessed far beyond this specific statement of principle. For one, 'liberal democratic federalism' Halberstam argues, 'celebrates [the] dispersion of public attention away from a single majoritarian body politics. Federalism on this view, naturally furthers the project of democracy by constitutionally preserving multiple points of democratic engagement throughout the system' (p.186). Such an understanding of federalism argues, *inter alia,* for submitting the problem of subsidiarity to vigorous political interaction among different levels of government—an insight taken up by the Convention as discussed above.

But the Constitution is wanting in stressing the horizontal dimension of loyalty and mutuality, for example, the requirement and specific form of mutual loyalty, fidelity, and cooperation among the member states themselves rather than simply between them and federal institutions. The Constitution only partially balances the focus on a vertical paradigm of *multi-level governance* toward one on a horizontal one of *multi-centerd* governance.

If we are to explore the normative implications of such a focus on horizontal subsidiarity, I have argued elsewhere that we need to revisit the principle of mutuality as a horizontal commitment between states or peoples rather than primarily between levels of governance. To be sure, the principle of mutual recognition of laws and regulations is embedded in the unchanged articles on the single market (Part III. Title 3. Chapter 1). This means endorsing the approach by the ECJ of a managed for of recognition, most cautious about impinging on states' regulatory authority in the name of free trade (Nicolaïdis 1993, 1997; Nicolaïdis and Egar 2001). In the same spirit, the revised articles serving as a basis for cooperation in the areas of justice, security, and freedom have put mutual recognition of judgments and penal practices at the center of cooperation among policemen and judges. Only minimum common standards are called for, and only to the extent that they are necessary to ensure mutual trust. The Constitution leaves open approaches to finding the right balance between harmonization and recognition. But at least it does not adopt a conservative version of fidelity in the third pillar as many Conventioneers had called for.

These clauses speak to the role of 'managed' policy competition in enhancing the legitimacy of governance by allowing voters of each constituent unit to witness and take part in the contestation of their national approach to policymaking through demonstration effects and

the institutionalization of such demonstration effect, negatively—naming and shaming approaches—or positively—policy transfers. Accountability and thus legitimacy are enhanced as it becomes easier for citizens to 'vote comparatively' rather than 'vote with their feet'. But, as we stressed in *The Federal Vision,* legitimacy is not necessarily enhanced by regulatory or policy competition if the feedback mechanism from policy competition to policy reform itself is not mediated through some sort of democratic process. Policy competition can act as a *constraint* on democracy. In that sense, mutual empowerment must be conceived as an antidote to the notion of a 'federal state' where local democratic processes are bypassed and subsumed under unified democratic and market dynamics.

Unfortunately, as discussed earlier, the draft fails to institutionalize the Open Method of Coordination as a general approach to cooperation in the EU, perhaps most faithful to such a philosophy of democratically managed policy competition, by replacing common policies by cooperation, mutual learning, and shaming. To be sure the OMC is mentioned in specific areas—social, industrial, and environmental cooperation—where it had been adopted in the 1990s and the method will continue to be used with or without constitutional blessing. But it is telling that the Conventioneers did not find it important enough that the OMC be spelled out in black and white for symbolic reasons. Notwithstanding cries from supranational purists, the idea that the public opinions of Europe can help adjudicate how their countries learn from the rest of the Union enhances rather than subverts the Community method and the spirit of mutual loyalty among European publics.

Perhaps even more telling is the fact that the draft contains little new about EU citizenship, which may be the most symbolically potent expression of the EU's character as an expression of Kant's cosmopolitan law, that is the constraints put on states in their treatment of citizens from other states (while domestic law constrains their treatment of their own citizens and international law their treatment of each other). Citizenship rights in the EU involve mostly rights connected with freedom of movement and nondiscrimination when borders are crossed and people live and work in member-states other than their own. Unfortunately, sovereignists killed early on in the Convention the idea of expanding mutual political rights in other countries beyond the existing right to vote in local elections—that is to the right to vote in the national elections of a country where one resides. Ancient Greeks called this principle isopolity: cities would

reciprocally grant equal rights to citizens residing within their walls. At least the draft Constitution strengthens the vertical aspect of rights—sympolity for the Greeks—by incorporating the Charter of Fundamental Rights. But the Charter's reach should not be exaggerated: despite ambiguities, it is supposedly meant to guard against abuses in EU law, not to supersede national practices. In empowering citizens against the state, the Charter is in any case part of the universal trend initiated after World War II to decouple the notion of rights from that of belonging to a particular polity; noncitizen residents in the EU are also beneficiaries. Beyond the Charter, the Constitution regrettably fails to politically recognize not only EU citizens living outside their states but also these non-EU citizens by giving them a greater voice in European affairs. A real demoicracy would call for consistency if not equality in the way we treat other Europeans and non-European others.

And yet in fact, many of the debates spurred by the Constitution in the various member-states have turned on the notion of 'acceptable differences' between member-states. While the EU may be a far cry from the teleological view of the European Union as the 'Universal and Homogeneous State' *en herbe* heralded by prophets of the end of history it is predicated upon a similar assumption, namely, that those who join in such a union have come to a tacit or explicit agreement over what constitutes acceptable differences among themselves and have developed enough mutual trust to believe that they will all continue to act within these parameters (see Robert Howse's introduction to Kojève 2000). But how far then can we stretch the notion of acceptable differences? Is subsidiarity not also about being able to renegotiate the scope of such allowance? More radically, does it imply that different parties to the federal covenant might interpret such allowance differently? Europe's version of asymmetric federalism under the label of 'enhanced cooperation' simply follows from this presumption. Such flexibility in turn implies that, in different areas of actions and at different times, the 'center' of Union action will change location.

4.3 Conclusion

In the end, the diagnosis might boil down to this: the draft Constitution for the EU confirms most of the shifts we indentified as characterizing the kind of federal union which eschews most traditional features of

federal states. In this sense, the advent of constitutional politics in the EU does not announce a new convergence toward the US. The account given above starts with the vertical dimension of federalism, namely that between the states and the Union, as was explored in *The Federal Vision*. The horizontal dimension of federalism, that of the relationship between the member-states themselves is emphasized in turn in order to characterize the kind of (horizontal) transfers of sovereignty actually taking place. But nothing has been said yet of the asymmetric bargain underpinning such transfers. Indeed, the balance of power between states was at the cost of the initial bargain struck in the US, as discussed by Magnette in this volume. As to be expected, it also became one of the very core disputes at the heart of the Convention debates. On this count, I have argued elsewhere (Magnette and Nicolaïdis 2004) that one of the Convention's greatest failings was to have upset the horizontal balance among member-states in spite of introducing a formal provision asserting their equality. Throughout the negotiations, the bigger states apparently forgot that the EU was founded on a rejection of the hegemonic power politics that had plagued the continent for much of the previous four centuries. 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 combines the one country—one vote rule with weighting the relative voting power of states in the council according to the size of their populations. They had always conceded that some proportionality granting greater power to bigger states (which also applies to representation in the EP) was fair and realistic, 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 (which has wrongly been called the 'EU presidency'), 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 and a feature dear to the Irish, the Finns, and the Portuguese, among others. 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 also heading the commission, the EU system would move closer to leadership *à la française*, torn between a head of state and a prime minister, thus falling prey to the nation-state model after all (see *Whose Europe? National Models and the EU Constitution* Oxford: Oxford University Press, 2003).

Whatever its failings however, the new European Constitution should be seen as mainly an institutional vessel, a means not an end in itself, which would allow for continued deliberation and political battles in Europe over competing policies, ideologies, and visions.

If and when it comes into force, let us hope a European Constitution would be interpreted in the spirit of a federal union, compatible with the kind of transnational pluralism we can expect from a demoi-cracy. EU commissioners, ministers, and parliamentarians will continue to pass EU laws alongside national ones. The ECJ will issue judgments on constitutional conformity. Political parties and civil society will give opinions and make proposals. Eventually, constitutional amendments would be proposed, including through the *passerelle* clause which allows doing so without summoning a new Convention. It would be through these continued processes that we can assess whether indeed paradise has been lost, whether the EU will cross the rubicon by adopting a Constitution, and whether the provisions therein can serve as the basis for the emergence of a federal state. Thankfully, there are reasons, embedded in the blueprint itself, to think not.

It would be far fetched to argue that we have with this draft constitution a genuinely pluralist constitution to Europe embodying the spirit of constitutional tolerance, divesting sovereignty from nation-states without thereby falling into the trap of having to relocate 'it'. It would be far fetched to see it as the *constitution of shared identities*—explicitly aimed at managing differences, not engineering convergence. And yet surely, 'true partisans of liberty' since the beginning of the modern epoch have consistently emphasized federal liberty, that is to say, the liberty to enter into covenants and to live by them: a European Constitution's ultimate goal would be both to limit power in order to protect individual freedom and to establish a polity (Maduro 2001). If Europeans agree that, however imperfectly, it delivers a story about their polity as well as how it should be governed, if they hear this story as but one chapter in a never ending sequel, they might, by nodding it through after a great deal of contestation, contribute to making it so.

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5

Eurofederalism: What Can European Union Learn From United States?

Theodore Lowi

5.1 The American case: One among many

In the opening sentence of his essay on transnational governance, Michael Zürn draws from Claus Offe the stern contention that ''if the EU were to apply for membership in the EU, 'it would not qualify because of the inadequate democratic content of its constitution' '' (Zürn 2000: 110). The same would apply to the United States. If the US Constitution (1789) and the Bill of Rights (1791) had made its principles standards of admission, only half of the original states could have met them, and no more than half of the larger number of states could have met them in 1865 or, for that matter 1905, or 1945.

The Preamble affirmed that this is a 'Constitution for the United States of America . . . in order to form a more perfect Union. . . . ' Article IV, Section 4 provided that 'The United States shall guarantee to every State in this union a Republican Form of Government. . . . ' And the first eight Amendments (the Bill of Rights) convey twenty-five specific rights that are expressed in universal, unexceptionable terms. Yet the Constitution was not intended to apply to the states, as the Supreme Court made explicit forty-two years later in *Barron* v. *Baltimore*, one of the most important cases in US history. Mr Barron brought suit against the City of Baltimore, whose development activities had destroyed the commercial value of Barron's wharf. He won a substantial judgment in the lower court on the allegation that Baltimore had violated his Fifth Amendment rights by 'taking' his property 'without due process of law' and 'just compensation'. Barron lost at the state level, and Chief Justice John Marshall's Supreme Court rejected his appeal, arguing that

The Constitution was ordained and established by the people of the United States . . . for their own government, and not for the government of individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated . . . *The fifth amendment must be understood as restraining the powers of the General Government, not as applicable to the states*. (*Barron* v. *Baltimore*, 7 Peters 243 (1833) (Emphasis added))

This interpretation created a permissive 'dual citizenship', and without that gigantic compromise, the Civil War would not only have come sooner, but would surely have split the country into at least two separate sovereign nation-states. By 1860, the Union was able to win when the Civil War finally was fought, but the compromise of permissive, 'dual federalism' in *Barron* was not overturned. The Fourteenth Amendment, adopted 1868, had in effect been the key article of surrender of the Confederacy, because its very first sentence seems to have abolished dual citizenship and, with it, the end of state sovereignty: 'All persons born or naturalized in the United States and subject to the jurisdiction thereof, *are citizens of the United States and of the State wherein they reside* (emphasis added). But five years after its adoption, the Supreme Court intervened once again to save the states from a uniform standard of rights and a uniform understanding of 'a republican form of government:'

. . . however pervading the sentiment . . . and however it may have contributed to [their adoption] . . . *we do not see in those amendments any purpose to destroy the main features of the [federal] system* (*The Slaughterhouse Cases*, U.S. Wall. 36 (1873) (emphasis added)).[1]

Permissive dual federalism helped hold the American federal system together for another century. National institutions developed deeper roots and more stable politics. But the price was further postponement of the 'more perfect Union' promised in the same Constitution that enshrined federal institutions.

The EU is engaged in a comparable dialectic today, with federalism as the essential requisite for union, with the price in size and character yet to be determined and a future far from guaranteed. What lessons can be drawn from those of us who have gone down this path before?

5.2 The varieties of federal experience

There are many federalisms in the world. In 2002 there were 191 nation-states, as certified by membership in the UN. Of these, the number of

states 'involved in formal arrangements utilizing federal principles . . . ' varies from as low as twenty-four to a high of fifty-one (Lawson 2003: 467; Goodwin, Wahlke, 1997: 28).[2] The disparity is attributable largely to differences in how the observers apply a federalism criterion such as the one quoted here. But the accuracy of the total number is less interesting and far less instructive than the composition of the ten largest and most durable. The ten major federal systems, as of 1996, covered nearly half the world's land surface and accounted for roughly 40 percent of the world's population.[3] All of them work off the same general principle, that by dividing sovereignty and power vertically into two levels of government—each with its own constitutionally guaranteed right to exist—tyranny can be prevented and pluralities of people and interests can be tolerated without constant instability. However, their differences outweigh their similarities. For example, the constitutions of the United States, Switzerland, and Germany allocate several specifically identified powers to their national government and 'reserve' (a US term) the remainder for the lower level of government. The Canadian and Australian constitutions divide powers in virtually the opposite way. Canada's constitution delegates specific powers to the provinces and reserves all other powers to the national government (Friedrich 1968: 203; McRoberts 1997: 9–27). Australia came into its own with the national government enjoying a monopoly of income tax powers, foreign trade, banking and currency, corporate and labor regulation, and communication. After World War II, its preeminence in fiscal matters brought it control of much of education, health, and social services even though formal powers had been allocated to the states (Pusey 1991: 29–31). This can be seen as a tilt back toward the unitary English constitution; however, the eight Australian states maintain the 'state's rights', division-of-powers tradition, driven by the two major Australian parties—Liberal and Labor—conservative state's rights Liberal versus the more national Labor (Pusey 1991: 30–1; Williams 2001: 11)

In order to make sense out of the variety of federalism experience, there has to be a metric to range federal systems in some kind of logical space—the ideal being a continuum according to degree of centralization versus decentralization in federal–state (province) relations. This would also be a matter of practical value to any would-be federal state, including EU. The best metric would surely be the distribution of functions performed by each level of government, and the only way to pierce through such an abstract concept as function is to operationalize it in terms of the actual laws, policies, and programs regularly and habitually produced by the legislatures (and increasingly the executive branch) of both levels of

government. This sort of information is easy to get, translate, and categorize. And it is a great deal more reliable than the aggregate data (mainly fiscal) on 'policy outputs' drawn from OECD and other official sources. The inspection here will be only on the United States, but it will tell a story that will give the founding fathers of EU food for thought and a method for analysis and evaluation.

5.3 Who does what in American federalism?

5.3.1 The national (domestic) level

Table 5.1 is a visual rendering of the US federal system as it functioned between roughly 1800 (the advent of normal politics after a founding decade) until the 1930s. Column 1, the national domestic government, was, as intended by the framers of the Constitution, the smaller government with the shorter list of types of policies turned out regularly by Congress. This is an accurate picture of the national government until the 1930s. Mostly everyone is aware of exceptions, such as the national antitrust and railroad regulatory policies (1888–90) and the Federal Reserve, additional antitrust policies, and the income tax of the pre-World War I progressive era. But these are exceptions that prove the rule. They were few in number, and there was so much doubt as to their constitutionality that they were very narrow in jurisdiction and were weak and only sporadically implemented.

However, the relatively small size of the pre-1930s national government is not its most significant feature. The policy display also reveals that *the national government was functionally specialized*—specialized as to substantive objective and method or technique of governance. The objective shared by all the types of policies on Column 1 is the husbandry of commerce. Commerce was what had led to rejection of the Articles of Confederation after a dozen years, because confederation tolerated barriers to trade that interfered with creation of a common national market. The new Constitution with its stronger national government produced policies that earned America the designation by Europeans as a *commercial republic*.

The second trait common to all the items on Column 1 is the technique of governance. That technique is *patronage*. Patronage is a profoundly abused and misused concept, limited in our era to the distribution of jobs, access, and contracts as rewards of loyal service to members of the

Table 5.1. The Federal system: Specialization of functions among the three levels of government the traditional system, *c.*1800–1933

National government Policies (Domestic)	State government Policies	Local government Policies
Internal improvements	Property laws (including slavery)	Adaptation of state laws to local
Conditions ('variances')		
Postal services		
Subsidies (mainly to shipping)	Estate and inheritance laws	Public works
Tariffs	Commerce laws (Ownership and exchange)	Contracts for public
Works		
Public lands disposal	Banking and credit laws	Licensing of public accommodations
	Labor and union laws	
Patents		Assessable
improvements	Insurance laws	
Currency		Basic public services
	Family laws	
	Morals laws	
	Public health and quarantine laws	
	Education laws	
	General penal laws	
	Public works laws (including eminent domain)	
	Construction codes	
	Land-use laws	
	Water and mineral resources laws	
	Judiciary and criminal procedure laws	
	Electoral laws (including political parties)	
	Local government laws	
	Civil service laws	
	Occupations and professions laws, etc.	

victorious party—that is, the 'spoils system'. But patronage, properly understood in the medieval sense of patron in relation to client, is a distinct and fundamental technique of governance, with government the patron, distributing its resources to clients on an individualized basis, in return for loyalty, obedience, and support. The types of policies on Column 1 clearly make the national government a *patronage state*. These policies promote and expand alternatives, through incentives without or with a minimum of direct coercion. And the roads, canals, land settlement, etc., produced by those patronage policies are a by-product of building support for party and regime.

5.3.2 The state government level

The character and significance of the specialization of function in the national government can be more fully appreciated by inspection of Column 2, the policies at the state government level. And this will further demonstrate how useless and misleading it is to define federalism simply as a constitutional division of powers between the central government and a second or lower level of government.

The first impression is the comparative length of Column 2, and the etcetera at the bottom indicates the list could be longer. It also indicates that the framers intended that most of the governing in America was to be provided by the states.[4] And note well: each of the items on Column 2 is a category of policies, each occupying several volumes of actual statutes, all codified and classified according to subject matter.

A closer look reveals something much more profound couched beneath: State government is also functionally specialized. The powers 'reserved' to the States by the Constitution have been characterized as 'police power'. Its origins were probably in 'the royal power of granting equitable relief . . . as a duty and power of guarding the public welfare [without having] to wait upon legislation or judicial action, even though repression involved primitive processes' (Freund 1917/1965: 3839). Police power in the United States became a more general theory 'striking at all gross violations of health, safety, order and morals' (Freund 1917/1965: 66). When each of the items on Column 2 is unpacked, it becomes clear that virtually all of the policies enacted by the state legislatures can be comprehended by a single concept: *regulation*. It comes from the French *régle* (rule) and *réglementation* (to impose rules upon). Thus, if the national government from 1800 to the 1930s was a *patronage state*, the state governments, collectively, were a *regulatory state*, imposing rules directly on conduct, backed by sanctions (coercion) to maintain public order.

The states also have power to enact patronage policies, to construct public works, to encourage the arts, to distribute family, health and education services, etc., making the states more like 'modern' European *multifunctional* states. But the key differentiation between the US national government and the state governments was the regulatory element. The national government was not constitutionally excluded from direct regulation of individual conduct. For example, Article I, Sec. 8 explicitly provides that 'Congress shall have power . . . [t]o *regulate* Commerce with foreign Nations, and among the several states, and with the Indian Tribes. . . . ' But Congress so rarely chose to use its regulatory powers that the functional distinction between national and state governments remained constant for 140-plus years. The late

nineteenth-century exceptions mentioned earlier tended to prove the rule. The same is true of the virtual martial law rule of the four years of Civil War. If Rip van Winkle had fallen asleep in 1856 and did not wake up until the 1880s, he would not have had a clue as to the passage of time or the four-year revolutionary interruption of the Civil War.

The durability of this specialization of function—*patronage state* v. *regulatory states*—is clearly a case of nondevelopment. The national government resisted change despite the Civil War and the Second Industrial Revolution of the post-Civil War decades. But it could resist change no

Table 5.2. The Roosevelt Revolution: The political economy of the New Deal

Program(Policy/Agency)	Acronym	Year
Traditional policies		
Civil Works Administration	CWA	1933
Public Works Administration	PWA	1933
Civilian Conservation Corps	CCC	1933
Works Progress Administration	WPA	1933
Tennessee Valley Authority	TVA	1933
Rural Electrification Administration	REA	1933
Soil Conservation Service	SCS	1935
Regulatory policies		
Agricultural Adjustment Administration	AAA	1933
National Recovery Administration	NRA	1933
Securities & Exchange Commission	SEC	1933
Public Utility Holding Company Act		1935
National Labor Relations Act and Board	NLRB	1935
Fair Labor Standards Act	FLSA	1938
Civil Aeronautics Act and Board	CAB	1938
Redistributive policies		
Federal Deposit Insurance Corp.	FDIC	1933
Bank Holiday		1933
Home Owners Loan Corporation	HOLC	1933
Devaluation		1934
Federal Housing Administration	FHA	1934
Federal Reserve Reforms	FED	1935
Social Security Act	SSA	1935
Farm Security Administration	FSA	1935
Internal Revenue Tax Reforms	IRS	1935
Organizational (constituent) policies		
Judiciary Reform		1937
Executive Office of the President	EOP	1939
Budget Bureau	OMB	1939
White House Staff		1930s
Administrative Law		1930s
Federal Bureau of Investigation	FBI	1940s
Joint Chiefs of Staff	JCOS	1940

longer in face of the Great Depression. Table 5.2, 'the political economy of the New Deal,' is an inventory of the highlights of the growth of the national government. It is far from exhaustive, but it is sufficient to indicate not only the growth in size but, more significantly, the taking on of functions totally new to the national government. It is not possible simply to lengthen Column 1 of Table 5.1. Categorization is unavoidable, and the typology reveals not one but two additional 'functions of the state': regulatory policies and redistributive (fiscal and welfare) policies. At last, the national government of the United States had shed its Tudor[5] adolescence and was morphing into a modern multifunctional state: a regulatory state and a redistributive (welfare) state as well as a patronage state. These two new categories of policy are so distinct as functions of the state that policies of both types were not only declared unconstitutional during FDR's first term, but two independent lines of litigation were necessary. The sudden advances in policy practice and reversals in constitutional interpretation were termed the Roosevelt Revolution, making the national government of the United States a modern, multifunctional polity.

However, the revolutionary expansion of the national government away from patronage into directly coercive regulatory and redistributive (including welfare state) policies *did not come at the expense of the states*. All claims to the contrary are not just notwithstanding but are fallacious. The states in the United States still are the source of all the governing identified on Table 5.1, Column 2. And there are still no national marriage and morality laws, no national property laws, no national corporate laws or profession laws, etc. New national government was an add-on, not a displacement of the states.

5.4 From functions to consequences

5.4.1 Case #1: Ideology

Ideology follows power. This could be the most instructive insight for new federal systems, including EU. Direct but unanticipated consequences flow directly from the division of functions. Ideology is one example, and the best example to introduce the relationship between government functions and unanticipated consequences. Begin with the US case.

Once the functions of government are separated between the central government and the state governments, it becomes clear how and why *America's national government became the home of liberalism and the state governments became the home of conservatism*.

National government policies have been liberal in the sense that they are almost entirely instrumental—devoid of moral imperative. If it was good to build canals and to explore and survey conquered territory or deliver the mail, it was good because it was useful and productive; if it was good to subsidize coastal shipping or to sell public land cheap or give it away, it was good not because it was the realization of a biblical or some other moral principle but because it encouraged growth of national strength and wealth. It is this liberalism that characterized the policies of the national government in the nineteenth century and continued to characterize its policies in the twentieth century. Even as the national government began to adopt more regulatory policies, these were also almost entirely instrumental. For example, the antitrust laws were minimally motivated by the immorality of business conduct or even of monopoly but with maximization of the material benefits of competition.

In profound contrast, the American states were hospitable to conservatism because they were confronted with the fact that the coercion inherent in the regulation of any conduct affecting the 'health, safety, and morals of the community' almost always possesses a moral element. Most regulation by the national government has been concerned with conduct deemed harmful *in its consequences*. That is to say, it is liberal in orientation. In contrast, having given the states responsibility for maintenance and control of public order, the orientation around regulation by state governments tended toward conservative, concerned with conduct deemed good or evil *in itself*. Some state policies are liberal, instrumental; for example, regulating local traffic, local markets, fire hazards, and so on. And from time to time there have been more radically left regulatory policies, such as bank holidays, debt relief, and desegregation laws (Vallely 1989). But a scan of the history of policies in the American states will reveal that most state policies have been deeply, often radically conservative. And, once again, why not? The police power involves matters on which all citizens are conservative some of the time and many are conservative all of the time. For example, although few property-owning middle-class people will support such leftist policies as rent control or improved working conditions, almost all the lower classes support strict regulatory policies to preserve law and order and are the kind of God-fearing citizens who embrace most of the sexual and morality laws as well.

American cities, as agents of the states, have displayed the same conservative tendency. Having no place in the Constitution, local governments, including counties, are mere creatures of the states and exist for the convenience of the states, to implement the laws of the states, while

being permitted to adapt the state laws to local variations. Cities also possess a certain amount of authority under common law, such as power to control nuisance, disturbing the peace, carnal knowledge, and vagrancy. Uniformed forces use such powers, both statutory and traditional or common law powers, to herd prostitutes into certain districts, to keep the poor invisible, and to help maintain the barriers between neighborhoods separated along class, ethnic, racial, and cultural lines. In the United States these are state police powers long ago devolved to local police forces.

The relation between policy and ideology continued after 1937, even as the national government adopted policies that 'intervened' into areas of conduct deemed local and therefore piercing the shield of 'states' rights'. The real threat to state control of its own citizens did not actually begin until after *Brown* v. *Board* in 1954, which gave first recognition that the 'equal protection' clause of the Fourteenth Amendment gave Congress the authority to establish nationally uniform standards for race, class and gender, the disabled, and other deprived or dependent persons, as the first paragraph of the Fourteenth Amendment had apparently intended. The so-called social policies of the 1960s implementing the Supreme Court's 1955 decision mobilized the conservatism that had hitherto concentrated its politics on the state legislatures and local governments. Before the 1960s, it would have been a waste of time to go to Washington to fight on such issues as school curricula, divorce, abortion, the status of women, and so on. But that was no longer true after 1972, when most of the liberal democratic social policy agenda was in place. By 1980, the conservative presence in Washington was institutionalized; and by 1994, the conservative movement was hegemonic within the Republican Party. Ideology had followed policy.

5.4.2 Case #2: Politics and state building

This second case study focuses on the development of the U.S. as a nation-state. The United States of 1789 was neither united nor a state—at least not a fully recognized state in the international community of nation-states. Its first constitution, the Articles of Confederation, had failed after a dozen years, despite the fact that it was the most enlightened constitution up to its time. And it failed for all the reasons an EU Constitution will fail, unless it recognize a few important pitfalls. America's second constitution, of 1789, overcame enough of the shortcomings of the Articles to earn a new lease on life for the Republic, but many doubts remained in the United States and abroad regarding the viability of the Second Republic

and the distinct possibility that the Second might be replaced by a Third. As Oscar Handlin put it:

> For three decades after Revolution, the United States struggled with serious obstacles to development. It was excluded from the imperial trading system; its currency was unstable and capital was in short supply; and few knew how to organize large enterprises (Handlin 1968: 320).

The struggle for full international recognition continued into the War of 1812, whose principal cause was the American demand for 'neutral rights' to trade with both Britain and France without the interference of either warring nation. Since Britain controlled the seas, our complaint centered on them. Although the United States, by any measure, lost the war, it most certainly gained recognition abroad and fostered widespread nationalism and patriotism at home, with embrace of such common symbols as the flag and a national anthem, an overwhelming commitment to making the 'internal improvements' necessary for national integration, and an economic independence no longer to be subject to the vicissitudes of European wars. It is quite probable that a genuine American nation-state had not moved beyond the 'experimental' stage until the great 1812 war hero, General, then, President Andrew Jackson marked it with his Farewell Address in 1837. Referring back to Washington's Farewell Address in which Washington referred to the Constitution 'as an experiment,' Jackson vowed that 'the trial had been made [and has] succeeded beyond the proudest hopes of those who framed it' (Schlesinger 1986: 11 and passim).

I believe that the secret of success in overcoming serious odds against becoming a continental, democratizing nation-state can be explained not by a single event such as the War of 1812, but by comprehension of the distribution of power and functions between the national government and the state governments, as laid out in Table 5.1 A brutal summation goes something like this: The national government survived long enough to gain a solid foundation for its institutions and their legitimacy *because it was a patronage state*. As observed earlier, patronage is a distinctive and fundamental force of governance, characterized by a politics that is comparatively nonconflictive. Since there is no 'cracy' suffix for patronage, we might call it *clientocracy* because clients complete the definition of patronage. Reaching back to feudalism, patronage (according to the *OED*) is 'the action of a patron in giving influential support, favour, encouragement, or countenance, to a person, institution, work, art, etc. . . . ' Patron in relation to client was the principal relationship in stable, feudal government—a type of political relation in which the surplus resources of the patron

were distributed, on an individual basis, to those (clients) seeking the resources. Patronage proved then and proves now to be the most universally preferred form of political relationship precisely because it is nonconflictive. And it can be the principal form as long as there are resources that can be subdivided into units that can be promised and distributed as widely as necessary for the cooperation, coalition, conspiracy, or corporation required for the conduct the ruler or ruling party seeks.

The patronage relationship readily explains the relative stability of politics surrounding the national government. Patronage is the mother's milk of American politics, and stable 'party government' means stable government. When Andrew Jackson nationalized his method of government—'rotation in office' (called 'spoils system' by his aristocratic adversaries)—he was engaging in 'state theory' just as much as Hobbes and Locke with their 'social contract'. Coming to office on top of postwar (1812) crisis and the threat of secession by New England (in the Hartford Convention) Jackson not only constructed viable party government on a foundation of patronage but gave it the legitimacy it required:

> Office (has been) considered as a species of property, and government rather as a means of promising . . . the support of the few at the expense of the many. The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves . . . The [reform] proposed . . . would destroy the idea of property now so generally connected with official station, and although individual distress may be sometimes produced, it would, *by promoting that rotation which constitutes a leading principle of the republican creed*, give healthful action to the system (White 1955: 308–9; Schlesinger 1945: 46–7).

Jackson did not apply his philosophy of rotation to the fullest extent; Schlesinger estimates rotation between a fifth and a tenth of personnel during his eight years in office, which was no greater proportion than the record of Jefferson (Schlesinger 1945: 47). However, Jackson elevated it from practice to principle and, more to the point, applied it systematically *to areas far beyond rotation of office holders*. Patronage became the principle of governance. And as a consequence, American society and economy could 'modernize' through a series of economic and social revolutions into a 'modern society' while its political institutions could virtually resist development and remain a vestige of the English Tudor polity (Huntington 1968: 131–3).

This Huntington formulation is most astute and suggestive, but it fails to make even a wild guess as to how this could have happened. This slow or nonexistent political development in face of virtually revolutionary

socioeconomic development can be offered as support for the argument that the specialization of functions around patronage was the prime condition for political stability—'nondevelopment' being a dramatic synonym. The ability to dispose of vast public resources and the absence of obligation to maintain public order by regulatory policies or to expand political power or wealth by redistributive policies, made national state building and state maintenance a Garden of Eden, in which politics could work peacefully within whatever structures were provided while displacing or buying off conflicts by treating the resources as though they were unlimited. And in the short run they were unlimited. Resources were expanded by conquest and purchase; and at any point in time access of private interests to the existing fund of disposable public resources could be expanded indefinitely by subdividing them into larger numbers of smaller-sized units—whether the demands came from railroads seeking rights of way, corporations seeking protected or exclusive access, or settlers seeking permanent settlement. The only major effort by the federal government 'to regulate commerce among the several states' was the Fugitive Slave Act of 1850 establishing federal jurisdiction over all former slaves who had escaped and fled to a 'free state'. The Act made it a crime to shelter or help a fugitive slave, and it offered bounties for each fugitive captured and delivered to federal authorities. This law and the responses of the free states to it—dramatized by the horrors highlighted in Harriet Beecher Stowe's bestseller *Uncle Tom's Cabin*—contributed significantly to the end of compromise and the polarization of North and South. Patronage had bound together the loosely joined states, and regulation had torn it asunder.

5.5 The death and life of Eurofederalism

Going over the text of the EU Constitution and reviewing some of the discourse about it, pro- and con-, reveals a woeful lack of appreciation of the experience of state building elsewhere in the world, in particular the experience of countries with a history of relative success with federalism. The EU has made some advances in its effort to build a stable and effective federal state. But it is not enough to establish federalism merely by definition. Every provision put in its constitution is more than merely a specification resulting from the best compromise that can be obtained. Each of those provisions has long range consequences, unanticipated consequences that must be evaluated.

5.5.1 The architecture of the EU Constitution: Design for failure

The first thing one notes about the EU Constitution is its incredible length, which violates every principle and standard of constitution writing. The document to be submitted to all 25 EU members was 352 pages, accompanied by one 382-page addendum comprised 'Protocols and Annexes' and a second 121-page addendum of Declarations concerning the Constitution by representatives of member-states. Allowing for the spaces created by outline form, a conservative estimate based on standard font and conventional margins would shrink the total text plus the first addendum by 25 percent, to 550 pages! But the complexity is not to be measured alone by the length: Aside from the Preface and Preamble, there are four principal parts. Part I is divided into IX Titles, ranging from Definitions and Objectives of the Union, to Fundamental Rights and Citizenship, to Union Competences (powers) and 'Subsidiarities' (limits), to Union Institutions, Finances and Membership. One could have gotten the impression that Part I was the whole constitution (judging from the US Constitution). Yet it is only introductory, despite being composed of IX major Titles. Part II is the actual Charter of Fundamental Rights of the Union, comprised of VII Titles: Dignity, Freedom, Equality, Solidarity, Citizens' Rights, Justice and General Provisions for Interpretation and Application. (Solidarity is a rather novel right and may require a team of philosophers instead of the ECJ.) Then the back breaker comes in Part III, the powers of the Union titled 'The Policies and Functioning of the Union'. The most remarkable thing about this is its extraordinary specificity. Title III of Part I had already laid out five pages of 'Union Competences' (subdivided into eight Articles); yet Part III returns with a greater detailing of competences, subdivided into IV Chapters: Internal Market; Economic and Monetary Policy; 'Other Areas' (by economic sector); the Area of Freedom, Security and Justice; and Areas of Coordinating, Complementary or Supporting Action (again by broader subject matter, such as Public Health, Industry, Education). Those IV Chapters are in turn subdivided into a total of 32 Sections. There's more, but this sketch serves the point. As the great sleuth Hercule Poirot put it in *Murder on the Orient Express*, 'There are too many clues.' Poirot was confronting a murder of one person by a dozen conspirators. Are these state builders conspiring for a comparable objective?

A constitution can provide no more than a framework. It must then leave the rest for the political process, including the courts. A constitution can be formally changed only by one or more extraordinary (supermajority) decision rules. Questions of structure, division of powers, and rights

are constituent decisions that must trump the normal political process because a constitution provides the rules of the game, which cannot be changed to suit the convenience and felt necessities of mere majorities. The predictable defense for the length and detail of a lengthy constitution is that support for the constitution required compromises giving each dissenter some satisfaction. But it will not work that way. A constitution divides powers, but the constitution is not a resource divisible into separable units like patronage policies. A constitution is a system of principles, in which each principled part is related to each of the others, such that a decision about one element or unit has a bumping effect on most or all of the others. Consequently, state building requires state theory.

Alas! the drafters of the EU Constitution were not state theorists. There is no evidence of analytic, comparative evaluation in this document. (Where are their *Federalist Papers*? There are many thinkers of competence to provide them.) Exalted sentiments are to be found there; the promise of universal rights and 'subsidiarity' will make worthy ends and means. But the result is neither a pork barrel for patronage nor a social contract for the pursuit of happiness. The EU drafters have as yet learned little if anything from the other founding experiences.

5.5.2 Functional specialization of governments in EU federalism

Unlike the US Constitution, the division of functions of the two levels is not clear. According to the comparison made earlier, the EU Constitution appears at first blush to be a variant of Canadian/Australian federalism, with delegation of a number of specific powers to the country-members, the lower level government, with all other powers reserved to the higher (union) level. According to analyses by the BBC, EU laws 'will trump those of national parliaments . . . [and] the Constitution and laws adopted by the Union institutions . . . shall have primacy over the laws of the member states', (BBC News, 'What the EU Constitution Says' 10/29/04; *The Economist*, June 26, 2004, pp. 13–14 and 53–4).

Moreover, the 'exclusive competence' of EU extends to international agreements plus the following domestic areas: monetary policy for the eurozone countries, and for all members common commercial policy, customs, conservation, and all matters 'which do not fall within its exclusive competence . . . [but whose] objective cannot be sufficiently achieved by the Member States. . . .' (Draft Treaty, Title III, Article 12, paragraphs 1 and 2, and Article 9, paragraph 3.)

Yet the matter becomes confused later with a summation of the division of power that provides a reserved power clause much like that of the United States in relation to its states: 'Competencies not conferred upon the Union in the Constitution remain with the Member States'. Further confusion comes with Title III, Article 9, paragraph 3 granting to the Union the power to enter into any area that is *deemed* to be beyond the competence of the member-states.

There are two formal constitutional limitations on federal power. One is the ECJ. For example, if the EU adopted a general labor law or applies a law against the interest of a state or individual, it can be challenged in the ECJ. Many other types of right-based challenges can take that route (*The Economist*, June 26, 2004: 53) (see more below). The second route of limitation is 'subsidiarity,' an elusive concept that works through an extraordinary 'qualified majority' or 'double majority' political process whereby a law or motion in the European Council adopted by 55 percent of the countries representing 65 percent of EU's total population can require reconsideration of the controversial law or motion. If a new version cannot be agreed upon, the objecting nation can 'opt out'.[6]

The EU Constitution will probably go the way of the first American Constitution, The Articles of Confederation. It lasted just under thirteen years, but after all, that was the average life of the first four French Republics. EU could follow the United States and France by taking inspiration from the fact that death may be followed by transfiguration. The current EU Constitution cannot be salvaged by amendment. Let it decline into obsolence, taking advantage of the success of the Euro, of economic expansion, the promise of being a balance wheel to Pax Americana, and buying the passage of time that permits government institutions and processes to mature.

5.5.3 What can academia contribute?

Optimistically, federalism has been something of a solution in the construction of large and pluralistic nation-states because it offers a route to a compromise between a number of peripheral governmental units trying to create a central government without each having to commit suicide, but it is more than evident that federalism is not a solution in itself. All federal states have something in common, enough to warrant sharing the federalism label. But their differences of structure and ultimate success outnumber their similarities.

However, we, as social scientists, should be able to make a better, more useful contribution to the advancement of the EU by moving beyond a critique of its violations of the standards of constitutional draftsmanship, moving rather toward evaluation of the *functions appropriate for each level of government*. I provided already one illustration of this kind of functional analysis in my history of the functions performed in the United States by national and state (and local) governments, respectively, and the political and ethical consequences flowing from each (see Table 5.1 and discussion thereabouts). Four of the other contributors to this book provide related and reinforcing paths toward the most useful approach that academics can take. This is 'state theory' at its best, combining constitutional and jurisprudential principles with the empiricism of policy case studies.

5.5.4 Some state theory about the levels of federal systems

Nicolaidis' chapter is an ideal beginning. Although it is much more communal and sociological than the other contributions, she provides a logical and historical basis of three levels of governance essential to any constitutional design. She begins with an objection to the tendency to follow the US version of federal state, by proposing a:

> third way (toward) a non-centralized, transnational type of federalism . . . between *Union of democracies* [and] a *Union as democracy* . . . Sovereignists must accept that the EU is a community of peoples, not only of states . . . Supranationalists must accept that democracy in Europe does not require that this community merge into a single *demos*, it's will expressed through traditional state-like institutions. (emphasis in original)

This third way she calls *demoicracy*, and to her it is a third way for EU because it is 'a new kind of political community . . . that rests on the persistent plurality of its component peoples, its *demoi*'.[7]

Without entering into a full discussion with Nicolaidis, I propose to adapt her concept to a third way that is a more substantive definition of subsidiarity, defining the 'vertical relation' between the Union and the member-states. But further, it can be seen as defining a 'micro' level below the nation-state itself, the local communities in a 'union by choice rather than a union by force', . . . a European demoicracy (sic) found it on the recognition of a persistent plurality of its component peoples but not reducible to a set of complex bargains between sovereign states. This is unmistakably like Calhoun's 'concurrent majority', but it need not be taken that far to define the third level of her federal vision.

With this understanding, I believe it is possible to define a three-tiered federalism that can yield a useful functional analysis. This was inherent in Table 5.1 and the discussion there dealt with the political and policy implications of the division of powers provided in whatever constitutional design that is proposed. I was even more explicit in an earlier paper of mine, my presidential address at the 2000 International Political Science Association Congress in Quebec, in which I proposed a design of three layers arising (for obvious reasons) out of economics, in order to deal with the three political economies in the real world of the state: *micro*, *meso*, and *macro* (Lowi 2000).[8] My purpose in the earlier paper was of course not to propose EU reforms, but the three-tiered approach seems to be unavoidable as an approach to Eurofederalism. Constitution makers must take into account the nature and inherent limits of each level of government and the type of policy most appropriate for delegation and jurisdiction to each level of governance. This is an important task for the constitution makers, and it is the task literally for which political science exists.

I am not arguing that the same political patterns following from policies exist everywhere. My purpose is to support the argument that the functions of government (properly categorized) produce their own politics and that the proper study of policies will give the best clues as how to go about designing the three federal levels.

5.5.5 Toward levels and their functions, one case at a time

The state—with its institutions and processes of government—is an autonomous force in society, not nearly a set of institutions to be acted upon. To be behavioral about this, the state is composed of its functions and how these are implemented by its agents. Therefore, the behavior of the state and the consequences—intended and unintended—flowing from state activity can be studied one policy and *one type* of policy at a time. And the method is the traditional *case study*: experience embodied in close narrative by political scientists trained in the appropriate policy and its analysis and evaluation. Such individual case studies can then be accumulated as the data of the state, enabling us then to evaluate the larger and more significant problem of the appropriate level for allocating the respective functions and responsibilities. The constitution allocations of powers and responsibilities *cannot be properly studied by masses of quantitative data*. Description and comparison come in narratives collected and written by persons of knowledge, one experience at a time. I remember being amused by a clever remark made nearly half a century ago, that 'the

plural of anecdote is data'.[9] Advancing maturity led me to an appreciation of its validity, especially where institutions are concerned. But to make such data valuable, the narrative must be in a well-defined context, with a clear and explicit sense of *what each case is a case of*. All of this is pointing directly toward policy case studies directed toward policy case studies (Fesler 1973: 4–14; Morstein-Marx 1946).[10] Nicoliadis provides a good starting point for application of this approach to EU by identifying with a theoretical perspective, the three levels of the EU Constitution, which I proposed labeling micro, meso, and macro. Three other contributors—Sheingate, Hallerberg, and Majone provide the steps toward the proper study of constitution-making through policy cases.

Sheingate's study of agricultural biotechnology policies is actually a cluster of policy case studies in the one substantive category of biotechnology policy. Central EU authority (macro) arises under a treaty, which has 'constitutional imprimatur', even though Article 174 of the EU Constitution provides that macroenvironmental measures do not preempt such laws by one or more of the member-states (meso). In both the United State and EU, member-states can adopt policies that are more strict or more permissive than those of the higher authority, and in both systems the higher courts—US Supreme Court and ECJ—have the authority to adjudicate and resolve jurisdictional disputes. Although the meso member-states of EU have vetoed or put the brakes on implementation of many EU biotech policies, the US states, with one exception, have not challenged US national authority. On the other hand, the EU has been moving (at least in this policy area) away from member-state 'nullification by statute' toward the judicial resolution like that of the United States, properly termed 'adversarial legalism' and 'lawyer-dominated litigation'. This kind of adversarial relationship is most likely to occur in regulatory policies (such as most of the biotech policies), and judicial involvement is a highly predictable consequence in regulatory policies. Once accepted, adversarial legalism can be a stable and stabilizing constitutional process. Caveat: This is so far based only on one case study.

Hallerberg comes through with another policy case study, providentially, in an area of governmental function far removed (logically) from regulation: fiscal policy. His narrative indicates without a doubt the prominence of the EU—macrolevel—as virtually dictated by the commitment to a common currency, the Euro, and the necessity of common exchange rates and virtually equal necessity for a ceiling on member-state budget deficits that are above and beyond the discretion of the meso, state level. Hallerberg sums up the policy pattern in this area of fiscal policy as European (macro) level 'to regulate fiscal behavior at *all* levels of government'. (Emphasis in original.)

He is of course using 'to regulate' in an entirely different sense than the regulation in the traditional sense that is reported by Sheingate's study at the meso level of state.[11] Hallerberg goes on to endorse the principle that the 'central government should manage macro-economic policy and should ensure some redistribution for the benefit of the poor'. But he reserves to 'subnational governments' (meso and micro) the provision of 'local public goods', based on the rather shaky popular US assumption that preferences vary from one local government to another and that 'local government is closest to the people'. But he is quick to retreat somewhat by recognizing the problem of 'externalities' at the meso level. Add to that his recognition of the authority and responsibility of the EU level to engage in such macro policies as ceilings on budget deficits. This confronts still another problem in addition to externalities, the 'race to the bottom' between and among lower level governments over the provision of 'local public goods' that attracts new local, national, and international location decisions. These observations are not intended as criticisms but as reinforcement of the substantative, functional, and constitutional implications of every policy choice—more importantly in every constitutional choice of how to allocate authority and limitations on authority for each level of government. Given the inevitable inequalities of wealth from one micro or meso level to another, the eventual federal constitution will almost certainly have to confront imposition of severe limits on the devolution of power over 'local public goods'. The principle here is what counts: what is special about the macro level in relation to the other two levels.

Majone brings to this problem an interesting linkage between federal structure and policy by introducing two principles of constitutional self-regulation as defense against tyranny: the US separation of powers principle and the English (and essentially prerevolutionary France) principle of 'mixed government'. Separation of powers divides government against itself, with independent overlapping and mutually dependent branches—legislative, executive, and judicial. The principle of mixed government, in contrast, builds into the legislature equal divisions of three principal components of rule—King, Lords, and Commons, or, by whatever name, the principal cleavages or 'estates' in society: monarchy, aristocracy, and democracy. Each is given its own autonomy and rights with each in some respects dependent on the other two. However, all of this was presented by Majone in order to dramatize his contention that the 'Community method' is neither separation of powers nor mixed government. At the risk of distortion by simplification, it seems to me that his 'Community method' is a variant of the mixed-government constitution, with an

interesting twist. According to Majone, the Euro constitution is a mixed government constitution built on a central legislature with 'the territorial rulers' (the member-states) and a variant of 'a state' (cleavages in society) composed of not individual citizens but 'corporate bodies' balanced against each other and governed by mutual agreement rather than by a 'political sovereign'. He calls this a 'cooperative enterprise'. That was the hope of the mixed-government estates.

If I were a Justice of the US Supreme Court, my response would be, 'I concur, dissenting in part'. My dissent is not empirical but normative. Majone is, without full awareness, defining a *corporate state*, or (with Mussolini) a *corporativist state*. And it comes very close to the 'pluralist system' that multitudes of American political scientists (led by Yale's) embraced as 'the pluralist theory of power' in the 1950's and beyond. He virtually reinvents the pluralist dictum with his observation that 'policy emerges epiphenomenomally, from this contest, rather than from different ideological positions'.

Very much in service to my argument (unintentionally), Majone chooses a policy of regulation for his case study, which he terms as 'the modern regulatory state'. Immediately, his argument turns to 'the delegation program', that is, the delegation of rule-making power: 'of quasi-legislative powers to bodies operating at arms length from central government, agencies, boards, commissions, administrative tribunals'. In other words (i.e. in my words) this involves devolution (with delegations) to the meso level, where the process is dominated by government agencies bargaining with corporate groups (cleansed as NGOs) and with representatives of those state-members with a special interest in that which is being regulated. The venue for regulatory policy sometimes is in Brussels, but at most other times in the national capitals or other cities in which regulated entities are located. This is indeed pluralism, the corporate variant of pluralism, with bargaining among representatives of corporations, trade associations, and those public corporations called state-members—indeed a 'cooperative enterprise'.

It is no wonder Majone closes his contribution with 'the great question . . . whether self-government is possible in a community of 25 or 30 sovereign states'. That brought to mind a still more exasperated version of the same great question posed by then president of France Charles deGaulle, whether it is possible to 'impose unity out of the blue on a country that has 265 different kinds of cheese'. The United States may pose the still larger question of whether it is possible to govern constitutionally a country of fifty semisovereign states plus several

hundred multinational corporate 'states-within-the state'. This is indeed policy and politics at the meso level.

The United States under Ronald Reagan, George H. W. Bush, and George W. Bush has tried to respond to the problem of corporate self-government by reducing the number of regulatory policies being made by the national government—through deregulation, privatization, devolution, and just plain nonregulation under existing policies. Despite their rhetoric, the latter—nonregulation—became the most important, because none of those presidents was willing to spend any political capital on actual termination of regularity policies by officially closing down those programs by legislation as a matter of policy. Instead, they simply appointed heads of those regulatory agencies who were antagonistic to the program in particular and national regulatory programs in general, as a matter of ideology. This is deregulation by informalization—deregulation by an unspoken consensus not to regulate. This resurrects an old story told about President Grover Cleveland back in the 1880s, when he was sought out by a loyal Democrat seeking a federal job in return for his active support in the election. When President Cleveland refused him on the grounds that such an appointment would not be constitutional, the disappointed office-seeker replied, 'But what's a constitution among friends?'

Informality—reliance on processes quite apart from rule of law creates a large gap between formal government and informal self-government. This gap between the formal and the informal is virtually an operational definition of illegitimacy. EU, thus, cannot survive with a 350-page Constitution dependent on vast areas of government by delegation and informality, process, pluralism, and corporate self-government, with policy meaning nothing more than a by-product, of the process. One major sign of the deconstitutionalization of EU is the cleansing, the legitimizing, and the upgrading of the status of private interests and their interest groups—especially corporate interest groups—with the antiseptic designation as 'non-governmental groups, or NGOs, and a more recent one, quasi-nongovernmental groups (QUANGOs), parroting the US euphemisms that accompany the effort to adjust the Constitution and its anomalies as the national government began to expand at a meteoric rate during and after the 1930's'.

Soon after the Constitutional Convention in Philadelphia, Benjamin Franklin, who was of two minds about the document, responded to a friendly inquiry about the outcome: 'a republic, if you can keep it'. Democracy with a constitution is a republic. Democracy without a constitution is a process. Perhaps it would have been better for all Europeans if the quest

of a Eurofederation had never been undertaken—hopes being the parent of rebellion. Having undertaken the task, the Europeans cannot afford to fail. And, for better or worse, the future of Eurofederation is in the hands of constitution makers, not warriors; in the hands of scholars and scribblers, not parties, parliamentarians, or presidents.

Notes

1. The Court was referring to all three Civil War Amendments. The XIIIth Amendment, adopted in 1865, simply abolished all forms of 'slavery or involuntary servitude'. The XVth, adopted in 1870, conveyed the right to vote to all citizens regardless 'of race, color, or previous condition of servitude'. But the Court was concerned in *Slaughterhouse* with the provisions of the XIVth Amendment that set a uniform national standard of citizenship and gave Congress the 'power to enforce this article by appropriate legislation'.
2. The low estimate is from Lawson (2003: 467); the high estimate is from Goodwin and Wahlke (1997: 28).
3. The ten were: Australia, Brazil, Canada, Germany, India, Mexico, Nigeria, Russia, South Africa, and the United States.
4. Column 3, local government, has no place in the Constitution. Local governments are creatures of the state governments, applying state laws to local conditions. This is a significant layer but need not be dealt with here.
5. Characterization of the United States as a 'Tudor polity' is neatly argued in Huntington (1968: ch. 2).
6. As *The Economist* judges it, this 'double majority' legislation process makes it somewhat easier for small countries like Poland and Spain to block laws, and it stops the 'big three' from going it alone. In the United States this procedure was sought by certain southern leaders beginning in the 1820s, called 'Nullification.' The provocation issue was not slowing the protective tariff—the 'tariff of abominations', as Calhoun and others characterized it. Having failed for three decades to get the principle of nullification adopted, the southern states went one large step further, with secession and Civil War.
7. According to the *Oxford Companion to Classical Civilization*, *demoi* is an alternative spelling of *de moi* and an alternative spelling of *demes* and is defined in this volume as well as in the *Concise Oxford Companion to Classical Literature* as 'local communities or parishes in Attica, eventually numbering about 170, [which] replaced kinship groups (as the basis of the democratic constitution in Athens . . . Each *deme* had its own finances), and its . . . [deme leader was] elected by its assembly (*agora*) which dealt with local affairs'. Eventually membership in the *demes* became hereditary and did not change with the changes of residence. On reaching the age of 18, every male Athenian citizen was registered in his family *deme*'.

8. I believe the addition of *meso* is an improvement on the conventional micro/macro distinction in economics, but would assert further that it is absolutely essential for the *political* economy needed for constitution-making.
9. I credit this to my colleague Raymond Wolfinger.
10. For classic concerns regarding 'area and function', see various publications of James W. Fesler, beginning in 1946 with his two contributions to Morstein-Marx (1946) and Fesler (1973: 4–14).
11. To 'regulate' is to impose rules of conduct *on individuals*, backing those rules by sanctions when the rule or order is not obeyed. To 'regulate' fiscal (or monetary) behavior is to set rules or boundaries on the general *environment* of conduct by a broad standard, in this case by the superior government over all of the lower level governments, with no focus at all on the conduct of specific individuals. See Lowi (1972).

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Part III

Institutions and Processes

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6

Federation, Confederation, and Mixed Government: A EU–US Comparison

Giandomenico Majone

Even readers familiar with the general idea of 'confederation' and 'mixed government' will probably assume that nowadays these two concepts have only antiquarian value. The aim of the present chapter is to show that, far from lacking contemporary relevance, these concepts are in fact useful to understand the deep structure of the European Community and Union, and to highlight some crucial but often overlooked differences between EC/EU governance and full-fledged federations. As an extra bonus, a good grasp of these two, apparently passé, concepts can deepen our understanding of the nature of the constitutional debates on the US Federal Constitution of 1787 and the EU Constitutional Treaty of 2004. It turns out that 'mixed government' and 'confederation' are closely related modes of governance, even though their connection is not usually stressed by constitutional scholars. The organizing principle of mixed government is the representation of corporate, rather than individual, interests. Hence the overarching goal of this mode of governance is the defense and promotion of the interests of the component units ('estates') rather than the protection of the rights and liberties of individuals. In other words, a mixed polity is a 'government over governments' (to use James Madison's expression), not the political organization of a body of free citizens. Precisely this premodern understanding of governance makes mixed government a good model of the institutional architecture designed by the Treaty of Rome. Essentially the same model applies to confederations—associations of independent states which in order to secure some common purpose, agree to certain limitations on their sovereignty, and establish some common machinery of deliberation and

decision. Briefly, confederation is simply the extension of mixed government to the international level. The close link between these two concepts provides an important element of continuity between the Rome Treaty and the new Constitutional Treaty.

The chapter is organized as follows. Section 6.1 provides some historical background, recalling the importance of mixed government to eighteenth-century Americans, and clarifying the distinction between balance of powers—a key element of the philosophy of mixed government—and the newer principle of separation of powers embedded in the US Constitution. Section 6.2 analyzes the classical Community method, and Section 6.3 shows that the method is essentially a latter-day version of mixed government. Section 6.4 applies the results of the preceding pages—in particular the distinction between balance of powers and separation of powers—to explain the different approaches of the United States and the EU to the delegation of rulemaking powers. The strict nondelegation doctrine still prevailing in the EU—while the corresponding doctrine was abandoned some seventy years ago in the United States—is a clear indication of the rigidity and growing obsolescence of the Community method. The problem, it is argued in Section 6.5, is that the method, originally designed for the limited objective of market integration, has been stretched to the breaking point in order to pursue a variety of unrelated objectives. Sections 6–9 explain why the EU is a failed federation but a successful postmodern confederation. The advantages of confederation for the preservation of liberty and democracy at state level were well understood by Montesquieu and his American disciples, the Anti-Federalists. Many of their arguments are still relevant today. European political leaders and students of integration eschew any explicit reference to confederation, but the new Constitutional Treaty actually moves in a confederal direction. The intimate connection between mixed government and confederation is again emphasized in the concluding Section 6.10.

6.1 Mixed government and the creation of the American Republic

Gordon Wood (1998) has shown that most Americans set about the building of their new states in 1776 within the confines of the theory of mixed government. The idea of mixed government goes back to Aristotle, who thought that the best practicable type of constitution is one that mixes and balances the interests of the one (monarchy), the few (aristocracy),

and the many (democracy). Polybius, the first student of Roman institutions, explained the strength of Rome by the (unconscious) adoption of a mixed constitution in which the consuls represent a monarchical element, the Senate an aristocratic element, and the popular assemblies, a democratic element. But the true secret of Roman government, according to Polybius, lies in the fact that the three powers check each other and thus prevent the natural tendency to decay which would result if any one of these became too powerful. In this way the Greek historian modified Aristotle's theory of mixed government in two important aspects. First, his mixed government is not, like Aristotle's, a balance of socioeconomic groups (or 'estates' as they will be called in medieval Europe) but of political powers. Second, he gave to mixed government the form of a system of checks and balances, in which it passed to Montesquieu and to the founders of the American Constitution (Sabine 1960: 154–5). In fact, in the eighteenth century this ancient theory attained an exceptional vitality and prominence in the American colonies through its expression in the English Constitution. The result of the Glorious Revolution of 1688–9 was the firm establishment of King, Lords, and Commons—each possessing rights of its own but dependent on the others in certain respect—as the common foundation of the government of the realm. Following Aristotle, the English theory of mixed government held that the presence in the legislature of these three 'estates' would prevent the constitution from degenerating into the corrupt forms of tyranny, oligarchy, or anarchy. By contrast, the new theory of *separation of powers* emphasized the qualitatively distinct *functions* performed by the legislative, executive, and judicial departments of government. Such was the popularity of the older model that by 1730 the principle of separation of powers, especially the division of executive and legislative powers, was 'nearly eclipsed by its frequent blending with the more powerful concept of the mixed constitution' (Wood 1998: 151).

The persuasiveness of the theory of the mixed polity depended on its ability to combine in the polity the main corporate interests of society, and not simply governmental functions. This is why for the Anti-Federalists the great vice of the scheme of checks and balances proposed by the framers of the Federal Constitution was that it lacked the *social* sources of stability of the mixed constitution. Hence, 'the real balances and checks' of the British Constitution seemed to Patrick Henry far superior to the mere 'checks on paper' the American Federal Constitution proposed (cited in Rakove 1997: 271–2). Americans justified their constitutional opposition to English policy not by rejecting the theory of mixed

government, but by using and adapting it. Republicanism itself was said to be no obstacle to the mixed constitution. After all, said John Adams in 1772, the republics of Greece, Rome, and Carthage were all mixed governments. Pennsylvania was the only state which deliberately rejected the mixed polity in favor of simple democracy (unicameralism), but even in Pennsylvania there was a sizable and articulate opposition advocating the merits of a mixed republic.

For reasons explained by contemporary historians like Gordon Wood and Jack Rakove, the Federal Constitution eventually abandoned the model of mixed government in favor of separation of powers. By so doing, the Americans of 1787 shattered the classical Whig world of 1776. They 'reversed in a revolutionary way the traditional conception of politics: the stability of government no longer relied, as it had for centuries, upon its embodiment of the basic social forces of the state. Indeed, it now depended upon the prevention of the various social interests from incorporating themselves too firmly in the government. Institutional or governmental politics was thus abstracted in a curious way from its former associations with society' (Wood 1998: 606). John Adam's belated defense of the mixed constitution in the late 1780s fell on deaf ears. It is hardly surprising, therefore, that the concept of mixed government has lost any concrete meaning for contemporary Americans, except for a handful of constitutional historians. The model of mixed government is not only of historical interest, however. In the following pages I argue that this model presents striking analogies with the institutional architecture designed by the framers of the 1957 Treaty of Rome establishing the European Economic Community. Understanding the logic of this peculiar constitutional design may thus help Americans gain a deeper insight into a crucial moment of their own history, when Federalists and Anti-Federalists were fighting battles not too dissimilar from those fought in Europe today.

6.2 The classical Community Method

What makes the European Community unique among the various forms of intergovernmental cooperation is the strength of its institutions and the method of their interaction. As codified by the Commission in its White Paper on *European Governance* (Commission 2001: 12), this method rests on three principles:

- The Commission is independent of the other European institutions; it alone makes legislative and policy proposals. Independence is meant to

strengthen the Commission's ability to execute policy, act as the guardian of the Treaty, and represent the Community in international negotiations.
- Legislative and budgetary acts are adopted by the Council of Ministers and the EP, always on a proposal made by the Commission.
- The ECJ guarantees the maintenance of the balance among European institutions, and respect for the rule of law.

The most striking feature of the Community method is its rejection both of the model of parliamentary democracy, and of the principle of separation of powers. The Commission's monopoly of legislative and policy initiative has no analog either in parliamentary or in presidential democracies. In parliamentary systems, legislators introduce relatively few bills; most legislative proposals are instead presented by bureaucrats to the cabinet, which then introduces them as draft legislation to the parliament. Once legislators receive such proposals, however, they are free to change or reject them. This is not the case under the Community method, where as a rule the Council may modify Commission proposals only under the stringent requirement of unanimity In parliamentary systems, moreover, neither civil servants nor their political masters can preempt the right of initiative of parliamentary parties and individual members of the legislature. In the separation-of-powers system of the United States, not only do legislators have the final word over the form and content of bills, but, further, only legislators can introduce bills. In the course of a typical congressional term, members of Congress will introduce several hundred bills on behalf of the president or of executive-branch agencies. During the same period, members of Congress will introduce on their own behalf as many as 15,000 or 20,000 bills (McCubbins and Noble 1995).

It is important to realize what is implied by the Commission's monopoly of legislative initiative. First, other European institutions cannot legislate in the absence of a prior proposal from the Commission. It is up to this institution to decide whether the Community should act and, if so, in what legal form, and what content and implementing procedures should be followed. Second, the Commission can amend its proposal at any time while it is under discussion in the Committee of Permanent Representatives (Coreper) or in the Council of Ministers, while, as already mentioned, the Council can amend the proposal only by unanimity. Thus if the Council unanimously wishes to adopt a measure which differs from the Commission's proposal, the latter can deprive the main Community legislator of its power of decision by withdrawing its proposal. Finally,

neither the Council nor the EP or a member-state can compel the Commission to submit a proposal, except in those few cases where the Treaty imposes an obligation to legislate. In sum, under the Community method the Commission plays the role of agenda setter, being similar in this respect to the committees of the US Congress. Within their jurisdiction, Congressional committees possess the monopoly right to bring alternatives to the status quo up for a vote before the legislature. The agenda power held by committee members implies that successful coalitions must include the members of the relevant committee. Without these members, the bill will not reach the floor for a vote. In other words, from among the set of policies that command a majority against the status quo, only those that make the committee better off are possible (Weingast and Marshall 1988). Similarly, the European Commission cannot be forced by any other European institution, or by member-states, to make a specific proposal changing the status quo, unless that proposal makes also the Commission better off. To understand the rationale of this sweeping delegation of agenda control to a bureaucratic body, one has to keep in the mind that in the constitutional architecture of the Community, the Council of Ministers represents the national interests of the member-states, while the Commission is supposed to represent the supranational interests of the Union. If also the Council had the right to initiate legislation, it could turn back the clock of European integration for domestic political reasons. In other words, the Commission's control of the legislative and policy agenda serves the purpose of enhancing the credibility of the member-states' commitment to the cause of European integration (Majone 1996).

In addition to its monopoly of agenda setting, the Commission, as guardian of European law, can take autonomous decisions in order to determine whether member-states have complied with their Treaty obligations, or to permit them in appropriate cases to deviate from their obligations. In some cases the Commission can also take general measures (directives) without Council approval, for example to ensure that state-owned, as well as private, firms satisfy European rules on competition (Article 86 of the EC Treaty). The member-states have repeatedly, but always unsuccessfully, challenged the powers of the Commission under this article.

6.3 The Community method and mixed government

As noted above, these peculiar institutional arrangements were functional to the needs of the early stages of integration, when the member-states

had to find ways of credibly committing themselves to their common objective. We should try, however, to go beyond mere functional explanations, to probe more deeply into the institutional and political logic of the method created by the Treaty of Rome. Such probing has been impeded by the oft-repeated assertion that the Community is *sui generis*. It is true that the principles of the Community method diverge significantly from those of contemporary democratic states; but as Tocqueville once remarked, the gallery of human institutions contains few original pieces and many copies. It is likely, therefore, that if no relevant contemporary model can be found, interesting precursors may be discovered in Europe's constitutional past. In fact, the institutional architecture designed by the Treaty reveals striking similarities to the model of mixed government discussed above—a system of governance which was prevalent in medieval and preabsolutist Europe. According to this philosophy of government, the polity is composed not of individual citizens but of corporate bodies—the 'estates'—balanced against each other and governed by mutual agreement rather than by a political sovereign. Government is a cooperative enterprise rather than a delegation of power from a sovereign ruler—or from a sovereign people. In practice, mixed government was limited government since the corporate bodies constituting the mixed polity were interested less in making policy for the entire polity than in questions of privileges and rights (or 'liberties' as they were called): rights of the territorial rulers as against the estates, and vice versa, or the respective rights of each estate vis-à-vis the others. Hence the prime theme of the internal political process was the tug-of-war among autonomous power centers over the extent and security of their respective jurisdictional prerogatives and immunities—over the maintenance of a 'balance of powers'. However, the contest was tempered by a high degree of institutionalization. In principle, in the mixed polity law could not be modified at the will of any one party, since it was not seen as the product of unilateral will in the first place (Poggi 1978).

It seems unlikely that the framers of the Treaty of Rome were directly inspired by medieval theories of government or by the constitutional discourse of seventeenth-century England and eighteenth-century America. They did, however, make a conscious choice between two distinct constitutional alternatives: either separating the functional branches of government, or mixing the 'estates' of the polity in the legislature—where the three political estates are not, of course, the Crown, Lords, and Commons of the old British Constitution, but the national governments represented in the Council, the supranational institutions—Commission

and ECJ—and the 'peoples of the States brought together in the Community' (Article 137 of the Rome Treaty), represented in the EP. Jean-Paul Jacqué comes close to recognizing the influence of the model of mixed government on the Treaty of Rome when he argues that the organizing principle of the Community is not the separation of powers but the representation of (national and supranational) interests. Each Community institution is the bearer of a particular interest which it strives to protect and promote, and the nature of the prevailing interest determines the structure of decision-making. Thus, where the framers of the Treaty deemed that national interests should have precedence in an area of particular relevance to national sovereignty, such as fiscal harmonization, they required a unanimous vote in the Council. On the other hand, where it appeared that national interests had to be reconciled with the supranational or 'common' interest, it was decided that the Council should legislate by qualified majority, thus enhancing the significance of the Commission's proposals. Again, where it was thought that the common interest should prevail, the Commission was given an autonomous power of decision. In short, under the Treaty each subject matter has its own decision-making procedure according to the nature of the interest receiving special protection (Jacqué 1991).

In the Community, as in all mixed polities, the balance between interests, and between the institutions that represent those interests, has constitutional significance. The principle of institutional balance—or 'balance of powers' in the language of the ECJ—does not of course imply an equal allocation of power among the various interests represented in the polity. Rather, the principle refers to the preservation of the relative position of each interest in the relevant domain. It is the task of the ECJ to ensure the respect of an institutional balance which reflects the basic agreements reached at the constitutional level. In the jurisprudence of the Court balance of powers plays a role analogous to that of separation of powers in modern constitutional democracies: it is a 'fundamental guarantee' granted by the Treaty, see Section 6.5. To classical liberals, separation of powers—the centerpiece of modern constitutionalism—was a necessary condition of liberty. When countervailing branches of government are correctly arranged, then, as Montesquieu stated, 'power arrests power'. Elaborating on suggestive remarks by the French philosopher, James Madison clarified how separation of powers could be maintained by giving each branch of government a 'constitutional control' over the others. This control consisted in 'a partial agency in the acts of the others', for instance the presidential veto over measures passed by

Congress, or the Senate's power of refusing consent to certain of the president's appointments (citations in Beer 1993: 284). Both the theory of separation of powers and the theory of mixed government share the idea of using different branches of government to check and balance one another. But as Samuel Beer explains, the end served by these controls is quite differently conceived by the two approaches.

For the theory of mixed government, the division of power among branches of government was designed to balance different social bodies represented in those branches. . . . 'Balance' resulted since the consent of each was equally necessary to the exercise of that power. Each was also said to be a check upon the others since it could withhold that consent. This check, however, unlike the control by partial agency of Madison's scheme, was not intended to confine each to a certain function but to prevent any of the social bodies represented by them from becoming dominant. . . . In Madison's scheme, the purpose of the controls by differentiation was not the balance of social classes but governmental efficiency and republican liberty' (Beer 1993: 285).

It is important to understand clearly that in the logic of mixed government (hence of the Community method) institutional balance is not primarily a guarantee of individual liberty, but of corporate 'liberties'; that is to say, it is a guarantee of adequate representation and protection of corporate interests. This is a logical consequence of the fact that the members of the EC/EU are not individuals but corporate bodies—the member-states and the European institutions. The principle which Alexander Hamilton considered 'the great and radical vice' of the American Confederation—namely, 'the principle of *legislation for states or governments* in their *corporate* or *collective capacities*, and as contradistinguished from the *individuals* of which they consist' (cited in Rakove 1997: 191, emphasis in the original)—still prevails at the European level. Daniel Elazar had it right when he wrote that the EU 'has perhaps more in common with the American Confederation of the 1780s than with either the modern US federation or the tradition of the premodern leagues' (Elazar 2001: 49). Judicial doctrines of direct effect and supremacy, and the fact that European law can create rights and duties for citizens of the member-states—rights which can be enforced only by national courts—do not change the basic nature of the EC/EU as a 'government over governments', to use James Madison's expression. True, there is a citizenship of the Union, but only for persons already holding the nationality of a member-state: 'Citizenship of the Union shall complement and not replace national citizenship' (Article 17 EC). In other words, citizenship is not an autonomous concept of

European law, but is defined exclusively by the legislation of the member-states. Again, since 1979 we have a directly elected EP, consisting of 'representatives of the peoples of the States brought together in the Community' (Article 189 EC), but the EP is seriously deficient as a system of representation of individual interests. Those interests are still largely rooted at the national level and, hence, find their natural expression in national parliaments and national political parties.

Several other features of the Community system reveal its deep affinity to the model of mixed government. Thus, the modern notion of indivisible sovereignty is incompatible both with the spirit of the EC/EU and with that of traditional-mixed government. In both, sovereignty is shared among the corporate constituents of the polity. For the English of the seventeenth century, for example, sovereignty could reside only in Parliament where the three estates of the realm—King, Lords, and Commons—were 'wonderfully combined'. In analogous fashion, the bits of national sovereignty that the member-states decided to transfer to the European level are exercised in common by the European institutions. Also the limited role assigned to democratic principles and practices in the life of the EC/EU becomes understandable in light of the model of mixed government. In crucial respects this model—grounded, as we saw, in Aristotle, the most notable critic of Greek democracy—is not a variant of, but an alternative to, majoritarian democracy (Dahl 1989). Another characteristic of mixed government was the absence of centralized administration. Since each estate or corporate group was supposed to take care of its own members, there was no direct link between the central government and the individual members of the estates. Historians of administrative law refer to such a system as 'self-administration of the corporate society' (Mannori and Sordi 2001). Here too, the similarity with the Community system is striking. The Community does not have a true bureaucracy, since EC policies are generally implemented by national administrations, while politically sensitive policies remain in the competence of the member-states. It is sometimes argued that also a country like Germany, under what has been called 'horizontal' or 'cooperative' federalism, has only a small central bureaucracy since most of the programs of the federal government are implemented by state or local governments. If these authorities fail to act, however, the federal government has the means for intervening and directly executing its laws, which, unlike European laws, apply directly to individuals. The situation is quite different in the EC/EU, where the means to enforce compliance by the national governments are very weak.

Again, in modern democracies the main aims of the political struggle are the control of political power and the formulation and implementation of public policy. By contrast, the main theme of political conflict in the old mixed polities was the conflict which opposed one estate to another in defense of their respective prerogatives and immunities. Also in this the Community is closer to the mixed polity of the past than to a contemporary democratic state. On the one hand, in the EC/EU there is no central power to conquer in a competition among political parties; on the other hand, Community policies are not decided upon by a majority government but by an agreement, or political exchange, among the three lawmaking institutions. Not by chance, in the majority of votes the EP does not divide along party lines, but presents a united front against the other institutions—sometimes against the Commission but more often against the Council. In sum, the language of majoritarian politics—government and opposition, party competition, left and right—has very limited currency under the Community method, precisely because the prime theme of the internal political process is the contest among autonomous institutions over the extent and security of their respective jurisdictional prerogatives. Policy emerges, epiphenomenally, from this contest, rather than from different ideological positions (Majone 2005). A comparison between the way the United States and the EU have tackled the delegation problem provides a good illustration of the difficulty of significant policy and institutional innovations under the Community method.

6.4 The delegation problem in comparative perspective

A distinctive feature of the modern regulatory state is the extensive delegation of quasi-legislative ('rulemaking') powers to bodies operating at arm's length from central government: agencies, boards, commissions, and administrative tribunals. The delegation of such powers to policymakers, who are not under the direct control of political principals, has always been considered problematic from the point of view of democratic principles. The reason is that this type of delegation of powers creates an 'agency problem'—the possibility that the administrative agents will not comply with the policy preferences of their elected principals. In spite of this and other problems, however, the practical case for delegating rulemaking to expert agencies has everywhere proved to be overwhelming—except in the EU.

The case of the United States, the oldest regulatory state, is particularly instructive. Here the initial hostility to delegation—which found expression in the influential 'nondelegation doctrine'—was based on the principle of separation of powers: Congress, rather than administrators or experts, should make the law. The American polity has grappled with this issue for more than a century, and the nondelegation doctrine was the first attempt to resolve it. For several decades the doctrine enjoyed such widespread acceptance that it came to be regarded as the traditional model of American administrative law. The model conceives of the regulatory agency as a mere transmission belt for implementing legislative directives in particular cases. Vague, general, or ambiguous statutes create discretion and thus threaten the legitimacy of agency action. Hence, when passing laws Congress should decide all questions of policy, and frame its statutes in such specific terms that administrative regulation will not entail the exercise of broad discretion by the regulators (Stewart 1975).

The nondelegation doctrine had already found widespread acceptance when the first institutionalization of the American regulatory state, the Interstate Commerce Commission, was established by the Interstate Commerce Act of 1887. The Act, with its detailed grant of authority, seemed to exemplify the transmission-belt model of administrative regulation. However, the subsequent experience of railroad regulation revealed the difficulty of deriving operational guidelines from general standards. By the time the Federal Trade Commission was established in 1914, the agency received essentially a blank check authorizing it to eliminate unfair competition. The New Deal agencies received even broader grants of power to regulate particular sectors of the economy 'in the public interest'. The last time the US Supreme Court used the nondelegation doctrine was in 1935, when in *Panama Refining Co. v. Ryan* (293 US 388) and in *Schecter Poultry Corp. v. United States* (295 US 495) it held the delegation in the National Industrial Recovery Act unconstitutional. However, the US Supreme Court's reiteration of the nondelegation principle, coupled with its very sparing use to strike down legislation, illustrates a continuing judicial effort to harmonize the modern regulatory state with traditional notions of separation of powers, representative government, and the rule of law (Mashaw, Merrill, and Shane 1998).

In the EU, the debate on, and the practice of, delegation of regulatory powers to independent bodies have developed along quite different lines. Ultimately, these differences can be traced back to differences in the underlying constitutional principles. In the EU, the functional equivalent of the American nondelegation doctrine is the so-called *Meroni* doctrine,

enunciated by the ECJ in 1958 (case 9/56 *Meroni* v. *High Authority* [1957–8] ECR 133). The case relates specifically to the ECSC Treaty, but the doctrine is generally assumed to remain 'good law', applying *mutatis mutandis* to all European treaties, and acting as a rigid barrier to the delegation of regulatory responsibilities to institutions or bodies not named within the treaties. In the Court's reasoning, the Commission could, in fact, delegate certain tasks to administrative agencies, but only subject to strict conditions (Lenaerts 1993):

- delegation might only relate to powers which the Commission itself possesses;
- such assignment must relate to the preparation and performance of executive acts alone;
- as a consequence of this, independent bodies may not be afforded any discretionary powers;
- the Commission must therefore retain direct oversight over the delegated competence and will be held responsible for the manner in which it is performed;
- finally, such a delegation must not disturb the balance of powers among European institutions.

Although European courts continue to consider *Meroni* as good law, doubts about the continued relevance of the doctrine have been raised by several legal scholars and students of European integration. Thus, it is pointed out that the situation which gave rise to that case—the delegation of certain discretionary tasks to private associations—is quite different from the current issue of delegating powers to European public-law agencies. Even admitting the continued relevance of the old doctrine, its conditions would be satisfied as long as the Commission retains certain control mechanisms. For example, a system in which an agency, such as the European Medicines Evaluation Agency (EMEA) could autonomously adopt marketing authorizations for new medical drugs, would be in line with the doctrine as long as the Commission retained the power to veto decisions which it found contrary to European law or to the 'common interest'. For example, according to the Framework Directive on telecommunications of the year 2002, national regulatory authorities (NRAs) must be independent from the national governments, but the Commission is authorized to suspend, for a period of two months, draft regulations the NRAs may propose, if such regulations could create barriers to the internal market, or if they appear to be incompatible with European policy objectives, regulatory principles, or law. After two months, the Commission may

take a decision, under the comitology procedure, requiring the NRA to withdraw its draft regulation. Thus, the Commission can veto an NRA when it regards a draft measure to be incompatible with European rules, and it is hard to see why it could not monitor in the same way an independent European agency. In sum, other mechanisms of control, more respectful of agency autonomy, might have met the demands of the European Court. The fact that in the case of bodies like EMEA or the European Food Safety Authority (EFSA) a much more restrictive option has in fact been chosen, suggests that, in addition to legal concerns, considerations of institutional self-interest played a role in the definition of agencies' powers (Dehousse 2002).

In order to better understand the institutional interests of the Commission it should be remembered that since the Single European Act, the delegation of implementing powers by the Council to the Commission has become the norm. As the ECJ ruled in *Commission* v. *Council* (Case 16/88 [1989] ECR 3457), 'after the amendments made to Article 145 by the Single European Act, the Council may reserve the right to exercise implementing powers directly only in specific cases, and it must state in detail the grounds for such a decision' (cited in Lenaerts 1993: 36). 'Implementation', according to the Court, includes both rulemaking and adjudication. Hence, once the Council has decided to transfer executive authority to the Commission, it can be expected that the latter will exercise its implementing powers fully and will stubbornly oppose any delegation of rulemaking powers to independent agencies. Any softening of this position, it is feared, would entail the loss of treaty-based and judicially affirmed powers. The Meroni doctrine and the principle of institutional balance provide the crucial rationalization of the official position.

6.5 Is the Community method obsolete?

The Commission's stubborn opposition to any significant delegation of regulatory powers to independent European agencies demonstrates the difficulty of introducing significant institutional innovations within the framework of the classical Community method. The root of this difficulty lies in the organizing principle of the Community: the representation of institutional interests. As Jean-Paul Jacqué has argued, it is simply not possible for Community institutions to achieve more than incremental adjustments within the given framework: 'For a significant evolution to take place it would be necessary that an institution renounces to exercise

its prerogatives to align its position on that of another institution. This is hardly conceivable since each institution is the representative of interests which it is its duty to protect' (Jacqué 1991: 252; my translation). This inability to innovate is the main reason why the Community method, which for several decades has been a powerful engine of market integration, is increasingly perceived as being too rigid to accommodate the needs of an increasingly complex and diversified polity.

As noted in a previous section, under the Community method policy is largely epiphenomenal—the by-product of actions undertaken to advance the integration process, of efforts to maintain 'institutional balance', of interinstitutional conflicts, and intergovernmental bargaining. The policy that eventually emerges from the attempt to pursue several objectives simultaneously will typically be the best bargain that can be negotiated politically at a given time. Even then, policy outcomes are uncertain since implementation is largely under the control of the national administrations. Policy failure is of course a well-known phenomenon also at the national level, but there voters can express their dissatisfaction by changing the governing majority at the next elections. European elections are not about European policies; they are second-order national contests about national political issues, and the popularity of incumbent national governments. In short, the Community method was not meant to deliver efficient governance in a growing number of policy areas. Its main objective was market integration, and the maintenance of a balance between the various interests involved in the integration process. The system was viable as long as the tasks of the Community were fairly simple: essentially, the dismantling of tariff and nontariff barriers to intra-Community trade, what is called negative integration. Positive integration—the design and implementation of European policies in politically sensitive areas—is beyond the capacity and the modest normative resources of the Community institutions (Majone 2005). Hence, it is not surprising that most institutional and policy innovations of recent years have taken place outside the framework of the Community method, but by direct agreement among member-states, as in the case of monetary union or of the Schengen Agreement.

Perhaps most striking is the fact that even convinced federalists like the former German foreign minister, Joschka Fischer, seem to have lost faith in the traditional approach to integration. In a controversial speech given at Berlin's Humboldt University on May 22, 2000, the foreign minister (speaking in a private capacity) argued that there is only one solution to the security and other problems facing the newly enlarged EU: a federal

parliament and a federal government with full legislative and executive powers. *Herr* Fischer is of course aware that Europeans still pledge their highest political allegiance to their own nation-states with their distinct historical, linguistic, and cultural traditions. Hence, he rejects what he sees as the still prevailing model of a sovereign European federation eventually replacing the old nation-states. For Fischer, the federalist project has a chance of becoming reality only if national institutions are not only preserved, but in fact become active participants in the integration process. The German political leader envisages a division of sovereignty between Europe and the nation-states. Divided sovereignty entails a bicameral federal parliament which would represent both the Europe of the nation-states and the Europe of the citizens, thus bringing together the national political elites and the different national publics. In order to avoid potential conflicts, the lower house of the federal parliament would be composed of directly elected representatives *who are at the same time members of the national parliaments*. Moreover, Herr Fischer rejects the Community method as a viable approach to European integration. This rejection differentiates his position not only from that of old federalists à la Jean Monnet, but also from those who, like former Commission President Prodi, advocate the generalization of the Community method as the only adequate answer to the increasing complexity of European governance. To Fischer the crisis of the Community method is evident, hence he thinks that the federal vision cannot possibly be realized by trying to drive forward the integration process by dint of policies designed by remote supranational institutions. The method itself is one of the problems confronting the Union today since in spite of its past successes, it has proved unable to achieve the political integration and democratization of Europe.

6.6 The confederal option

Thus the Community method is increasingly rejected for political as well as policy reasons. However, the growing obsolescence of the method in its present, overstretched, version does not imply the obsolescence of the underlying model of mixed government. On the contrary, I argue that this model helps to understand both the failure of the EU as a full-fledged federation and its success as a postmodern confederation. Paradoxically, the confederal option has been practically banned from the discourse about the future and finality of the Union. Confederations, it will be

recalled, are associations of independent states that in order to secure some common purpose, agree to certain limitations on their freedom of action and establish some common machinery of deliberation and decision. The confederal model is also called 'compact federalism' to stress that the confederation is brought into existence not by the act of a sovereign people but by a compact among sovereign states. Although this is precisely the situation in the EC/EU, the possibility of confederation as a goal of European integration has usually been dismissed. After the collapse of the plans for a federal European Political Community in the 1950s, for example, many European leaders turned, not to confederation but to functionalism as the alternative road to an ultimate federalist end. Since that time, the integration debate has been largely conducted in terms of 'supranationalism' and 'intergovernmentalism', rather than in the more traditional, and more transparent, language of federation and confederation. It is as if one preferred to ignore the fact that a significant change in the finality of integration had taken place between the federally biased Treaty of Paris, which in 1951 established the Coal and Steel Community, and the confederal complexion of the Treaty setting up the European Economic Community.

Part of the explanation of the lack of interest for the confederal option was, and still is, the widespread opinion that confederal arrangements are inadequate to solve the problems of modern political economies, and hence that federalism can only mean federal state. It is of course true that most confederations of the past have lacked institutions strong enough to ensure the economic integration of the component polities. Thus the Articles of Confederation that preceded the US Federal Constitution of 1787, gave the unicameral Congress authority in important areas such as foreign affairs, defense, and the establishment of coinage and weights and measures. However, this Congress lacked both an independent source of revenue and the institutional means to establish a common market among the former colonies. Another plausible explanation is that in the past the main reason for establishing federal compacts (confederations or leagues) among sovereign states was the search for collective security. In postwar Western Europe, however, collective security was placed in the hands of NATO, not of the European Communities. Instead of collective security, economic integration became the rationale for a new form of association among sovereign states, based on law and strong common institutions. According to a well-known student of federalism, the late Daniel Elazar, by the end of the 1960s the European Community had begun to build what were, in effect, confederal arrangements, based

on the integration of specific economic functions, rather than on a general act of confederation establishing an overarching general government, however limited its powers. Elazar viewed the present European Union as being essentially complete as a confederation, although the member-states and their citizens do not share this sense of completeness partly because integration has taken place piecemeal, but especially because of the assumption that integration means federation, and federation means a federal state (Elazar 2001). Also a number of contemporary European leaders seem to think that even the future EU will be a good deal closer to a confederation than to a full-fledged federal model—even if they carefully eschew the language of confederation. Jacques Delors is generally considered a federalist, but his notion of a 'federation of nation-states' is reminiscent of the confederal model. The title of Joschka Fischer's above-mentioned speech at Humboldt University—'From Association of States to Federation: Reflections on the Finality of European Integration'—explicitly refers to federation as the 'finality' of European integration, but most of his concrete proposals are more in the spirit of confederation. Again, Tony Blair's often expressed vision of Europe—Super-power, not Super-state: the title of a speech given in Warsaw in the Autumn 2000—seems to suggest a Montesquieuian *république fèdérative*, capable of playing a significant role in international affairs without undermining the sovereignty of the *états confédérés,* see Section 6.7.

The main reason for the deliberate exclusion of the confederal option from the discourse on European integration, however, seems to be the statist tradition, which has such deep roots in Continental Europe. A confederation is not a state, but the 'state' is what Europeans have known for at least four centuries. As Elazar (2001: 43) puts it: 'Once statist premises are accepted it is very difficult to avoid viewing the EU as an anomaly, something that has to be turned into a state, even a decentralized one, very soon'. Since the end of World War II, moreover, the statist tradition has derived new strength from the development of the welfare state. The mistaken idea that in the age of international economic integration the national welfare state can only be rescued by the creation of a European federation has many supporters. To see why the idea is mistaken we have to ask: what could be included in the public agenda of a federation composed of states deeply divided along cultural, social, institutional, and economic lines? Only by asking this question it is possible to appreciate the limits of a European federation by comparison with existing federal states like the United States, Germany, and Australia—or even Canada and Switzerland. In these, as in most other known

federations, the institutions of the federal government are embedded in a constitutional framework which presupposes the existence of a 'constitutional demos' by whose ultimate authority the particular constitutional arrangement has been established. Hence the reference to an 'American People', distinct from, and superior to, the peoples of the thirteen former colonies in the Preamble to the US Federal Constitution of 1787. In Europe the presupposition of a constitutional demos does not hold. As Joseph Weiler writes: 'Europe's constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos, and hence the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where their federalism is rooted in a classical constitutional order. European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power' (Weiler 2001: 57).

Now, the absence of a constitutional demos, or of a European demos *tout court*, has far-reaching consequences not only at the constitutional level but also at the level of legislation and policymaking. A federation composed of polities lacking the sense of solidarity generated by shared historical memories and a sense of common nationhood would find it difficult to pursue redistributive and other policies with clearly identified winners and losers. Hence, such policies would have to be largely excluded from the federal agenda as being too divisive. Again, many forms of state intervention which may be considered useful in parts of the federation at a relatively low level of development, could turn out to be harmful in other, more developed parts, and vice versa. Similar problems are not unknown at national level, but they are made less troublesome by the relative homogeneity, the common tradition, and the sense of solidarity of the people of a nation-state.

In a prescient essay originally published in 1939, Friedrich Hayek concluded that: 'the central government in a federation composed of many different people will have to be restricted in scope if it is to avoid meeting an increasing resistance on the part of the various groups which it includes . . . There seems to be little possible doubt that the scope for the regulation of economic life will be much narrower for the central government of [such] a federation than for national states' (Hayek 1948: 265). Hence, a European federal state would be unable to pursue precisely those policies which characterize and legitimate the modern welfare state: social redistributive policies and, more generally, all policies favoring particular socioeconomic groups or jurisdictions, at the expense of other identifiable groups or jurisdictions. It should also be noted that a serious legitimacy

problem would arise even if a large majority of citizens of the Union were in favor of a given policy, as long as the opponents of that policy are concentrated in a few member-states, where they form the majority. But a European federation unable to provide the variety of public goods (including income redistribution), which citizens of modern welfare states take for granted, would be unable to attract and retain sufficient popular support. The national governments would remain, for their people, the principal focus of collective loyalty and the real arena for democratic politics. Democratic life would continue to develop in the framework of the nation-state, while the federation, far from correcting the democratic deficit of the present EU, would actually make it worse because of the disappointed expectations of those who had envisaged something like a European welfare state. In turn, this loss of legitimacy would prevent the federal government from acting energetically even in areas, such as foreign policy and defense, where the nation-states do need to pool their sovereignty in order to play a more incisive role on the international scene (Majone 2005). The intrinsic limitations of a full-fledged European federation is probably what Daniel Elazar had in mind when he suggested that the EU may have more in common with the American Confederation of 1781 than with the modern US federation.

6.7 Mixed government and Montesquieu's confederate republic

Modern scholarship has shown that Montesquieu's model of the confederate republic provided the theoretical underpinning of Anti-Federalist thought, and of their successors of the states' rights school of constitutional interpretation (Beer 1993). The French political philosopher is known as the discoverer of the principle of separation of powers but in fact he was an advocate of mixed government—a mode of governance, it will be recalled, which is based, not on separation of powers but on the representation of corporate interests and the balance of powers. In reality, Montesquieu was referring to a separation of functions rather than separation of powers in the sense of organs of the state. Moreover, his notion of checks and balances—which was wholeheartedly adopted by James Madison and, through him, shaped so decisively the federal constitution of the United States—has to be interpreted, in accordance with the underlying philosophy of mixed government, as a balance between the socioeconomic interests represented in the polity. In light of these

misunderstandings it is only an apparent paradox that the real disciples of Montesquieu in America were not the Federalists led by Madison, but the Anti-Federalists who wanted to preserve the sovereignty of the thirteen states, while recognizing the need of forming a confederation for the purpose of defense against external threats. As we saw in Section 6.1, most eighteenth-century Americans favored mixed government at the state level, and it seems reasonable to assume that the Anti-Federalists viewed confederation as following the same logic.

Montesquieu's principal contribution to the theory of confederation was his solution to the dilemma of scale by means of compact federalism. According to the French philosopher, too much diversity in the body politic leads to conflict, and so disrupts popular government, while homogeneity improves the prospects of self-government. However, homogeneous small republics are easily dominated by large states, unless they protect their collective security by forming a confederation. In a confederation the various member-states have their separate, internally determined, interests which the common institutions are supposed to defend, but not to modify or regulate. The confederates bargain over the exchange of benefits that are useful to their respective purposes, but this exchange is purely utilitarian, it is not constitutive of the interests being served (Beer 1993). As in neorealist accounts of European integration, national preferences remain essentially unchanged. Like the French philosopher, the American Anti-Federalists believed that democracy and liberty could flourish only in fairly homogeneous polities, while a federation of the type James Madison envisaged would lead eventually to excessive centralization. For both Montesquieu and the Anti-Federalists, smaller government meant less danger from overpowerful bureaucrats wielding authority commensurate with their great competences. A key tenet of their common philosophy is that the political process tends to be divisive, hence cannot reduce diversity. If lawmaking is to approach agreement, therefore, it must start as nearly as possible from homogeneous preferences. Within the member-states of the confederation homogeneity is favored by their relatively small scale. In the government of the confederate republic agreement is made easier by the narrow scope of policy, which traditionally was limited mainly to defense. Defense is a matter on which the member-states can fairly easily agree since it involves no internal regulation of the diverse interests of the confederates, but only the external protection of their territory. In general, confederation is government by agreement, and this form of collective governance is possible only if the confederation is not required to act in fields where

true agreement cannot be achieved. For Montesquieu it is right that power should remain largely within the member-states since they are the true political communities. Among the important consequences of basing the confederate republic on a treaty or contract among the member-states was the idea of secession as a fully acknowledged right. As we read in Book 9, Chapter 1, of *Spirit of the Laws*, 'the confederacy may be dissolved and the confederates preserve their sovereignty'.

These were also the positions defended by the American Anti-Federalists. The purpose of the confederation, they argued, is merely to preserve the state governments, not to govern individuals. Hence, the Preamble of the Constitution should start with the words 'We the States' rather than 'We the People' of the United States. They admitted that some strengthening of the confederation was needed, but its powers should be as few as possible and should be narrowly, not broadly, construed. As Samuel Beer has shown, Madison's theory of the extended republic, set out in classic form in *The Federalist*, numbers 10 and 51, was framed in reaction to the model of the confederate republic and to the Montesquieuian argument which supported it. The Virginian's intellectual critique was reinforced by a demonstration of the failures of the Confederation of 1781: internationally, the weakness of the new republic abroad; domestically, the inability of the Continental Congress to prevent the member-states from creating obstacles to interstate trade or from discriminating in favor of foreign goods and services. The proposed solution consisted in replacing the model of a 'government over governments' by one in which the authority of the government of the United States extended to individuals as well as to state governments. In order to justify such a drastic centralization of power the Federalists needed a new legitimacy, and this was provided by Madison's 'invention' of the sovereignty of the people of the United States as a whole, which alone could stand superior to the people of any single state. Thus Madison envisioned a federal government resting for its authority not on the states, not even on the people of the several states considered separately (as in the case of the European Union), but on 'an American people . . . who constituted a separate and superior entity that would necessarily impinge on the authority of the states' (Morgan 1988, cited in Beer 1993: 254).

Absent a European demos the Madisonian solution to the problem of legitimizing a centralized federal government is simply unavailable to the political leaders of the EU. Thus, as suggested above (for a more detailed analysis, see Majone 2005), a would-be federation would lack the material and normative resources to provide the public goods Europeans have

come to expect from the state, whether unitary or federal. This seems to leave general confederation—that is, including the areas of foreign policy, security, and defense—as the only viable option for the future. As has already been pointed out, historically confederations failed because of their inability to integrate the separate markets of their component units. However, far-reaching, and probably irreversible, integration of the national markets of the member-states is the great achievement of the Community method. Building on this solid foundation it should be possible to establish confederal structures that are stable and effective. The Constitutional Treaty agreed to by the member-states in June 2004 is revealing of the current thinking of European leaders, even though it has been rejected by the French and Dutch voters in 2005.

6.8 The right to secede

What is arguably the single most important element of compact federalism in the Constitutional Treaty has attracted little public attention. This is Article I-59 (in the draft version of June 10, 2003) on 'Voluntary withdrawal from the Union', according to which: 'Any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements.' The procedure is spelled out in the second paragraph.

> A Member State which decides to withdraw shall notify the European Council of its intention; the European Council shall examine that notification. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be concluded on behalf of the Union by the Council, acting by qualified majority, after obtaining the consent of the European Parliament.

The Constitution ceases to apply to the state in question from the date of the entry into force of the agreement or, failing that, two years after notification of the decision to withdraw from the Union. To appreciate the significance of these provisions, one should keep in mind that the possibility of secession is the crucial element distinguishing the confederal from the federal model, being inherent in the contractual nature of the confederate pact. As already mentioned, in Montesquieu's model of the confederate republic, secession is a fully acknowledge right of every member. The view of the confederate pact as a formal contract among sovereign states was fundamental also to John C. Calhoun's constitutional theory, justifying secession from the Union and nullification of its laws at

the time of the American Civil War. The refusal of the federal government to accept secession as a solution was of course the immediate cause of the Civil War.

The founding Treaty of Rome was silent on this point, but most legal commentators think that secession would be illegal under European law. When the possibility of voluntary withdrawal was first proposed in October 2002 by Giscard d'Estaing, the president of the Constitutional Convention, concerns were expressed that it could be a recipe for chaos, with Euroskeptic parties in member-states provoking secession crises for short-run political advantages. This is unlikely to be a serious problem in practice. The advantages of economic integration are such that a *credible* secessionist threat could emerge only if the European Union should pursue policies that seriously violate the sovereign rights of some member-states, or systematically discriminate against their citizens or regions. As long as the policies of the Union satisfy the basic requirements of subsidiarity and proportionality, and are in the general interest of all the citizens, an argument for secession would not be credible and hence not believed.

6.9 The emerging confederal model for collective security

The exit option is only one, albeit a particularly significant one, of a number of features that give the Constitutional Treaty a recognizable confederal complexion. In institutional terms, the Constitutional Convention had to choose among three possibilities: to continue with the present arrangements, whereby the executive function at the European level is effectively divided between the Council of Ministers and the Commission, with one institution more in the lead on some policy issues and the other on other issues; a Commission-led executive; and, third, an executive led by the European Council (Wallace 2003). The final agreement reached by the member-states moved definitely beyond the status quo, and just as definitely rejected the model of a Commission-led executive, in favor of a European executive led by the European Council. Whereas the Commission wanted to deny the Council of the heads of state or government the status of a European institution, Article I-18 of the Constitutional Treaty lists it among the institutions of the Union, along with the EP, the Council of Ministers, the Commission, and the Court of Justice. The envisaged European Council provides the Union with the necessary impetus for its development, and defines its general political

directions and priorities. It meets quarterly and decides by consensus, except where the Treaty provides otherwise. Its president is elected by qualified majority of the Council, for a term of two-and-a-half years, renewable once. He, or she, drives forward the work of the Council, ensuring proper preparation and continuity, and the external representation of the Union on issues concerning its common foreign and security policy (CFSP), without prejudice to the responsibilities of the minister for foreign affairs. This foreign minister of the EU is another significant innovation. He/she is supposed to assume the responsibilities of both the High Representative for the CFSP and the commissioner for external affairs, thus putting an end to the dichotomy of the EU's diplomacy. The new position would amount to an unprecedented fusion of policy development and policy execution at EU level, as the foreign minister of the Union is also one of the vice presidents of the Commission, but carries out the common foreign, security, and defense policy as mandated by the European Council.

Articles I-39 and I-40 of the Constitutional Treaty—on 'Specific provisions for implementing the common foreign and security policy', and 'Specific provisions for implementing the common European security and defence policy', respectively—lay the foundations of a European confederal model in the area of collective security. According to Article I-39, the European Council identifies the strategic interests of the Union, and determines the objectives of its CFSP. In turn, the Council of Ministers frames this policy within the framework of the strategic guidelines established by the European Council. The CFSP is implemented by the Union's minister for foreign affairs *and* by the member-states, using national and Union resources. Before undertaking any action on the international scene or any commitment which could affect the Union's interests, each member-state must consult the others within the Council or the European Council. European decisions on CFSP are adopted by the European Council and the Council of Ministers *unanimously*, as a rule. Under both Articles I-39 and I-40, the role of the Commission is fairly minimal, being restricted to supporting the foreign minister's proposals 'where appropriate'. Far from generalizing the Community method, as advocated by the Commission, the Treaty effectively excludes it from these crucially important policy areas even more completely than the previous treaties. For example, the Commission is no longer 'fully associated with the work carried out in the common foreign and security policy field' (Article 27 EC), and while the EP has to be regularly consulted on the main aspects and basic choices of the CFSP, and kept informed on the evolution of the

policy, the Council president is no longer required to 'ensure that the views of the EP are duly taken into consideration' (Article 21 EC).

6.10 Conclusion

In an earlier section reference was made to Daniel Elazar's view that by the late 1960s the European Community had begun to build what were in effect confederal arrangements based on the integration of specific economic functions or sectors rather than on a general act of confederation. In fact, such arrangements were already built into the 1957 Treaty of Rome. As we saw in the first part of this chapter, the institutional architecture designed by the Treaty is nothing else than a latter-day version of mixed government. According to the philosophy of mixed government, the general polity is composed, not of individual citizens but of corporate groups, or estates, governed by mutual agreement rather than by a political sovereign. Each estate was supposed to take care of its own members, hence there was no direct link between the central government and the individual members of each corporate group. The function of the central institutions was limited to, protecting the rights and privileges of the estates—their corporate 'liberties'—and preserving the balance between the different political and economic interests. The protection of corporate, rather than individual, liberties is one criterion by which confederations may be distinguished from federations. As Elazar has pointed out, federations are communities of both individuals and polities and are committed to protect the liberties of both, but with a greater emphasis on the liberties of individuals than on the liberties of the constituent polities. Confederations, on the other hand, place greater emphasis on the liberties of the constituent polities, since it is the task of the several polities to protect individual liberty, more or less as each defines it, within their own borders. In other words, Montesquieu's confederate republic is simply the extension of the model of mixed government to contractual relations among sovereign states for the purpose of producing public goods such as collective security or, nowadays, economic integration. In this sense, the major shift from the 1951 Treaty of Paris to the 1957 Treaty of Rome was indeed the change from a prefederal to a confederal tendency. Viewing the European Community/Union as a confederation, we can see that it has succeeded where most confederations of the past failed, namely in integrating the economies of a group of advanced countries, by peaceful means and respecting their national sovereignty. Because of this

achievement—largely obtained, let us not forget, by market liberalization and by negative, rather than positive, integration—the EC/EU may be rightly considered the leading model of the postmodern confederation designed to prepare its component polities to meet the twin challenges of international economic integration and global insecurity.

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7

Comparing Constitutional Change in the United States and the European Union

Paul Magnette

While claiming to be building a *sui generis* polity, European political leaders simply cannot help looking at the United States each time they contemplate a reform of the institutional arrangements of the European Union. Frequent outbreaks of anti-Americanism notwithstanding, European elites remain fascinated by this country, the pioneer of the science of federalism—and the godfather of European integration.

Small wonder, then, that the inaugural session of the European Convention, held in the Brussels building of the EP in February 2002, was hailed by a unanimous European press corps as 'Europe's Philadelphia'. Finally, the European Union seemed to have arrived at its 'constitutional moment'. After half a century of piecemeal and restless European integration, after twenty years of uninterrupted and evermore tricky treaty reform, the leaders of the EU seemed to have reached the conclusion that the time had come for a profound and enduring rationalization.

Two years later, the enthusiasm had faded away. The Brussels summit of December 2003, where the Heads of State and Government failed to agree on the Convention's constitutional draft, was described in the press as a 'fiasco'. National politicians—motivated by the need to defend narrow national interests—and diplomats only too happy to prove that a Convention from which they had been excluded had proved less efficient than classic intergovernmental conferences—had apparently reasserted their rights as 'Masters of the treaties'. The example of Philadelphia, this time, shed a cruel light on the European experience. In the Federalists' rhetoric, the comparison with the American achievement dramatically highlighted Europe's failure (Lamassoure 2004).

Social scientists should take these spontaneous comparisons for what they are—political rhetoric—but they should not ignore them. With all their excesses, these political uses and abuses of history remind us that politicians—and academics alike—simply cannot help reasoning by analogy. Those who study federal arrangements are inevitably inclined to look at the American experience as a 'model'. Rather than rejecting this comparison, for all its flaws, we should rather bear it in mind, and wonder how far spontaneous comparisons contribute to shaping political choices. We should also try and determine if such a comparison is as naive and abusive as it seems at first glance. After all, the Americans of the end of the eighteenth century and the Europeans of the second half of the twentieth century were confronting a similar dilemma: how can states, unwilling to renounce their sovereignty, form an efficient and durable Union?

Examining the way they tried to address this problem, and how their answers were shaped by their beliefs about the domestic and international context, may improve our understanding of federal constitution-making. This, simply put, is the argument of this chapter. The United States and the European Union may be understood as two different versions of the 'federal vision' (Nicolaïdis and Howse 2001). Both systems combine common institutions and state independence, but they balance the levels of governance differently. This chapter tries to explain why the founders of the two systems opted for different constitutional solutions, and how their original choices channeled later reforms.

Section 7.1 explains why the recent European Convention could not be 'Europe's Philadelphia'. More important than either its internal features or the differences in the nature of the founding states was the sequence of events. While Philadelphia was the culminating point of a 'founding moment', the Brussels experience was but a late attempt at rationalizing a system which had been in existence for half a century. Comparing the Brussels and Philadelphia Conventions is a misleading exercise if one loses sight of this major difference, as it would amount to comparing different stages of the constitutional process in each system. Such methodological failings have tended to spawn the teleological interpretations of the European Union so favored by politicians and academics alike: the EU is seen as an embryonic or underdeveloped United States rather than as a unique and original organization.

To avoid this bias, Section 7.2 contrasts the 'founding moments' of the United State and EU constitutional development. It argues that the nature of the original compact in both cases is explicable in terms of the interaction between domestic and international variables. In contrast to the

American experience, where the two agendas converged, the foundation of the European Communities was kept apart from domestic concerns, and this explains its functional and intergovernmental nature. Section 7.3 argues that the original patterns (the way the 'federal problem' was initially addressed) shaped later constitutional change. In the same way as the major transformations of the US Constitution reproduced the pattern of the Founding (Ackerman 1991), the 'constitutional' evolution of the EU has constantly reflected the features of its uneven birth.

7.1 Why the Brussels Convention could not be Europe's Philadelphia

There is, at first sight, a striking similarity between the Brussels Convention and its Philadelphia forerunner: in both cases, the alleged flaws of the existing confederal arrangements were used as a pretext to convene a constitutional assembly. Despite the fact that Philadelphia took place only a decade after the foundation of the Confederation, while the Brussels Convention arose after half a century of common experiences and several attempts to revise the treaties, both forums apparently had the same revolutionary potential: they were 'constitutional moments', based on a new procedure and supposedly designed to surpass the divisions of the past. Why then did the American Founding Fathers opt for a revolutionary solution, and why did the European leaders more modestly stabilize and rationalize their confederation?

One could first think that the contrast between the audacity of the Men of Philadelphia and the conservatism of the European conventioneers may be explained, at least in part, by the institutional features of the two Conventions. Comparative research has illustrated that the 'deliberative setting' of constitution-making forums matters: setting up a specially convened assembly; guaranteeing its representativeness and the independence of its members; balancing public debates and negotiation behind closed doors; deciding that the constitution will be ratified by referendum are all factors which may prevent the resurgence of interest-based bargains and favor a 'sound' process of deliberation (Elster 1994; 1998). Perhaps surprisingly, however, the initial conditions of the European convention were not less favorable than those of Philadelphia. Certainly, as it had been created as a preparatory body whose draft would be renegotiated by the governments, the Convention had to anticipate intergovernmental bargains and to restrain its own ambition to avoid

being disavowed by the governments (Magnette and Nicolaïdis 2004). But Philadelphia was equally constrained: formally, it was supposed to revise the Articles of Confederation (not to write a brand new constitution), and the final decision remained in the hands of the states. The choice to ignore this limitation, by declaring that their text should be ratified by specially convened conventions in the states, and that it could enter into force even if one-fifth of the states did not ratify it, was taken by the members of the Philadelphia Convention themselves, in full knowledge of the revolutionary nature of their decision. In Brussels, by contrast, the tiny federalist minority pleading for such a revolutionary leap never managed to gather a majority.

The formal lack of independence of the Brussels Convention does not suffice to explain its conservatism. In several respects, its mandate could even seem more open than that of Philadelphia (Magnette 2004): its task was defined in vaguer terms, allowing more room for initiative; the assembly included a wider range of viewpoints, offering the opportunity to think creatively; and it was obliged to deliberate publicly, while able to use more restrictive and discreet forums to try and reach agreements. On paper, and all other things being equal, the Brussels Convention was a rather promising forum; its unfulfilled promise merely confirms that 'other things' were not, in fact, equal at all.

If the institutional variable fails to account for the difference between the two sets of negotiations, another possibility is the preferences of the actors as an explanation of their respective outcomes. Twentieth century European states, with their long history, strong fiscal and distributive capacity, solid and stable national identities contrast with the young, weakly populated, poorly developed, and recently independent states of eighteenth-century America. Given the strength of the European states, their entrenchment in territorially based interests and the deep sense of national loyalty of their citizens and leaders, their fusion into a European state—be it federal—was very unlikely. This difference cannot be ignored, but it should not be overestimated. Comparisons show that there is no clear correlation between the demographic, economic, and cultural strength of a state and its willingness to remain sovereign. Reading the debates of the Philadelphia Convention—as they are reconstructed in Madison's notes—one is struck by the harsh sense of independence, and the radical unwillingness of some members representing very small, poor, and weakly populated states, to abandon the smallest part of what they understood as their sovereign power. Despite their apparent cultural proximity and shared experience of war against an external enemy—the imperial British crown—the leaders and

average citizens of the thirteen founding states cherished their 'national' autonomy. Reminding us of the strength of these feelings, historian Gordon Wood concludes that '[g]iven the Revolutionaries' loyalty to the sovereignty of their states and their deep-rooted fears of centralized governmental authority, the formation of the new Constitution was a truly remarkable achievement' (Wood 2002: 151).

There is, however, a third difference between the two constitutional Conventions: the stage in the process of constitutional development at which they took place. Contrary to Philadelphia, and *pace* the European federalists' rhetoric, Brussels was not a founding moment. Before the Convention, the European Union was already much stronger than the loose American confederation of the 1770s. The comparison should not be made in terms of competence. The EU still lacks fiscal and distributive capacities, as well as military and diplomatic resources. But the difference is crucial in terms of institutional cooperation and legal constraint. The Confederation Congress was not a permanent body; short mandates hindered the emergence of stable leadership; it was frequently impossible to gather the quorum so that more often than not decisions could simply not be adopted. More importantly, the rare decisions that could be reached were often ignored by the states. One of the major reasons why the federalists thought a reform of the Confederation was necessary, was the absence of authority of the Congress on the states, particularly insofar as implementation of the Congress' resolutions was concerned. The Confederation Congress took resolutions, but these were simple 'recommendations that the states were supposed to enforce' (Wood 2002: 72), and they often failed to do so. Neither did they supply their allotted contributions or troops. Consequently, decisions taken by the Congress were often irrelevant.

In contrast, after half a century of piecemeal integration, the EU was built on a widely accepted legal order based on the key principles of direct effect and the supremacy of European law; nor was the role of the Commission and the Court as 'guardians of the treaties' seriously challenged. Contemporary European states are infinitely more respectful of their legal obligations as EU members than were the eighteenth-century American states of those stemming from membership of the American Confederation. This explains why the deliberations of the Brussels Convention were dominated by the notion that the European Union had reached a good balance of cooperation and independence that could be rationalized but should not be broken. True, a small minority argued that the forthcoming enlargement threatened the Union with paralysis.

According to this federalist group, without a qualitative leap toward more centralization and majority voting, future EU policies would all end in deadlock. On the other hand, an equally small Euroskeptic group argued that the conventioneers should seize this opportunity to reduce the EU's bureaucracy and the institutional constraints upon national sovereignty. But these critics cancelled each other out, as had happened so often in the past, and the wide majority of the conventioneers agreed that the EU merely needed to be simplified (Magnette 2005).

The experience of the European Convention confirms that sequences matter: a stabilized system, which has survived internal crisis and external pressures, and which is therefore entrenched in the actors' perceptions and habits, is less likely than a young polity to experience deep systemic changes. Moreover, the Brussels Convention illustrates the importance of path dependence in constitutional politics: although this body had been created with the ambition of surpassing the deadlocks of intergovernmental negotiations, it actually reproduced this logic to a very large extent. Moving back to the 'founding moments' of the two systems and comparing these to each other is thus doubly justified. For one thing, comparing similar stages of institutional development should help us avoid temporal biases and teleological interpretations. In addition to identifying the key features of the initial compacts may help us understand the logic of contemporary constitutional change on either side of the Atlantic.

7.2 Comparing constitutional foundations

The invention of the American Republic in the 1770s to 1780s and the creation of the European Communities in the 1940s to 1950s might, at first glance, seem incomparable. The differences are indeed obvious: the American Founding Fathers were Men of the Enlightenment imbued with classical republican doctrines of self-government (Pocock 1975), the European leaders of the afterwar period were skilled politicians worrying about the restoration of their position on the international scene (Milward 1992); the Americans, having experienced a war of independence against an imperial crown, shared a deep conscience of their common fate, whereas the Europeans were trying to recover from a war among themselves; the Americans merely lived on their own production, the Europeans were largely dependent on foreign aid; the Americans could feel protected against external threats by the Atlantic, the Europeans were all too conscious of their insecurity in the cold war era.

7.2.1 The federal question

Despite these obvious differences, the foundations of the United States and the EC share crucial elements. First, those involved faced the same basic question: how can states form a Union that strengthens them on the international scene without undermining their autonomy? In fact, the second aspect of the question—protecting the sovereignty of the member-states—turned out to be the most sensitive issue. Indeed, this has been one of the most enduring problems of modern political thought since the invention of the state in the mid-seventeenth century—as it had been a dilemma of ancient philosophers reflecting on the nature of leagues of cities. And although they did not raise it as explicitly as the American Founding Fathers did, the European leaders of the postwar period had to come to grips with it in their attempts to define their Union. In both cases, the problem was new: as long as they had been colonies of the British Empire, the American 'states' had been prevented from experiencing independence; as for the Europeans, the relative success of the nineteenth-century balance of power—and their hope to restore it after 1918—had led them to neglect the question of their unity. The 'founding moment' of a federal polity is precisely this moment when the states have to face simultaneously the twin problems of their autonomy and their interdependence.

Second, in their reflections on this major problem, the American and the European founders encountered the same basic constitutional questions. The Men of Philadelphia, and those who drafted the first European treaties, struggled with the two core questions of any federal polity. On the one hand, the vertical problem: how to delineate the competences of the different levels of power, how to prevent conflicts between levels of power, and how to solve them when they arise? On the other hand, the horizontal problem: how to institutionalize a balance between states which prevents the hegemony of the large states without giving too much power to the small ones; how to combine, in other words, equality among states and equality among citizens? Again, the way the questions were addressed, and the answers they gave rise to differed, but this is precisely what makes the comparison useful.

7.2.2 Explaining constitutional choices: interests and ideas

The question thus becomes: how can we identify the variables which explain why the respective Founders opted for one option instead of

another? In Europe and in the United States alike, the historiography tends nowadays to avoid determinist analysis, describing the advent of a constitution as the inevitable consequence of a given material situation, or as the means used by the leading class to institutionalize its privileges. Contemporary scholars also try to avoid idealist interpretations, presenting the constitution as the institutionalization of a doctrine which suddenly became hegemonic. Economic historians concede that ideas do play a certain role, at least in those areas where the actors are unsure about the costs and benefits of their choices (Moravcsik 1998). As for intellectual historians, they show how ideas are shaped by material conditions (Wood 1969; Bailyn 2004). Schematically, we can say that constitutional choices are determined by two major factors: the perception of the impact they will have on the actors' interests, and the prevailing political ideas.

The respective weight of these two factors in turn depends on several secondary factors. It is commonplace in political science to recall that some cultural contexts are more open to 'logical' patterns of thought, privileging doctrinal solutions, while other, more 'pragmatic' contexts favor utilitarian reasoning (Perelman and Olbrechts-Tyteca 1969). Political scientists often highlight national prejudices: they underline the predominantly pragmatic pattern of thought of the American Founding Fathers, who tended to make their decisions by assessing their probable consequences; they stress the merely 'rationalist' style of the European constitution-drafters, moved by conceptual argumentation; and highlight the 'empiricist' style of the British negotiators who tend to privilege the lessons drawn from past experience (Sartori 1965). Beside these cognitive factors, scholars also agree that when the likely consequences of a decision are unpredictable, the actors tend to be influenced by prevailing ideas, which act as roadmaps. Moreover, institutionalist analyses stress the evolutive nature of these factors: actors tend to revise their ideas in the light of the lessons drawn from their experiences (Olsen 2002). Constitutional processes are indeed always experimental. The drafters of a constitution may study history, analyze foreign experiences, assess their own past; they may reflect rigorously on the likely impact of the institutional choices they contemplate, they will never be able to foresee perfectly the impact of their decisions. Even if some constitution-makers have a more acute vision of their task than others; even if, with the benefit of hindsight, we may admire their prescience, they rarely manage to convey their convictions so widely as to forge a real consensus. Hence, constitutional compacts are compromises which always preserve a certain dose of disagreement—either openly, or through ambivalent wordings

which leave room for different interpretations so as to avoid open confrontations (Holmes 1988). In turn, these persisting conflicts pave the way for constitutional oppositions and adaptations (Olsen 2002).

7.2.3 The American way: when domestic and international agendas converge

How, thus, were the American and European founders influenced by their beliefs about politics and their perceptions of the domestic and international context, and how did they draw the lessons of their constitutional experiments? Let us take the American case first. In his recent historiographic essay on the American Revolution (2002), Gordon Woods provides a useful guide to this intricate and widely commented event. He first reminds us that, at the time of the Declaration of Independence of July 1776, the first priority of the Americans was the establishment of state constitutions. The Revolutionaries' priority was to institutionalize the republican principles in the name of which they had fought against the British crown. The grandiloquence of the Declaration itself bears testimony to this concern. The meaning of Independence was twofold: on the one hand, it was an anti-imperialist victory, consecrating the autonomy of the former colonies from the Empire; on the other hand, it was a political revolution hailing the advent of republican principles against the archaic monarchy. The Americans felt doubly sovereign: free from external domination as citizens of independent states, and free from internal authority as citizens of republican regimes. They cherished the two faces of the European concept of sovereignty, defined in these terms by Rousseau a few years earlier: 'that no one inside the State could have declared himself to be above the law, and no one outside it could have imposed any law which the State was obliged to recognize' (Rousseau 1997: 115).

In this revolutionary context, the question of the link between the thirteen states was a secondary problem. The adoption of the Articles of Confederation defining their cooperation, four months after the Declaration of Independence, was a nonevent: 'in marked contrast to the rich and exciting public explorations of political theory accompanying the formation of the state constitutions, there was little discussion of the plans for a central government' (Wood 2002: 70). The 'constitutional question' was confined to the state: the major question was how to establish powers that could not encroach upon their fresh liberty, how to invent a constitution that would protect them against the risks of despotism and corruption inherent in the European monarchy. The only controversy

taking place during the negotiation of the Articles was the problem of the states' representation in the organs of the Confederation, opposing the small and the big ones. But this was understood as a problem of diplomatic relations. The nature of the confederation was not deemed a 'constitutional' question: the sovereignty of the states which had proclaimed their independence as 'free and independent states' was taken for granted, and their union was understood as a classic 'league'. Article 2 of the Confederation's status made this crystal clear: 'Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.' Two years after the ratification of the Articles, many went so far as to think that the Confederation had lost its significance with the end of the war, and it seemed to be destined to become ever less important.

The nature of the 'central government' only became an issue in the mid-1780s. With the passing of time, the flaws inherent in the Confederation became more visible: war lasted longer than anyone had expected, and the Confederation seemed too weak to protect its states—especially as they neglected to supply their contributions to the central government so that soldiers could not be paid. In addition to the weakness of the Confederation's powers in the regulation of commerce prevented American farmers from selling their surplus abroad, engendering tensions between the Northern and Southern states. The organization created by the Articles of 1777 was unable to decide, and unable to convince the states to implement and support joint decisions, to the point where it was *de facto* barred from doing what it had been created for: guaranteeing peaceful relations among states, and ensuring their protection vis-à-vis the external world.

The paradox of the American Revolution, so brilliantly analyzed by Gordon Wood in his 1970 book, is the fact that this 'international' concern only gained ground when it converged with more pressing 'domestic' concerns. In the second half of the 1780s, the leading class begun to realize that the republican principles they had advocated were now 'distorting republican equality, defying legitimate authority, and blurring those natural distinctions that all gentlemen, even republican gentlemen, thought essential for social order' (Wood 2002: 140). Although the republican constitutions had been designed to prevent the risks of corruption inherent in monarchies, the revolutionaries came to realize that another form of corruption threatened them: populist legislatures, along with extraparliamentary rebellions, jeopardized the very stability of the newly founded states. To prevent further corruption of the republican principles

by demagogues, all states first endeavored to revise their constitution. Executives and courts, initially seen as potential aristocratic threats on the virtuous legislature, were now strengthened as counterweights to the legislature's abuses. The constitutional question remained, at this stage, a domestic issue. The turning point was the moment when a large part of the élite begun to think of shifting 'the arena of constitutional change from the states to the nation and were looking to a modification of the structure of the central government as the best and perhaps only answer to America's political and social problems' (Wood 2002: 145). This is what made Philadelphia possible. Still jealous of their sovereignty, the states gathered in the Confederation Congress only agreed, initially, to convene delegates of the states to revise the Articles of Confederation and remedy its most obvious flaws. A few weeks later, as rebellions and sedition grew and marked the spirits, 'the reconstruction of central government was being sought as a means of correcting not only the weaknesses of the Articles but also the democratic despotism and the internal political abuses of the states' (Wood 2002: 152).

With hindsight, we can see that the achievement of Philadelphia was twofold. On the one hand, the conventioneers invented a new polity. Had them all been Madisonian, had they adopted the Virginia Plan, America's contribution to constitutional thought would have been limited. They would have created the widest republican state on earth, until the French Revolution. Had the antifederalists won, they would have improved the science of confederation. These were, for the Men of this time, the only two possible alternatives. But because the supporters of the Virginia Plan had to compromise to take account of the arguments of those who defended state sovereignty, they invented a new polity: the famous 'compound republic' described by the Federalist papers as 'partaking both of the national and federal character' (n° 62). It is this necessity to compromise which gave rise to the principle of separation of powers between the states and the federation—instead of the veto Madison wanted to give to the national legislature against state laws. It is this necessity which renewed the meaning of the principle of separation of powers: checks and balances were not, as in Montesquieu, the institutionalization of a mixed government balancing different social groups, but a means to protect the people against its own abuses—the tyranny of the majority and factionalism. The famous principle of 'dispersed sovereignty', stating that 'the people' is the source of any power, emerged for the same reason: it offered a solution to the 'dilemma of sovereignty'. It was made the cornerstone of the constitution for it allowed its supporters to argue that

'sovereignty' lay neither in the central government nor in the states. In other words, the Men of Philadelphia invented a new polity because they tried to tackle their domestic and international concerns simultaneously, and because their divisions prevented them from forming a simple 'national government'.

The second invention of the Men of Philadelphia was the constitutional process itself. First, they wrote a full-fledged constitution although they were only supposed to revise the Articles of Confederation. By so doing, they blurred the classic distinction between the 'diplomatic' and 'domestic' spheres. They suggested that, in their book, relations among states could be the object of a constitutional contract, thereby extending the scope of constitutionalism. Second, by changing the rules of ratification, they affirmed the revolutionary nature of the constitutional process. When the majority decided that their draft constitution would have to be ratified by elected conventions, and that the text could enter into force even if one-fifth of the states had not ratified it, they deliberately carried out a revolutionary act, inspired by their domestic experience. The popular ratification of the state constitutions symbolized their revolutionary nature: because the constitution was understood as a 'supreme law' distinct from normal legislative acts, it could not be adopted by elected representatives but had to be accepted by the only legitimate source of authority, the people itself. By restating this doctrine at the 'federal' level, the Men of Philadelphia consciously placed themselves outside the realm of legality. Writing a constitution was, by definition, a revolutionary act. As we see in Section 7.3, future transformations of the US Constitution would reaffirm this principle, by ignoring the process of constitutional revision prescribed by the supreme law itself (Article 5).

7.2.4 The European way: preserving the domestic–international divide

The foundation of the European Union—actually the European Communities—did not bear the same revolutionary meaning in the eyes of its authors. This, again, may be explained in terms of historical sequences. When the European states 'restored' democracy after 1945, they moved back to regimes which had existed before the authoritarian period or before the Nazi occupation. The Americans carried out two revolutions in the same decade: they shifted from the *ancien régime* to republican principles, and they moved from confederal arrangements to a federal polity. In their eyes, the two dimensions were intimately linked: the new federation was the buttress of the states' republican constitutions.

The European elite, on the contrary, were convinced that the restoration or stabilization of democracy was a domestic problem. True, the Italian activist Altierro Spinelli wrote in his famous the *Manifesto di Ventotene* of 1943 that a European Federation would consolidate the renewed Italian Republic by preventing it from drifting toward fascism again. But those in command had more realistic views: the Italian statesman Alcide De Gasperi was primarily moved after 1946 by a desire to 'reassert the role of Italy in the European and world order, and a clear understanding that welfare and the promise of economic security were the vital steps to national reassertion' (Milward 1992: 333). The same holds true, *mutatis mutandis*, for the other five founding states. The Belgian Federalist Fernand Dehousse pleaded for 'integral federalism' as a solution to Belgium's internal and external challenges. But he had no influence on his socialist colleague Paul-Henri Spaak who supported 'the American wish for political integration in Western Europe [...] because it would be the best available guarantee of Belgium's economic and military security' (Milward 1992: 324). In France, for Robert Schuman 'as for Spaak, the idea of European integration became dominant when he was called upon as a foreign minister to grapple with the problem of national security' (Milward 1992: 325). Even the German case was not really different. It is difficult to contradict Ernst Haas when he underlines that 'the triptych of self-conscious anti-Nazism, Christian values, and dedication to European unity as a means of redemption for past German sins has played a crucial ideological role' (Haas 1958: 127). But even the most ardent defenders of idealist readings of the EU (or so-called 'constructivist explanations') acknowledge that this democratic concern was merely a rhetorical argument: 'Interests and identity coincided, since Adenauer used his firm belief in Western institutions to regain national sovereignty for West Germany' (Risse and Engelmann-Martin 2002: 296). In the six founding states, cooperation was deemed a necessary condition and/or guarantee of national sovereignty; but once sovereignty could be reasserted and protected, the issue of democracy would be a purely domestic problem.

The foundation of the EU was marked by a second conceptual division. Although, in the immediate postwar years, concerns for economic and military security were linked, the two problems were in fact kept separate. In June 1947, General Marshall made his famous speech at Harvard University announcing US support for European economic recovery; ten months later, sixteen European states signed the treaty establishing the Organization for European Economic Cooperation to coordinate the use of American funds. Albeit this American initiative was partly motivated by

security concerns—it represented in some senses the 'economic flip side of the Truman Doctrine' (Dinan 2004: 21)—it concentrated on issues of trade and monetary exchanges. Military issues were dealt with in parallel but separately: five European states (the three Benelux countries, Britain, and France) first formed a defensive alliance by signing the Brussels Treaty in March 1948; one year later, joined by four other European states (Italy, Denmark, Iceland, and Norway), they signed the North Atlantic Treaty with the United States and Canada. Cooperation among European states was dominated from the very beginning by a functional approach: different issues led to different organizations, with different institutions and variable membership.

The 'constitutional agenda' was not fully absent from this foundational period, but it repeatedly failed to shape the cooperation among European states, and thereby strengthened, *a contrario*, the functionalist logic. The 'federal way', which always remained conceptually vague, was a widespread aspiration in these founding years. In the eyes of the most ardent advocates of integration, the 'functionalist' approach based on sectoral cooperation was seen as a 'second best'. But it would soon prove to be the only feasible scenario. The Congress of Europe held in The Hague in May 1948, gathering dozens of European movements which had mushroomed since the war, soon showed that, beyond vague appeals to European unity, the governments diverged on nearly everything. Ten of them finally managed to sign the treaty establishing the Council of Europe one year later, but even before its signing it was clear to most of its members that the consensus on which it was based was so narrow that it would end in deadlock. In part, the Schuman Declaration, launching the idea of a sectoral economic community in May 1950, was a response to this disappointment: as they realized that attempts to set up a more ambitious organization, with a stable membership and common institutions were doomed to failure, the states most interested in European cooperation favored the functional approach, which gave birth to the ECSC in April 1951.

This functionalist option was confirmed, three years later, by the failure of a second 'constitutional' attempt. In the framework of the negotiations on a European Defence Community (EDC) among the Six, a 'constitutional assembly' had tried to define a broader institutional framework inspired by federal principles, so as to gather existing cooperative projects under a single constitutional umbrella. The members of this *ad hoc* assembly chaired by Paul-Henri Spaak adopted their draft constitution establishing the European Political Community in March 1953, but it

sunk with the Defence Community itself when the treaty was rejected by the French assembly in August 1954. Again, the relaunch of the functionalist approach at the Messina Conference of June1955 (that would lead to the creation of the European Economic Community in March 1957) was at least in part an answer to this failure. With hindsight, this founding decade appears as a constant oscillation between a 'constitutional way' and a functionalist approach. The repeated failures of the former consolidated the latter. European integration was confined to the economic realm, and it remained separate from domestic issues of democratic consolidation.

The functionalist pattern of European integration not only narrowed the scope of cooperation among European states, it also marked its 'constitutional process'. As early as 1948, Schuman's idea that a 'European assembly' should be convened in order to deliberate about the ends and means of European unification had been abandoned in favor of more classic diplomatic conferences. The negotiations which gave rise to the treaties of Paris and Rome took the form of 'intergovernmental conferences', initiating a long series of diplomatic bargains among member-states. Each country was represented by a delegation of government officials consisting of both diplomats and line ministry experts. These delegations formed the basis of a pyramid of negotiation: they gathered in working groups which examined the details of the arrangements, while the heads of delegation—usually senior diplomats—met regularly to assess the progress of the negotiations and settle the most sensitive issues in close contact with their respective foreign ministers. In parallel, the Heads of State and Government met bilaterally or multilaterally to provide the political impetus and address the most contentious problems. These first conferences were deprived of stable leadership: in the absence of a formal chair, the negotiations which led to the ECSC Treaty were *de facto* dominated by Jean Monnet, the head of the French delegation, who benefited from France's leading position in the absence of British negotiators. The Brussels IGC of 1956–7 crystallized the process of 'constitutional change' in the EU. It preserved the mixture of expert groups, diplomatic supervision, and political negotiations that had dominated the first IGC, but added two additional elements which have survived until the present day. First, it established a form of shared leadership: as the European partners now had institutions (those of the ECSC), they could have chosen to endow the High Authority with the task of managing the IGC, but they instead opted for a less supranational process. The foreign ministers chose to confer this tricky responsibility to one of their number: since the

IGC took place in Brussels and since Spaak had chaired the preparatory committee, he was the natural candidate for the job. Formalizing this experience, the rotating presidencies of the Council of Ministers would formally become the chair of these negotiations in the next decades, with EC institutions merely acting as advisers. Second, mindful of the political crisis generated by the ratification of the EDC Treaty, the national delegations worked in close contact with national parliamentarians, party leaders and interest groups. The IGC remained a discrete forum, acting behind closed doors and ignored by the general public, but it spread beyond the diplomatic sphere toward a large array of national politicians and 'concerned interests', foreshadowing the complex forms of diplomatic negotiations that would become commonplace over the course of the next decades.

The regime derived from these negotiations also remained primarily intergovernmental. First, the governments never broke with the canons of international law: their text was a treaty agreed by 'the High contracting parties', not a constitution, and it would only enter into force after ratification by all the member-states. Second, the institutions they created resembled those of an international organization much more than federal arrangements (Menon, A. 2003). Negotiating cooperation arrangements with a view to maximizing their interests, the governments of the founding states reasoned in instrumental terms: 'the decision to delegate or pool sovereignty in international regimes is analytically separate from (and subordinate to) bargaining over substantive cooperation' (Moravcsik 1998: 21). In this climate, the governments jealously protected their independence. The creation of the supranational High Authority was not meant to substitute a 'federal government' for intergovernmental practices, it was, on the contrary, understood as a necessary price to be paid for making intergovernmentalism work. In Monnet's book, the supranational body was an international equivalent of the domestic technocracy: as domestic politics need some technocratic input to avoid being dominated by short-term electoral concerns, international negotiations require some supranationality to correct the bias of state interests. The High Authority was not to be a substitute for but a complement to classic intergovernmental practices. The so-called 'community method' was understood by the Founders as an improved form of intergovernmentalism rather than as a break with diplomatic practices. The decisional supremacy of the Council of Ministers, its rotating presidency and its subtle system of weighed votes, were inventions inspired by international organizations much more than by federalist principles. The EEC Treaty confirmed and strengthened

this intergovernmental spirit, by reasserting the primacy of the Council of Ministers over the Commission.[1] The Americans had invented their 'federal model' by mixing 'national' and 'federal' forms of government; the European Founders formed their own model by hybridizing some 'supranational' elements with intergovernmental mechanisms. Both remained marked, as we now see, by these initial choices.

7.3 The lasting effect of the foundation

The impact of a constitution on future political developments is somewhat ambivalent. On the one hand, the constitution is supposed to set the rules of the game, to draw the boundaries within which the polity must always remain. The advocates of a so-called originalist interpretation of a constitution go so far as to see it as a quasi-sacred text which should always preserve the meaning it had for its authors. On the other hand, a constitution is never fixed: it contains procedures which make its revision possible, and is the object of constant debates and interpretations which may change its meaning without altering its wording. Politics are shaped by the constitution, but they may also reshape it when it appears unfit for new conditions. Within this dynamic, however, the constitution nevertheless enjoys some primacy: even those who reject originalist interpretations of the supreme law, acknowledge that the founding text encapsulates basic values which continue to channel ordinary politics long after their definition (Sunstein 2001). As a supreme legal norm, it creates the institutions within which political discussions arise, and thereby channels them. As a political reference, the constitution is a 'model' against which alternatives are assessed. Crystallizing a political compromise which took place at a certain point in history, it makes it last well beyond its foundations.

Both the American and the European experiences illustrate the lasting effect of a founding compact. They have at least two major elements in common. First, because the original constitution is always a compromise, it inevitably gives rise to long-lasting conflicts. Its most controversial aspects are contested for decades; its most ambivalent elements are the object of constant reinterpretations. The constitution elicits the tensions which will lead to its own transformation—it contains the source of its constant regeneration, to speak in machiavellian terms. Second, in both cases major constitutional reforms tend to reproduce the constellation of oppositions which governed the original compromise.

7.3.1 Constitutional change and state development in the United States

In the United States, the federalist versus antifederalist conflict lasted for at least a century after the adoption of the constitution, until major domestic crisis led to dramatic reinterpretations of the Founding. These alterations were so deep that they are understood in retrospect as refoundations or 'regime changes' (Ackerman 1991; Tushnet 2003). The peculiarity of these great transformations is the fact that, like the Founding itself, they occurred through a revolution—that is, in violation of the legal norms, and through wide political mobilization. The Constitution of 1787 contained an article making its own revision possible, but as has been demonstrated by Ackerman (1991), these were so defined as to make its use impossible, which paved the way for an alternative mode of constitutional change, echoing the revolutionary nature of the Founding. In the 1860s, the opposition between those who defended the rights of the state, and those who wanted to limit them in light of the principles enshrined in the constitution, remained so deep that the first major existential crisis the Americans faced could not be solved within the constitutional framework: opposition to slavery spawned a Civil War. The end of the war did not suffice to reassert the primacy of the constitution, however: unable to meet the conditions imposed by Article 5 for revision, the victorious partisans of the federal government had to ignore the constitution to amend it—deciding, in violation of Article 5, that an Amendment could not be rejected by a quarter of the states. Confronted with this new constitutional reality, the Supreme Court initially tried to protect the former system and then gradually incorporated the new principles into its constitutional jurisprudence. Three generations later, in the 1930s, the opposition focused on another existential question—the power of the federal government to interfere with economic life, and thereby extend the scope of its action—which led to a comparable constitutional change. The New Dealers first conquered one branch of the federal government—the executive—then generated wide public discussions on their projects and won a decisive legislative election which allowed them to implement their program. The Court, once again, initially adopted a conservative attitude, annulling laws it deemed anticonstitutional, before finally accepting them and transforming its own jurisprudence in the light of the new regime.

Two aspects of these major constitutional transformations are important for our comparison. First, in terms of process, these two moments show that the initial compromise shapes future changes: as the Founders

had deliberately suspended legality (the Articles of Confederation and the mandate of the Convention) to forge a new constitution, the republicans of the 1860s and the democrats of the 1930s ignored the formal process of constitutional revision. Aware of the conservatism of Article 5, they engineered an alternative process of constitutional change, summarized in these terms by Bruce Ackerman: 'the decisive constitutional signal is issued by a President Claiming a mandate from the People. If Congress supports this claim by enacting transformative statuses that challenge the fundamentals of the preexisting regime, these statuses are treated as the functional equivalent of a proposal for constitutional amendment' (Ackerman 1991: 268).

To some extent, this 'new model' reflects the principles of the procedure prescribed by the constitution: it requires intensive interactions between different branches before a constitutional change is possible. But in this new system, a vertical separation has replaced the horizontal division envisaged by the Founders: while the process of revision they had organized was based on a confrontation between the states and the national government, the constitutional practice has replaced it by a confrontation between the federal branches of government. The third branch is part and parcel of this 'modern system': by criticizing the innovations, the Supreme Court 'invites the running group of politician/statesmen, and the public more generally, into a critical dialogue about the future' (Ackerman 1991: 264). When the partisans of constitutional change manage to have their choices confirmed by the voters, the Court's task is to reinterpret the old principles in the light of the new values, and thereby consecrate the revised constitution. Whether this system had been foreseen by the Founders—who according to Ackerman deliberately conceived the constitution so as to make this sort of enlightened deliberation on major issues possible—is a question which goes beyond our subject. For the sake of comparison, it suffices to say that the original contract creates a pattern of forces, gives forceful examples and conveys habits which shape future changes. The repeated failures of the conventional way—Article 5 of the constitution—tend to make the alternative—presidential initiative, interinstitutional confrontations, and popular mobilization—evermore attractive for would-be reformers.

The second aspect of this experience worth noting for our comparison is related, once again, to historical sequences. According to the German sociologist Karl Mannheim, any polity faces four major challenges in the course of its formation: first, the construction of the state apparatus against rival powers (churches, local aristocracies, corporations, and so

on); second, the definition of the boundaries of the nation and of the rules determining who belongs to it (the citizenship question); third, the extension of suffrage to new categories of the population; fourth, the definition of the respective powers of the market and the state. In American history, these four existential issues were connected to the federal question: in a compound republic, regime changes always imply revising the balance of power between the states and the federal government—and tend, in the long term, to strengthen central authorities. By addressing the definition of the citizenry and the role of public authorities in the market, the Reconstruction and the New Deal entailed a redefinition of the nature of the central government. The peculiarity of the American history lays in the fact that these four issues were addressed in 'constitutional moments': the Founding defined the national government; the Reconstruction redefined the nation by abolishing slavery and nationalizing citizenship; the New Deal recast the relation between the state and the market; and the civil rights movement achieved the long-term process of extending the suffrage to all adults. Because the problems they settled were so important, constitutional changes in the United States gave rise to wide and lively political mobilization, which became the key moments in the nationalization of American politics. It is in these circumstances that leaders appealed to the nation at large, and made citizens take conscience of the existence of the nation.

7.3.2 Intergovernmental constitutionalism: the European way

Like the US Constitution, the founding European treaties have long remained—and to some extent still remain—the object of contentious debates. Two competing interpretations of the 'meaning' of European integration, which tend to oversimplify it, are still very influential. On the one hand, the federalist doctrine: the German minister for foreign affairs Joschka Fischer, describing the EU's future as a European Federal Republic in his famous speech of May 2000, echoed ambitions which remain widespread among politicians, academics, and activists in countries such as Germany, France, Belgium, and Italy. On the other hand, the EU is still primarily seen by others as a functional international organization, designed to maximize economic state interests in an evermore interdependent world economy—the British Prime Minister Tony Blair's speeches on Europe are variations on this theme, which is also widespread in Nordic and Central European countries, as well as in Euroskeptic parties elsewhere in Europe. Between these two positions, one can find dozens of

mixed views. But these two 'models' are, so to say, the poles of the debate: they structure, positively or negatively, ongoing discussions on the EU's *finalité*, just as the 'federalist' and 'antifederalist' doctrines dominated constitutional debates in the United States for decades.

There are, however, two major differences between the American and European experiences. First, in Europe, these issues were kept separate from crucial questions of state development: because the EC was set up after European societies had faced—and to a large extent settled—the problems of the definition of the nation, of the boundaries of the suffrage, and of the welfare state, its 'constitutional' issues were much less dramatic than their American counterparts. For decades, the definition of the EU's powers and the organization of its institutions and decision-making processes were the province of professional diplomats and ministers for foreign affairs, largely ignored by rank-and-file politicians and ordinary citizens. The frontier between the domestic and international spheres remained solid. To a certain extent, the Maastricht Treaty of 1992 was a turning point in this respect: its ratification gave rise to wide and lively public debates in several member-states, which were, in a sense, the first 'constitutional moment' of the EU. But these debates never crossed the boundaries of the European nations: although the arguments heard in one country often echoed those occurring in another, the 'Maastricht debate' remained a collection of national events, more than a truly European phenomenon. Moreover, Maastricht was an isolated moment. The treaties of Amsterdam (1997) and Nice (2000) were largely ignored by the nonspecialists. Whether the 'constitutional treaty' adopted by the Convention (2003) and signed by the governments in June 2004 will elicit broader and deeper public discussions—notably in those countries which, like Britain, will hold a referendum before its ratification—remains to be seen. This hypothesis cannot be excluded, but as far as the past is concerned, it can be asserted that the 'constitutional' debate in Europe only involved narrow elite. This probably goes some way to explaining the absence of a European 'civic culture'. 'Constitutional moments' play an important role in the civic education of a people: they reassert the past and offer clear—if often caricatured—alternatives for the future. Major issues, leading to structured debates, personified by clearly identified leaders, can mobilize citizens who are, otherwise, rather passive. This is, according to Ackerman (1991), the essence of the dualist American model of constitutional democracy: leaving citizens 'in peace' in ordinary times, but appealing to them when 'big issues' must be addressed, the US Constitution *economizes virtue*. Europe has not experienced comparable 'constitutional moments'. Because they

were—or seemed to be—disconnected from the priorities of the citizens, the amendments made to the EU treaties did not attract much public attention. The nature of the EU's regime—the absence of clear leadership and the intricate system of interinstitutional cooperation—and the protection of linguistic and cultural diversity, contribute to make the emergence of structured debates on the alternative futures of the EU difficult. As a result, most voters do not understand the impact of the EU on their own situation, and find it difficult to form opinions. They remain passive European citizens (Magnette 2003).

The second major difference between US and European experiences relates to their rhythm. In the United States, constitutional moments are rare and dramatic: existential questions give rise to wide movements criticizing the status quo, claiming innovation and eventually forging a new compromise. In the EU, the founding dilemmas were solved through two different channels. On the one hand, the 'constitution' slowly gained ground by thwarting attempts to circumvent it. Repeated failures to break the initial compromise gradually stabilized it, by demonstrating that it was stronger than the alternatives. On the other hand, the governments constantly adapted the institutional framework, but through piecemeal changes rather than systemic transformations.

These two patterns of constitutional evolution roughly correspond to two periods of European integration. In the 'founding years', between the launch of the ECSC in 1951 and the Luxembourg compromise in 1965, the compromise seemed so fragile that many thought it could be fundamentally transformed. Thus in the years 1951–4, the federalist movements hoped that the creation of an EDC, flanked by a Political Community inspired by federal principles, could accelerate the course of integration, and break with the 'functionalist' model. The rejection of the EDC Treaty by the French assembly in 1954 demonstrated that they were wrong. Three years later, by adopting the Rome Treaty, and then by rejecting the British proposal for a European free-trade area that would have diluted it, the French authorities confirmed their acceptance of the European project, and strengthened the 'community model'. In the early 1960s, misunderstandings and disagreements remained very deep. In 1961–2, de Gaulle thought he could reassert French hegemony by creating a Political Community more independent from the United States, and based on strictly intergovernmental mechanisms, but his plans were thwarted by the opposition of the Benelux countries. Three years later, the ambitious president of the European Commission Walter Hallstein believed he could force France to accept more supranationality in exchange for concessions

over agriculture, but he had underestimated de Gaulle's capacity for resistance: using Hallstein's actions as a pretext, de Gaulle imposed the 'Luxembourg compromise' on his partners, which reduced the Commission's margin of maneuver and rendered the use of qualified majority voting practically impossible. With hindsight, this period appears as the EU's existential test (Magnette 2000): it consolidated because, each time a party tried to break the initial balance—by reducing or enhancing supranationality—the plan was vetoed by at least one member-state. The original misunderstandings and disagreements were not solved, but since then the Community's regime has not been called into question.

Given the impossibility of transforming the EC's regime radically, constitutional changes could only take place gradually and through piecemeal reforms. The 'constitutional' history of the EU is that of a long series of small adjustments. Some were put forward by the Court, although its overall contribution to the constitutionalization of the EU is often overestimated. True, the Court consecrated the principles of direct effect and the supremacy of EU law in the early 1960s, despite the opposition of most governments, and this is usually understood as a judicial coup (Stein 1981). Until the end of the 1970s the judges seemed moved by an integrationist philosophy which inclined them to expand EU competence and defend the common institutions, in a way reminiscent of the Marshall Supreme Court. But like its American counterpart after its 'Marshallian period', the Court begun 'to emphasize member-state ''margin of interpretation'' and to avoid direct confrontation with the member-states' (Shapiro 1999: 334). Moreover, the Court's jurisprudence has never really altered the EU's regime: the Court promoted its own powers, and protected those of the Commission and the EP, but it could not radically undermine the governments' powers. According to some scholars, the reforms implemented by governments in the same period can be seen as reactions to the Court's initiatives, so as to preserve the original balance (Weiler 1991). Indeed, the governments forced the Commission, after the Luxemburg compromise of 1965, to consult their permanent representatives before making its proposals public, thereby qualifying its constitutionally enshrined monopoly of legislative initiative. A decade later, the creation of the European Council gathering the heads of state and governments ensured that real political leadership would come from the intergovernmental sphere. The Commission's executive powers were tightly controlled too: the rise of committees composed of national officials and charged with scrutinizing the Commission's proposals confirmed the anxiety of governments to maintain a firm grip on EC decisions.

Apart from these gradual adjustments, the EU's basic rules were frequently revised from the mid-1980s onward. The intergovernmental conference of 1985, which gave birth to the Single European Act, opened a long series of gradual treaty changes: it was followed by new treaties signed at Maastricht (1992), Amsterdam (1997), Nice (2000), and Rome (2004). But far from breaking with the EU's constitutional development, these events confirmed it: intergovernmental conferences remained diplomatic negotiations, dominated by cost–benefit calculations and instrumental institutional changes. The only novelty of this period was the growing weight of 'constitutional doctrines'. Since Maastricht, the governments have continued to revise the rules of the game very cautiously, only accepting more qualified majority voting when they thought this would serve their interests. But they have also constantly strengthened the EP, though under no real pressure to do so. In part, this may be a strategic choice—for countries like Germany which are better represented in the EP than in the Council and Commission, or for small countries who think they can more easily form alliances in this more fluid institution. But it can also be explained by the weight of formalist patterns of thought (Pollack 1997; Moravcsik 1998; Rittberger 2001): familiar with the parliamentary model as they are, European leaders often think that this is the only way to make the EU look more democratic.

Seen in retrospect, the European Convention was, more than a turning point, the last stage of a trend that begun twenty years earlier. On the one hand, it remained dominated by intergovernmental bargains where each party tries to protect or enhance its weight in the decision-making process: the opposition between large and small states, latent since the origins, became the major issue of institutional discussions (Magnette and Nicolaïdis 2004b). On the other hand, the conventioneers were moved by a desire to simplify their founding treaties, and make them resemble the constitution of a parliamentary state. The paradox of this constitutional convention might well be that, designed to settle the Union's founding ambivalence; it has in the end intensified it.

7.4 Conclusion

Despite deep and wide differences, the American and European experiences of constitution-making and constitutional change have more in common than it might seem at first sight. At the most general level, these two cases illustrate the dilemmas any 'federation' must face: how can states form a

lasting union without jeopardizing their autonomy; how can the delineation of competencies between the state and federal levels of power allow the union to work without reducing the states to mere implementing agencies; how can the hegemony of the big states be avoided without giving the smaller states the possibility to block the whole system? These questions arise in any form of union among states, be it 'federal' or 'intergovernmental'.

Still, comparing different unions, such as the United States and the European Union, also helps understand why some polities go further than others. We probably need, in order to refine the contrasts highlighted here, a broader typology of multistates polities. While international regimes, confederation and federal states face comparable dilemmas, they offer different solutions, depending on historical sequences. By this we do not mean that a federation created in the eighteenth century must be, by definition, different from a Union born two centuries later. What matters is the temporal coincidence of issues of state development. Comparing the 'founding moments' is instructive in this respect. In the American case, the Founding took a revolutionary path when, in the mid-1780s, the domestic and international agendas eventually converged. The fact that the Founding Fathers sought to address the corruption of the thirteen states and the weakness of the Confederation altogether explains that they went beyond the golden rules of Confederations. By contrast, in the European experience, the domestic issues of democratic consolidation were kept separate from the international agenda. Hence the 'functional' nature of the EU, the intergovernmental nature of its process of treaty change, and the uninterrupted debate on its political finality. A union aiming at solving domestic and international problems simultaneously gives birth to a 'federal state' to the extent that the founding states see the federation as a solution to domestic problems and therefore accept major institutional constraints (such as renouncing unanimity for constitutional change). A union keeping the two issues separate will take the form of a 'federation of states', in which the member-states refuse to give away their power to control and eventually veto constitutional changes that could erode their internal sovereignty.

Comparing succeeding constitutional changes confirms the hypothesis that sequences matter. What gave the Reconstruction and the New Deal their revolutionary impact was the fact that constitutional changes addressed crucial issues of state development (the definition of the nation, of the citizenry, and of the relations between the state and the market). The Union was strengthened, as in the Founding, when it was seen as a solution to issues the states could not solve by their own. In Europe, these questions had been addressed, and in large part settled,

before the inception of continental integration. Treaty changes thus raised much less controversial issues, and remained dominated by intergovernmental bargains. In this respect, the European Convention confirmed the tradition more than it broke it.

This chapter did not aim at assessing the value of the two 'models'; its purpose was merely to explain why different solutions were given to similar problems. Yet it is difficult to leave the normative issue fully aside, since it is part and parcel of these processes of structural change—and always present *in nuce* in academic discussions. More often than not, those who refer to the 'American model' in Europe seek to denounce the weakness of the EU's constitutional basis. By so doing, they echo those American scholars who express their hope that 'constructive affirmations of common citizenship will instill the civic pride and hope that may propel the European Union beyond the limits reached by the dynamics of fear and humiliation' so that it will bypass its present stage of 'hollow shell that will be crushed in one or another of the unending crises that make up human history' (Ackerman 2004: xvi–xvii). A normative assessment should, however, be truly comparative if it is to be fair and intellectually fertile. Measuring the 'weakness' of the EU in light of the US model, as Federalist activists and advocates of US constitutionalism often do, is not only unilateral, but also misleading. Erecting one experience as the 'model' and the other ones as imperfect imitations hinders the comprehension of each experience's uniqueness. On the other hand, highlighting the original value of the EU, by contrasting its flexibility and respect for national identities to the rigid uniformity of the US model, and presenting it as 'a model for its time' (Slaughter 2004), should not make us forget that it was made possible by a convergence of factors which will not necessarily be replicable elsewhere or in other times.

Note

1. The only 'federal' element of the first two treaties lied in the powers of the Court, but the negotiators were apparently not fully aware of this (Pescatore 1981) since supreme courts were not part of the European constitutional doctrine of the time.

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8

Federalism and Public Administration: The United States and the European Union

B. Guy Peters

Public administration is no less affected by the fundamental structure of the political system than are other aspects of government. It may be conventional to assume that the public bureaucracy will administer programs in a formal–legal, Weberian manner regardless of the political context within which it functions, but that stereotypical view of bureaucracy seriously understates variations in administration, even within a single political system.[1] Despite the stereotype, the members of public bureaucracies do exercise a good deal of discretion (Bryner 1987; Baldwin 1995) and exercise that discretion, often at the lowest, 'street-level' (Meyers and Vorsanger 2003) of public organizations. Hence, any structural factors in the political system, such as federalism, that may increase variation in implementation and enforcement are potential barriers to the unified, linear model of implementation that resides at the heart of much of public administration thinking—especially that of practitioners.

A good deal of recent literature on public administration, especially that adopting a rational choice perspective, has been concerned with mechanisms for controlling discretion and preventing deviations from legislative intent (Huber and Shipan 2002). In almost any country, regardless of their constitutional structure, the implementation of central government programs through subnational governments is one important source of such deviation. Accountability and legislative control are among the oldest questions about bureaucracy within a democracy, but structural and managerial changes in the public sector have increased those

concerns (see Peters 2004*a*). An increasing use of federal and quasi-federal actors for implementation is but one of a large number of decentralizing and deconcentrating trends in government that have made controlling bureaucracies all the more difficult for their nominal political masters.

This chapter will discuss the impact of federal or quasi-federal structures on the capacity of governments to make and implement policy effectively. Further, the degree of variation that federalism may produce in policy, often in large part as a function of the manner of administration, will be considered from both an empirical and a normative perspective. That is, we need to examine not only what difference federal or quasi-federal structures make in policy outcomes, but we also need to consider the desirability of those differences. There is an implicit, or at times explicit, assumption in the literature (as well as among many real-world policy-makers) that uniformity is a central value for good governance. On the other hand, many of the models of governing that have been introduced during the past several decades have assumed that greater variety is desired by citizens, and also is desirable for governments (OECD 2001; Tamura and Tokita 2004).

Federalism can certainly be one of the mechanisms through which any tendencies toward rigid adherence to standards of uniform policies across the geographical stretch of a country can be diminished if policy designers have such a goal. Federalism has the further advantage of having a greater probability of producing differences across territorial units that are more or less desired by the citizens of those units. Given that there is some more or less autonomous political process within the components of a federal union, then the politics of those constituent units should be able to shape policy choices in ways that are more acceptable to the subnational community than the global choices made by a national government.

Finally, by way of prefatory comments, I have been speaking rather vaguely of federal and quasi-federal structures when describing the political systems in question. I am using the United States and the European Union as the principal examples in this chapter.[2] The United States is clearly a federal system and, although it may irritate some member-states to be reminded of this, the European Union has many of the principles and traits of a federal system, without some of the defining features (Sbragia 2004). In particular, there is not a formalized constitution that expresses dual sovereignty and that specifies the divisions of powers. The various treaties that form the EU come close to such a formalized arrangement, but do not as yet move beyond treaties among presumably fully sovereign regimes.

Given the above, I am using the phrase *quasi-federal* to describe this structure. One dimension of federalism in the European Union is the relationship that exists between Brussels (the analog of a central government) and the member countries. This relationship is similar to that found in federal systems such as Germany in which the *Länder* are responsible for implementing virtually all *Bund* legislation. The requirements for the member-states to implement European rules are more formalized than in most federal states so that we should expect greater compliance with directives, and more uniformity, among the European countries than among the states in the United States (Fischer 1994). That having been said, however, the evidence is that there are markedly differential levels of compliance by the governments and administrations in the member countries of the EU.

The large and growing literature on multilevel governance in the European Union provides another point of departure for understanding intergovernmental dynamics within the European Union (Marks, Hooge, and Blank 1996; Bache and Flinders 2004). While individuals living in federal regimes may not find the descriptions of multilevel governance quite so novel as have some scholars of the European Union, this term does describe an important reality for studying the European Union and its processes for making and implementing policy. In particular, it describes the extent to which autonomous bases of influence over policy may alter the linear, hierarchical model that has been inherent in the design of the European model.[3] That pattern of interaction is generally assumed to strengthen the powers of subnational governments, but in practice it may actually centralize power in the center (Peters and Pierre 2004), given its capacity to employ a common strategy against a largely divided set of lower level governments.[4]

The multilevel nature of European governance is perhaps clearer in administration than in any other aspect of governance. Although the national governments are tasked with including European regulations in national systems of law, it is often the subnational governments who are actually responsible for the implementation. This is certainly true in federal systems such as Germany and Austria, but also very true for decentralized unitary systems such as Sweden and Denmark. Thus, multilevel governance is not just about dividing the spoils coming from Brussels, it is often very much about dividing the work.

8.1 American and European versions of 'Federalism'

Federalism is an important concept for the analysis of political systems, but despite a common core of meaning, there are marked differences in

the manner in which this form of governance functions in practice. This difference is found among states that are formally federal, but is also relevant for understanding public administration in the United States and the European Union. The particular concern of this chapter is the extent to which the center of the governance system is capable of controlling the constituent parts in order to gain uniformity and compliance. Some federal systems, such as the United States, permit the states substantial discretion in their implementation, especially for laws which address issues for which there are likely to be marked differences among the states. Others, however, strive for greater uniformity in order to ensure equality and fairness for all citizens.[5]

8.2 Federalism and administration

Federalism, and other forms of decentralization within the public sector, have a significant influence on the administration of public programs. The most important of these influences is on the actual decisions made in the course of implementing policy, but federalism can also influence the structure of service delivery and the nature of the personnel involved in delivering those services. Federalism is but one of several means for coping with the problem of governing in space as well as in time. As Gulick (1937; see also Fesler 1949) rather famously has pointed out, area is one of the bases of organizing administration, public or private, and the manner in which governments cope with delivering services across their geography will have an impact on their effectiveness (see also Peters 2004*b*) as well as their legitimacy.

Federalism is one solution for coping with the problem of space, and is important in that it legitimates the general tendency of subnational actors to exert influence over policy and to alter policy. Although the central government may set the policy framework in many policy areas and then use the subnational units to perform the work of implementation, most of the policy areas are really bargained rather than imposed. As is true with other methods of legislative delegation (see Page 2000) delegation of implementation—and with it some control over the actual shape of the policy (Hoppe, Graf, and Dijk 1987)—is often a rational decision on the part of the legislature. The latter can minimize its information costs by delegating some decisions to subnational authorities who will know both the details of the policy area and local conditions. This may also reduce the possibilities of policy failure, given that a less comprehensive

design can be devised that can then be adapted to local circumstances during implementation.

Even in supposedly unitary political systems, often thought to provide high levels of uniformity in public policy and administration, the use of territorial divisions for administration tends to reduce that uniformity in favor of bargaining between local interests and the central state. Perhaps most importantly, in France there is a long strand of research and theory about the relationship between the center and the periphery that points to the power over policy and administration that exists in the lowest levels of government, and the pattern of mutual cooptation between representatives of central government and the areas over which they nominally are in control (Grémion 1976; Duran and Theonig 1996; Duran 1999; for discussions of bargaining at this level in United States see Scholz, Twombly, and Headrick 1991). While this level of local control is not, of course, designed into policies in most unitary states (the Scandinavian countries being the exception), the resultant practice does produce some of the presumed benefits of decentralization.

The increased decentralization of government in virtually all industrialized democracy has increased the quasi-federal nature of governing in these governments. As part of the general strategies of reforming the State (Pollitt and Bouckaert 2003) power over policy has been moved away from the center and given both to subnational governments and to deconcentrated elements of national administration such as 'agencies'. Much of the logic of these approaches to public management has been to minimize the need for uniformity in the provision of services and to maximize the ability of government to 'serve the customer'. That perspective obviously runs counter to the usual demands on the part of policymakers that their programs be implemented uniformly and as intended, whether the initial formulation was at the same level of government, and whether there are autonomous organizations responsible.

Despite some increased generality in the arguments about decreasing uniformity of policies and the increasing impacts of decentralization, federalism is significantly different from other forms of decentralization simply in the structural legitimacy that federal arrangements may have, and the inability of a central government to revoke them by fiat.[6] Further in the quasi-federal arrangements of the European Union, the constituent units remain in essence sovereign powers, who may at times not appreciate prerogatives being reduced. The use of the European states as the means of implementing EU regulations, especially given their direct adoption into national law, means that those prerogatives may be

threatened even more than in other federal systems such as the United States in which the states are given some latitude for interpretation and discretion.

The ambiguous nature of sovereignty within the European Union is exacerbated by the different administrative and policy traditions remaining within the various member countries that are perhaps more different from one another (see Van Waarden 1995; Knill and Lenschow 1998) than the traditions in different states and provinces of a federal country.[7] That range of variation can only increase with the expansion of the Union in 2004 and the inclusion of a number of countries whose recent administrative history has been shaped by one or more authoritarian regimes.

8.3 Implementation

Top-down models of implementation assume that laws adopted by a legislature should be implemented in a manner as close to the intentions of the 'formators' as possible (Lane 1981, 1987). That idealized model is difficult to achieve even within a unitary and highly legalistic administrative system, but may be still more problematic in a federal regime. Even in federal regimes in which the central government is an active, or even dominant, legislator in a range of policy areas, those governments may depend on subnational governments for the implementation of those programs, and the implementation of programs by actors with at least some level of shared sovereignty tends to produce variation. Indeed, the classic work on implementation (Pressman and Wildavsky 1974) had as its focus on the implementation of a federal program in the United States through state and local government, and the many possibilities for deviation or inaction ('clearance points') along the way. Long before the notion became popularized, federal governments were in the business of 'steering, not rowing', but could not always be sure that the 'oarspersons' were not heading in the wrong direction.

We should remember, however, that different states may have different ambitions concerning uniformity in administration, and in the final outcomes of policy. One aspect of the logic of federalism is that uniformity may not be necessary, or even desirable, in some policy areas. Policies that involve basic civil and political rights are assumed to require uniformity across the entire system, although even those may be implemented by subnational actors. Other types of policies may vary, and vary markedly, even if they are mandated and/or subsidized by the central

government. This can be contrasted with the logic of a unitary state in which the obligation of the State may be to create as much uniformity as possible, in administration as well as in the laws that govern policy.[8]

The administrative style developed in the European Union for policy implementation is in essence that of a unitary regime being executed within a quasi-federal context. As has been noted a number of times the administrative style of the EU is largely French,[9] and has an emphasis on uniformity and legality. Thus, the implementation device of transferring the *acquis* almost verbatim into national law is an attempt to prevent the deviations from central standards that is characteristic of implementation in most federal regimes. As noted, that decentralized administrative style may well have advantages for a federal regime, but those potential advantages appear to have been consciously ignored in the implementation of EU programs.

Despite the attempts at legal inclusion, the evidence is of something of an 'implementation deficit' to match the democratic deficit in the EU (Peters 2000). Although countries do differ in the levels of compliance they have been able to achieve, most studies of policy implementation in the European Union do show deviations from the expected norms (see, e.g. Lampinen and Uusikalya 1998). Some of these are the result of inadequate capacity, a barrier to implementation that is likely to be all the more relevant after May 1, 2004. Other deviations may be the result of misinterpretation of intent, or fundamentally different understanding of technical issues, and some may be wilful.

Federalism may be associated with deviations from legislative intentions during implementation for several reasons. One factor is that if a state or provincial government is controlled by a different political party than the central government, then those governments may have different policy priorities. Even if there are not partisan differences among governments the objective differences (economic, social, and cultural) among subnational regions may generate differences in the manner in which the program is delivered (Hoornbeek 2004). Finally, the nature of federalism in some systems approximates the 'picket fence' concept in which there is functional segmentation in the system by expertise that tends to separate subgovernments from one another and limit policy coordination and integration. If this is the case, the problems of vertical coordination will simply exacerbate the problems of horizontal coordination endemic in all policymaking systems (Peters forthcoming).

The differences in policy and administration encountered among subnational units in a government are often discussed as a negative

consequence of political decentralization in government, but these differences need not be totally detrimental to governance. Louis Brandeis argued decades ago that the American states were the 'laboratories of democracy' and indeed the different administrative and policy choices made by subnational units does permit innovation and learning that would be more difficult in more centralized regimes (Peters 2003). In public administration, this has been seen recently in the diffusion of many administrative reforms upward from subnational governments to the federal level.[10]

Further, the opportunity for differences among subnational units also permits adaptation to different needs and local conditions. This is especially important for a country as large and diverse as the United States but is not unimportant for smaller and more homogeneous political systems as well. If nothing else, the capacity to produce local deviations from a centrally determined policy template may be seen as some measure of democratic control over policy, especially when there is strong identification by citizens with the subnational political entity.

8.4 Staff and structure

As well as influencing the capacity of government to implement its programs, federalism can also influence the structure of administration. The obvious effect of this sort is that in a federal system each of the constituent units may be govern the right to organize its civil service system as it wishes. As in the analysis of implementation, the variations among federal arrangements may produce more or less variation in personnel systems among the subnational units. On the one hand, federalism in Germany has relatively little variation in personnel systems, with a common civil service law for *Bund* and *Land* civil servants and very similar patterns of rewards for office. On the other, federalism in the United States or Australia permits different very personnel systems among the various governments.

While personnel systems and similar details of internal management within public administration may appear to be a somewhat arcane concern, these may have some significant influence on the central policy and implementation questions discussed above. One simple, but important, point is that a more integrated system for personnel management makes movement among the levels by individual civil servants relatively easy. For example, in Germany the same civil service laws apply, and for the

most part the same civil service salaries are available, in the *Länder* and the federal governments. That capacity for movement, and the recognition of common legal frameworks may, in turn, facilitate coordination across levels of government. This is in clear contrast to the fifty personnel systems in the American states, and the thousands of personnel systems in local governments that make movement and cooperation difficult.

The personnel system of the European Union involves a good deal of movement from the administrative systems of the member countries to Brussels and back. For members of most national administrative systems, going to the EU is 'ticket punching'—a necessary career move in order to gain European credentials. Of course, public servants may go and never come back, attracted by the higher salaries (in most cases) and the sense of being at the center of a historical project of immense significance. The movement back and forth has diffused some ideas about administration, and some Directorates General are clearly managed in the style of particular national administrations that have played, or continue to play, central roles in their policy development and management. What has yet to be determined fully is if there is a general Europeanization of administration (Knill 2001; Page 2003) that can infuse national decisions with common, *European*, administrative values (such as these can be said to exist).

8.5 Coordination and coherence

The variation in policy and administration associated with federal structures creates the need for some form of vertical coordination, to complement the usual demands for horizontal coordination within the individual levels of government. That having been said, federal structures for implementation may enhance the tendencies toward low levels of horizontal coordination found in most governments. This reduction in coordination capacity results in part from the 'picket fence' (Wright 1987) linkages of sectorally based organizations and individuals across levels of government. These linkages serve to some extent as a source of political support for the actors at each level, and in turn make policy coordination more difficult. The vertical negotiations over policy and administration with the other levels of government potentially would have to be redone if bargaining and adjustments with other policy areas produced changes in the policy regimen, hence the members of each of these 'pickets' can argue in favor of its autonomy from the rest of government, an autonomy that is reinforced by professional expertise.

Moving administrative decisions hierarchically downward to subnational governments is tending to make horizontal policy coherence all the more difficult as 'new governance' involves more social partners in decisions, and further locks in policy decisions once they have been negotiated. As norms of citizen involvement and empowerment have followed the adoption of administrative decentralization, policies are increasingly affected by negotiations within local, sectoral networks (Togeby 2003). This process may enhance some aspects of democracy and promote the creation of social capital, but it also makes reaching more comprehensive goals for coordination and coherence difficult, if not impossible (Sørenson and Torfing 2002) through the bargaining implicit in this model of governing which can be used in programs administered by national governments themselves, but appear more common when the programs are administered by subnational actors.

The capacity of a central government to create the desired level of coordination across levels of government, especially when combined with problems of coordination across policy areas, will vary according to the formal structure of federalism, as well as according to the will of the actors involved. Few political systems have developed effective formal mechanisms for this range of coordination activities, although there are some notable examples such as the substantial degree of fiscal coordination in Germany and Austria, and meetings of federal and provincial premiers in Australia and Canada. Most coordination among levels of government is, in reality, informal, involving negotiations and the *Politikverflechtung* that long has been argued to characterize German federalism (Scharpf, Reissert, and Schnabel 1976; Lehmann 2000).

Multilevel governance is a version of vertical coordination of governments that may be possible within the European Union (George 2004). As already noted, this term is itself somewhat vague, and appears to assume some level of cooperation across the levels, rather than the competition that often is observed in other forms of managed, decentralized regimes. In particular, we have argued that the absence of distinct legal frameworks and the reliance on sometimes quite informal negotiations between different institutional levels could well be a 'Faustian bargain' where actors only see the attractions of the deal and choose to ignore the darker consequences of the arrangement (Peters and Pierre 2004). To some extent, the 'Faustian bargain' stems from a tendency in multilevel governance thinking to argue that this mode of governance represents something radically different from traditional models of intergovernmental relations. Thus, we argue that the 'Faustian bargain' can

be to some extent escaped if multilevel governance is not seen as an alternative but rather as a complement to intergovernmental relations defined in a regulatory framework.

8.6 Accountability and control

The final consideration in the relationship between federal structures and public administration is the familiar, yet crucial, question of the accountability of administration. The problems of accountability are closely related to those of implementation, given that in a federal system the central government—or the Brussels governance apparatus in the case of the European Union—generally delegates some of its authority to subnational governments to implement programs in the name of that other, hierarchically superior, system. Once that delegation has occurred, the principal must find a means of ensuring that the agent has indeed fulfilled the expectations of the principal and that the program has been put into effect within the range of acceptable deviations from a presumed norm. The principal, of course, can encounter all the problems of shirking and moral hazard associated with any principal–agent relationship (see Wood and Waterman 1991; Pollack 2003).

While the implementing agents have numerous incentives to avoid central control and to find ways of doing what they please, the central government has numerous incentives to ensure compliance, in addition to the obvious desire to ensure legality. For one, the central government may be attempting to create trust through the capacity to be effective. In the case of the European Union this need may be especially relevant for the process of expansion, as there will be a need to try to deliver the benefits that citizens have voted for in referenda during the past several years. Even established states may want to use compliance as a means of building the state and enforcing a sense of common destiny, as when the Canadian federal government attempts to ensure that recalcitrant Quebec, or reluctant Alberta, do not avoid federal requirements.

Genuine compliance of subnational actors during policy implementation also enables actors in the central government to complete their own chains of accountability, for funds as well as for action. Given that central governments often subsidize their own programs that are being implemented through the subnational governments; they need to be sure that this money is spent legally and appropriately. The increasing number of steps between the authorization of funds and its actual

expenditure, and the increasing number of actors that are involved as 'governance' models involving a range of social partners become the norm for implementation mean that these accountability chains can be extremely long, and hence the need to find enforcement mechanisms rather substantial.

Being faced with political and legal pressures to ensure compliance, the central government is able to use a variety of tools to monitor and control. The European Union is perhaps unusual among federal and quasi-federal regimes in the extent to which it concentrates on the use of formalized legal instruments to control implementation, as opposed to using incentives or even competitive devices for monitoring and compliance (see Hood et al. 2004). Certainly the United States has had its political conflicts over unfunded mandates coming from the federal government, but other policy instruments, such as matching grants, are used to provide the states and localities with incentives to implement federal programs. We know, of course, that those seemingly cooperative instruments can produce priority inversions in the states and localities and that they can be used to affect program areas other than those for which they are nominally targeted,[11] but the style of implementation that emerges remains less hierarchical.

Accountability in the European Union is less developed than in national political systems, including federal systems such as the United States (see Kostas 2004). To a great extent the European Union depends on the member-states themselves to ensure accountability, although the Union has been developing some institutions and instruments of its own in an attempt to hold its own administrative structures accountable for their actions. These institutions are also useful for controlling public administration in the member countries, and have created linkages with national organizations enforcing administrative responsibility.

It should also be noted that the European Union is shifting its pattern of implementation more in the direction of 'soft law' as well. In particular, the Open Method of Coordination is a mechanism for using targets, guidelines, voluntary agreements, benchmarks, and a host of other vague terms used to describe less formal means of harmonizing law across the member countries (Borras and Jacobssen 2004). Such methods of implementing programs make the generalized movement toward harmonization within the Union appear less Draconian than the conventional means, but may become as demanding—if a benchmark is enforced stringently it ceases simply to be a target and becomes a rule. Further, with enlargement, the capacity to use such informal devices may

be lessened, given significant differences in the administrative capacities of the members.

8.7 Summary and conclusions

This chapter remains only a preliminary examination of the possible effects of federalism on public administration. To some extent, the consequences of federalism will depend on the particular form of federalism that is being practiced, and the manner in which policymaking and administration activities are divided among the various levels of government. It also depends on the capacity of the central government (or its analog) to monitor and enforce the implementation of its own rules. Despite the variations that can be found among federal structures, the general tendency toward decentralization will have some impact on the uniformity of implementation and on the capacity of the system to delivered coherent and coordinated programs.

As important as these differences among federal systems may be for the implementation of policies, these differences may be even more important in terms of their capacity to coordinate public action, and to hold governments accountable for their actions, and to link citizens and their rulers through effective control mechanisms. Most of the federal or quasi-federal mechanisms for managing public policy assume that the agents of the central government will be relatively willing partners in the process of implementation, especially if sufficient financial incentives are made available to those governments responsible for implementation. There is, however, little reason to believe that to be the case, given both the history of many public programs and the political and other incentives there are to defect.

Therefore, the real implementation problem in a federal system (or not) appears to be one of accountability and control rather than simply producing action. Certainly action is important, but producing the right action is even more important. In a federal system there may be more than one right answer, each having some legitimacy. Interestingly, the quasi-federal system of the European Union actually bestows less legitimacy on deviations from centrally determined standards than would the typical federal system. Multilevel governance structures in the EU are meant to be negotiated and open, but even those may have more central dominance than would be expected. The emergence of soft-law and the apparently looser standards under that regimen may in the end produce the flexible response to complex problems that is meant to be one of the virtues of a federal arrangement.

Notes

1. Although those variations may generally be more apparent in federal regimes, they may exist in unitary systems. The United Kingdom is probably the most hierarchical and unitary political system remaining in Europe, but there are (at least) three different administrative systems in the various components of that one country.
2. Reference will be made to other federal regimes were appropriate for making particular points about the range of federal options for managing and implementing public policies.
3. Of course, the 'Community method' is now being modified extensively by the creation of procedures such as the open method of coordination and other aspects of 'soft law' that further weaken the capacity of top-down models of administration to function as might have been anticipated. See Héritier (2002) and Mörth (2003).
4. This analysis assumes that these levels of government are in overt competition for power, whereas in reality they may be engaged in more cooperative activities.
5. These differences may also reflect different administrative cultures across countries, with more legalistic cultures or traditions emphasizing uniformity (see Torstendahl 1991). The emerging administrative culture in the EU reflects the legalism of many of its constituent units and hence there is limited discretion for national actors.
6. That statement is perhaps too strong, given the traditions of decentralization and local autonomy in, for example, the Scandinavian countries. Central governments have certainly tampered with the structure of local government, e.g. the major consolidation of local authorities in Sweden in the early 1970s, but the long and continuing partnership arrangements in administering public programs have thoroughly institutionalized this system of governing.
7. Remember, however, that Quebec in Canada and Louisiana in the United States do have some elements of a different legal system, and also have strong traditions of exceptionality in making and implementing law.
8. The use of prefects in France and in other Napoleonic states is an example of an attempt to ensure uniformity in execution as well as in law. As noted above this often failed, but the logic was still that of control from the center.
9. There are also significant elements of the administrative style of tsarist Russia in policy execution in the EU.
10. For example, many of the ideas implemented as part of the National Performance Review (the Gore Commission) had been tried out earlier in state governments. In administrative terms the American states have been significantly more progressive than has the federal government over the past several decades.
11. For example, at one point federal government support for immunization programs would be cut off if states did not comply with federal guidelines for regulating doctors and dentists with HIV-AIDS.

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9

The US Supreme Court and the European Court of Justice Compared

Martin Shapiro

This paper will compare the US Supreme Court with the Court of Justice of the European Union (ECJ). Both are courts of general jurisdiction of federal systems.

Typically in continental Europe national courts are divided into three quite separate systems: a civil court system that hears disputes between private parties and criminal prosecutions, an administrative court system dealing with challenges to the lawfulness of acts of government administration, and a single constitutional court which is the only court that may deal with issues of constitutionality and deals solely with such issues. In the United States most courts, both state and federal, undertake private, criminal, and administrative adjudication and have the power to declare laws or other government actions unconstitutional. It is significant that the ECJ, like the Supreme Court, handles all kinds of cases.

9.1 Constitutional jurisdiction

Both courts have the power of constitutional judicial review, that is, the power to invalidate statutes or other acts of government as in conflict with some higher law, the Constitution in the United States, the EU treaties in the EU, which the ECJ treats as and refers to as the constitutional documents of the EU. In both, this power of constitutional judicial review

includes the power to declare statutes and administrative actions of the member-states invalid not only if they are in conflict with the US Constitution or EU treaties, but also if they are in conflict with federal or EU statutory law.

In the United States while various 'standing' rules somewhat constrain who can get to the Supreme Court, in general both private parties and government officers and organizations may invoke the Court. Normally such invocation occurs on appeal either from lower federal courts or the highest state courts, all of which themselves initially may decide constitutional as well as all other legal issues. The treaties provide that only member-state governments or organs of the EU, or individuals directly subject to EU statutory law, may directly invoke the jurisdiction of the ECJ. Thus, it is difficult for individuals to reach the ECJ on constitutional issues. However, where an issue of EU law, statutory or constitutional, arises in a member-state court, the treaties provide that the member-state court may suspend its proceedings, make reference to the ECJ on the issue of EU law that has arisen and then, guided by the resolution of that issue provided by the ECJ, go on to decide its case. (Article 234 EU treaties) Thus, individuals seeking to challenge member-state laws or other actions as in violation of EU law, including the treaties, may get to the ECJ via the reference procedure.

The reference procedure appears to mark a major contrast between the US Supreme Court and the ECJ. The contrast is not, however, or at least in the future will not be, as great as it appears. In the first place the US Supreme Court need not, and frequently does not, reach a final decision of appeals cases that flow to it from the states. In cases that mix issues of state law and US constitutional law, the Supreme Court may decide the US constitutional issues and then remand the proceedings to the state court from whence it came for final disposition. It must be admitted, however, that in most instances this remand is simply a courteous formality. For the Supreme Court rarely takes a state case in which the decisive issue is not one of US law, so its decision on US law typically will leave the state court nothing to do but go through the formality of issuing the final judicial order.

More important is the future of the reference system itself. A reference system seems plausible at the initial stage in the development of a dual judicial system and in keeping with the continental European tradition of confining constitutional interpretation to a single court as opposed to the US practice of vesting such interpretation in all courts. Yet over the long haul

the reference practice is bound to erode. After the first stay of proceedings and reference of a constitutional issue from a nonconstitutional to a constitutional court and a decision of the issue by the constitutional court, on another day in another case there may well be another reference of the same issue. And, perhaps, a third and a fourth. But what happens when the same constitutional court has made exactly the same constitutional pronouncement in ten successive references to it. Must the nonconstitutional courts forever, in case after case after case, impose the costs and confusions on the parties and on itself of stopping its proceedings and making a reference and waiting for a reply when everyone knows at the outset exactly what that reply is going to be? And can the constitutional court impose the cost on the litigants and, more importantly on itself, of filling its calendar with cases in which ultimately it will solemnly repeat exactly what it has said a dozen times before? The EU and other continental referencing systems have developed a legal doctrine called the *acte clair* doctrine (Craig and De Búrca 1995: 406–20) permitting nonconstitutional courts themselves to resolve constitutional issues raised in their cases when they can do so by following constitutional jurisprudence already firmly established by pronouncements of the constitutional court. Thus over time reference systems tend to turn into something very like the US system, in which lower courts make constitutional judgments guided by Supreme Court precedents.

In the US system, however, a party encountering an adverse US constitutional decision by a state court may appeal ultimately to the US Supreme Court. In a reference system, when a member-state court opts to make the EU constitutional decision on its own rather than making a reference, the party has no way of reaching the ECJ. At best he can appeal within his own domestic court system hoping to persuade the member-state appeals court to take reference. But it too may opt to decide itself rather than take reference. Thus even in the near term future, things will be different in the United States and the EU from the perspective of litigating parties.

In the United States the Supreme Court is most likely to take a constitutional appeal when lower courts, either state or federal, have disagreed in their resolution of the constitutional question at issue. In the EU, as more national courts make more decisions of EU law on their own, it is likely that a national court will often be confronted by an EU law issue that a number of other member-state courts have decided, but about which they have disagreed among themselves. In such instances the member-state court is likely to take reference rather than join in the disagreement. It can, of course, argue that the very existence of disagreement among other national courts is an indication that the issue has not been clearly

resolved by the ECJ and is, therefore, one in which reference is still required. Ultimately the ECJ, like the Supreme Court, is likely to preside over a flow of constitutional issues from lower to higher courts whose volume will be determined in large part by how clear and consistent the pronouncements of the highest court are.

9.2 Internal practices

The ECJ is staffed largely by continental European judges shaped by continental judicial practices and the Supreme Court is not. The initial practice of the ECJ was heavily influenced by French practice. The working language of the Court is French. But the French influence is more that of the Council of State than regular French courts. Continental judicial practice generally pretends not to be one of case law precedents, although the reality is otherwise. Unlike the regular French courts, however, the Council of State, as highest administrative court, has openly constructed French administrative law as case law.

From the French Council of State the ECJ has borrowed the office of Advocate General for which the US Supreme Court has nothing comparable. The Advocates General are judicial officers of the ECJ but do not sit as judges deciding cases. Instead for each pending case one of the Advocates General prepares a written report to the court, which is published in the official case reports along with the opinions of the court. Advocate General's reports are frequently cited in legal arguments, and sometimes in the opinions of the court although they are not as authoritative as the actual opinions of the court. Typically they exhaustively analyse the relevant previous decisions of the ECJ and seek to identify on what issues there is a well-settled ECJ position and on what issues there is not. The Court need not accept nor even comment on the recommendations of the Advocate General or his or her reasoning. Yet particularly where the ECJ has agreed with the Advocate General on the outcome and itself has been cryptic in its opinion, the Advocate General's published statement is frequently resorted to in attempts to discern what the court is really doing.

Although seemingly at odds with US practice, the Advocate General's performance actually represents a kind of convergence. The ECJ issues only one opinion in each case. There are no concurrences or dissents. Not even the vote is published. English and Irish judges tend to employ case law discourse in the opinions they write for the ECJ. Continental judges typically do so less and probably French judges least, although

these are guesses given that the opinions are unsigned. Legal discourse surrounding the ECJ, and the legal presentations to the court filed by the parties, tend toward heavy case analysis and argument from precedent. Much of the language of the treaties and even the EU statutes is too general to make much sense or have much stability without interpretive judicial precedents.

It is the practice of the Advocates General which provides an official, published, readily acceptable, precedential discourse in which the decisions of the ECJ can be embedded. It openly acknowledges and emphasizes the case law, precedential aspects of the work of the ECJ, the same kind of case law, precedential discourse in which the work of the US Supreme Court is embedded.

What is most significant here is that in most of the member-states of the EU only a single, special court is in place to exercise constitutional judicial review and that this court does nothing but exercise constitutional review. Furthermore, in most continental states a separate court system exists which decides only, and is the only judicial decider of, challenges to the legality of acts of government administration. The ECJ is much more like the US Supreme Court than its European neighbors in exercising both the constitutional judicial review power and the power to review administrative actions not only for their constitutionality but for their obedience to the regular statutory laws enacted by the legislative process.

The reference procedure in the EU does involve a higher degree of judicial discretion than does appeal in the United States, but in both systems private parties can get to the top court to challenge member-state government laws or administrative actions or those of the central government as violations of federal or EU statutory or constitutional norm as declared and interpreted in the previous case decisions of that top court.

9.3 The judges

The judges of both the United States and the EU are political appointees; in the United States for life by the president with the consent of the Senate, in the EU a national contingent by the government of the member-state with the consent of the other member-states for a term of six years. Most US judges, including Supreme Court justices, are selected mid-career from among successful practitioners, government lawyers, law professors, and lawyer-politicians. Many serve on lower courts before moving to higher, but there is no regular judicial career system or promotion ladder. In most

European states there is a judicial career service with young law graduates proceeding directly to a judicial training school and then to lifetime judicial service with promotion by seniority. Some appointments to the ECJ are from among senior judges in member-state career services, but others are not. Particularly during the early decades of the communities, the ECJ's membership tended to represent a range of experiences and enthusiasms more akin to, the US Supreme Court's range than the typical member-state high courts.

High court decisions are important political decisions made by a small number of persons relatively isolated from immediate political pressures. Thus personal policy preferences are likely to play some role. Empirical studies of US Supreme Court justices' voting behavior show such preferences to dominate judicial decision-making at least when particular legal questions have a number of plausible answers (Baum 1997). Comparable studies of the ECJ judges is not possible because their individual votes in particular cases are not recorded. It seems probable that their preferences also determine outcomes to some degree. Many courts have the potential successfully to intervene in public policymaking, but whether they exploit that potential depends on what the judges themselves choose to do. Thus who is on a court counts.

US Supreme Court justices have tended to fall into two types. One is a political party leader rewarded or bought off by a president of his or her own party. In most instances such appointees will reflect one of the main ideological tendencies within his or her and the president's party but will not have been appointed to push the Court in a particular direction. The second type is the distinguished lawyer or judge or law professor of the same party as the appointing president but appointed with more of an eye to his or her distinction as a professional than his or her party service. Today there is some tendency of presidents to seek to use appointments to push the Court in particular policy directions or toward more or less judicial activism, but so far without marked success. Indeed, the more common story is presidential appointees moving in policy directions or toward levels of judicial activism unanticipated by their appointers.

The ECJ story is somewhat different but equally cloudy. In its early days the ECJ was seen as an international or transnational court and one that might have little to do. Member-state appointing authorities tended to turn to lawyers who specialized in international or comparative law. National career judges who had spent their whole professional lives deeply embedded in national law were not attractive prospects for such a court.

Political leaders did not anticipate major policymaking by the ECJ. As a result probably disproportionate numbers of persons who were not career judges and were particularly interested in international law were appointed. International law specialists are likely to be enthusiastic about the strengthening of transnational law and transnational courts. Probably an unintended consequence of member-state governments paying relatively little attention to their choices, and choosing suitably qualified experts, was an early compliments of judges who were particularly enthusiastic about expansive readings of the treaties and expansive decision-making by the court. These international law experts may have been particularly anxious to move EU law and the ECJ from the largely voluntaristic arena of international law and courts to the more obligatory realm of constitutional law and constitutional courts. To some degree the judges of the ECJ moved the communities toward greater integration because those particular judges wanted to.

Over time the situation has changed. As the ECJ has actually become a constitutional and administrative review court and has become more and more involved in matters of regulatory law, it becomes more natural to appoint to it not international law specialists but experts in the comparable bodies of domestic law. Moreover, national governments are now quite aware that the decisions of the ECJ may have significant impacts on their authority and policies. They are more likely to pay attention to prospective appointees' policy views and propensity toward judicial activism than governments once were. Today's actual functions of the ECJ and perspectives on its work are more likely to move tried and true ordinary jurists to the court than transnational law enthusiasts. There are no doubt many exceptions and, like US presidents, member-state governments cannot accurately predict what their appointees will do once appointed. At one time it might be said that European judges, trained in positivist traditions of deference to legislative bodies, would necessarily be less activist than judges embedded in common law traditions, particularly American judges acclimatized to a legal culture of judicial supremacy. Given that many of the continental member-states have been experiencing an extended periods of growth in constitutional judicial review fostered by judges with more or less conventional European legal educations, such arguments based on differing legal cultures become highly suspect. At this point it seems likely that the ECJ has roughly the same almost accidental mix of judicial activists and judicial self-restrainers that exist in European national constitutional courts and the US Supreme court.

9.4 Judicial lawmaking by 'interpretation'

All courts make some law or public policy. Most of the law most courts make is made through the judicial interpretation of legally binding text. That text consists of statutes enacted by legislatures, rules, regulations, decisions, and other pronouncements enacted by government administrative agencies and constitutions or other bodies of 'higher' law such as treaties. Some judge-made law derives from other, earlier judge-made law, when courts decide cases by following, ignoring, reversing, or modifying their own previous decisions or precedents. The Supreme Court, like other US courts, purports to follow its own precedents unless it finds good reason not to. In non-English-speaking European states most courts purport not to follow precedent but to judge each case anew on the basis of a governing statutory text. In reality they too follow precedent unless they are convinced to do otherwise. The ECJ sometimes mentions precedent and sometimes does not, but is about as constrained by precedent as most Western courts are and as free to break with precedent.

'Interpretation' or 'application' of previous law, constitutional, statutory, or case, necessarily involves some lawmaking because the previous law sometimes does not give a single, unambiguous, correct answer to the legal question before the court. The proportion of lawmaking to law following tends to rise with the level of court. Those questions of law that are very, very clearly settled are unlikely to get to court at all because lawyers will advise clients against whom they are settled not to pursue them fruitlessly and expensively in court. If such settled questions are presented in trial courts, those courts usually give the settled answer, and it will rarely be worth the cost to appeal those answers. The less settled, the more likely appeal, with the least settled most likely to reach the highest appellate courts.

Moreover the more vague, general, ambiguous, or internally contradictory the controlling legal text, the more open to judicial discretion are the unsettled questions that reach the highest courts and, obviously, the greater the number of them.

Further the less able the original author of the text is to amend it in order to correct subsequent 'misinterpretations' by the courts, the more unfettered is the judicial interpretive discretion.

Finally, anyone who is charged with the implementation of a legal text must interpret it in order to implement it. Thus a court charged with determining the legality of implementation by others has no choice but to interpret the text itself to determine whether to acquiesce in the implementer's interpretation.

The Supreme Court and the ECJ both are highest constitutional judicial review courts. Constitutions, by their very nature, tend to be relatively general and vague, to offer often unstated balances or trade-offs between various goals or values, and to deliberately construct various institutional tensions or boundary problems. Typically too they are relatively difficult to amend. Federal constitutions, because they invoke the theoretical absurdity of two sovereigns over the same people and territory, are likely to be particularly ambiguous.

The Supreme Court and the ECJ both are highest administrative judicial review courts. In the context of highly complex, high-tech regulatory regimes, they must determine the legality of administrative implementation of statutes. To do so they must interpret the statutes. Statutes enacted by legislative processes in which many interests are represented, there are many potential veto points, and success depends on coalition building, are likely to contain many unresolved issues papered over in ambiguous wording, sometimes approaching lotteries in which legislators in effect assign decisions about ultimate outcomes to subsequent implementors. Both the United States and the EU legislative processes are of this nature.

In the EU the implementation phase is even more difficult than in the United States. In the United States most Congressionally enacted law is implemented directly by one or another single federal administrative agency. Thus typically courts only need to deal with a single statutory interpretation made by a single agency and the rival interpretations made by adversely regulated private interests. In the EU much of the statutory law is in the form of 'directives' which must be translated into member-state statutes and those member-state statutes then implemented by each member-state administration. Even EU 'regulations' which can be implemented without member-state statutes are mostly implemented not by a single EU administration but by each of the national administrations. And in either instance, the Commission may come up with its own interpretations and challenge member-state interpretations as, of course, may adversely affect private parties, typically through reference proceedings. Thus the ECJ must deal not only with private party interpretations challenging a government interpretation but a whole range of different interpretations by different governments.

Note that in many instances constitutional and administrative review are inextricably mixed and need not be differentiated. Where an EU court invalidates a member-state implementing statute or a member-state administrative act as violating a directive, technically it is engaged in 'constitutional' review because it is enforcing the treaty-based supremacy

of EU law over national law. But while it is technically engaged in supremacy constitutional law, what it is actually doing is precisely the same checking on an administrative interpretation of a statute as it would do in pure administrative review, for instance, when someone challenges a Commission interpretation of an EU statute. In the United States, of course, even the purest administrative review, for instance, when the Supreme Court checks whether a federal administrative regulation tracks the statute authorizing the regulation, is also Fifth Amendment due process' review.

Thus combining constitutional and administrative review, both the US Supreme Court and the ECJ enjoy the potential for a great deal of judicial lawmaking. In purportedly democratic polities, however, such a potential is more or less constrained by the possible public perception of lawmaking by a few unelected judges as illegitimate.

9.5 Federalism and judicial lawmaking

Both the Supreme Court and the ECJ are imbedded in some sorts of federal or at least free trade or customs union systems. Such systems are cartel-like. The ideal position for each participant is that other states obey the free trade rules by not advantaging their own producers and consumers while it itself does burden imports and subsidize exports. The second best position for each participant is that all obey the free trade rules. Thus each player has a high incentive to cheat, and all have a high incentive to prevent cheating. A free trade constitution enforced by constitutional judicial review is a convenient mode of maintaining the cartel in the face of member-state cheating incentives.

Where, as in the United States and EU, the cartel has a legislature, it could police cheating itself by passing legislation singling out and punishing the cheater. But legislatures are not well constructed to engage in continuous surveillance of the detailed mass of member-state health, safety, environmental, and consumer protection regulation in which domestic economic advantage can be embedded and camouflaged. Nor are the US and EU legislatures likely to be able to respond quickly with corrective legislation. Surveillance by the administrative or executive organs would be more feasible but expensive and inevitably embroiled in political charges and countercharges of lax, nit-picking, or discriminatory supervision. Constitutional judicial review provides incentives for private parties who find themselves disadvantaged by member-state regulation to challenge them on free trade grounds in litigation.

A litigation market is created in which, at private rather than public expense, a high level of multiple, decentralized surveillance is maintained that will bring detailed, concrete instances of national regulatory cheating on free trade to the attention of a central authority with the legal competence to label and sanction them as cheating.

Thus judicial action by the central (cartel) courts against a cheating member-state is not seen as the constitutional court versus the member-states, but rather as the member-states collectively against a cheating member-state even though each member-state knows it itself will sometime or other be caught cheating. As long as all member-states wish to continue the free trade cartel, all will support at least that variety of constitutional judicial review aimed at enforcing free trade, which in the United States is called negative commerce clause review and in the EU free movement review. And the inevitable judicial law or policymaking entailed in such review will be accepted as a legitimate cost of maintaining free trade even if it is vested in a few nonelected judges.

Courts engaged in constitutional federalism review in federalisms basically designed for free trade purposes inevitably wield a great deal of particularized policy discretion. At the founding period of the US Constitution both the states and national governments were engaged in regulatory activities although the tempo of those activities escalated greatly from the 1880s onward. Of course at the founding of the EU, the member-states were regulatory states. And after an initial period, transnational EU regulation has proliferated. In some instances EU regulation has replaced that of member-states, but member-states have remained heavily in the regulation business.

In federalisms, where both levels of government are regulating, some conflict between the two bodies of regulation is natural given that both governments are regulating the same people in the same places. Beyond this natural level of conflict, an additional level of conflict is generated by strategic behavior on the part of the member-states of free trade federalisms. Above and beyond bona fide regulation, member-states may use regulation to disguise barriers to transstate trade. An attempt to keep imported beer out of the local market may be disguised as a consumer protection measure that just happens to set permissible maximum alcohol levels for beer below those of the levels in popular, imported brands.

When state regulatory standards are alleged to conflict with federal standards, a constitutional issue is raised to be decided by constitutional review courts because federal or transstate constitutions typically proclaim federal standards to be supreme over local ones. State regulations

conflicting with federal regulations will violate such supremacy clauses. Where state regulation inhibits interstate imports or advantages exports, such regulations violate constitutional free trade clauses.

In both kinds of cases the constitutional review court will have to interpret regulations. In the former it will have to decide whether state–federal conflict exists and whether it exists in an area where federal regulation is supposed to be supreme. In the latter, precisely because the state has taken pains to disguise its anti-free trade move as legitimate regulation, the constitutional court may seek to discern the intent of the state regulation. Moreover, interpreting the regulation will be necessary to determining its impact on cross-border trade. Many such calls are not clear-cut so that judges hostile to particular regulatory provisions may sometimes strike them down on federalism grounds even when their real objections are to the substance of the regulation.

9.6 Balancing least means and the evolution of federalism judicial review

In instances where state regulation may burden free trade, the classic balancing least means situation arises. Does the legitimate state interest in environmental or consumer protection or health and safety outweigh the transnational interest in free trade? Could the state have protected its legitimate interest in some way less damaging to free trade? Should the asserted state interest be given no weight because it is a sham covering a deliberate anti-free trade move? Judges may decide such cases not only on the basis of how much they value federal free trade or federal supremacy, but also on how much they approve of particular state regulatory moves.

Although balancing least means tests are almost inevitable in federalism cases, ultimately they tend to a virtual autolimitation on judicial activism. In a democracy the balancing of contending interests preeminently is a task for the legislature and ultimately for the electorate. Clearly stated judicial balancing of interests brings the always-endemic conflict between electoral democracy and judicial review to the forefront. Least means tests require a court to imagine all of the possible alternative statutes that the legislature might have enacted to achieve its declared legitimate regulatory goal. If the actual statute adopted is not the one among all possible alternatives that does the least damage to free trade, then the enacted statute fails the least means constitutional test. The constitutional free trade court is in effect saying to the legislature, 'We will veto your statute if

it is not as good as the one we would have chosen if we were the legislature'. Balancing least means tests dramatically demonstrate the substitution of judicial for legislative lawmaking, a substitution that judges embedded in democratic polities hardly wish to dramatize. Thus free trade federalism constitutional courts over time are likely to be relatively modest in their policing of member-state statutes purporting to serve member-state interests in health, safety, consumer protection, etc.

Because federal constitutions typically place some limits on the scope of federal regulatory authority, some cases will involve questions of whether the broader government has overstepped its constitutional bounds. Over the long haul, in both the US and Europe, economic activities have become less and less local, so, even quite apart from particular judicial sentiments, a wider and wider scope for transstate regulation has necessarily been conceded. Where member-state regulation has been at issue, both the Supreme Court and the ECJ have decided a large number of cases, have generally privileged free trade over state regulatory claims, but have decided substantial numbers of cases in favor of member-states. It could hardly be otherwise given that parties adversely affected by state regulations have a high incentive to try to knock them off by accusing them of being disguised anti-free trade measures whether they actually are or not. Beyond this phenomenon, however, it may be said that both courts have shown a strong, long run, free trade over state regulation preference. Nevertheless, both courts, after periods of substantial hostility to state regulation, have signaled that they were alert to efforts by proponents of laissez-faire to use constitutional free trade provisions as general antiregulatory weapons.

Any free trade federalism constitutional review court is likely to go through a certain historical cycle of decision-making at least when at the founding all member-states joined voluntarily. Prefounding, overt, member-state burdens on free trade among the members are likely to be voluntarily removed or to fall to almost unopposed judicial scrutiny. The first real problems come from preexisting member-state health, safety, environmental, consumer protection, and other such regulations that were not primarily intended to serve as barriers to trade and do not announce themselves as such. Challenges to such regulations on the grounds of their negative impact on interstate commercial flows will soon drive a policing court to the balancing least–means approach.

As time passes and litigational experience collects, legislatures will become adept at passing new barriers to trade disguised as bona fide regulation. And the regulated, looking for any port in a storm, will challenge any and all member-state regulations, bona fide and otherwise,

on free trade grounds. Thus the policing court will be driven to more and more and more and more intense reviews of member-state regulations and is likely to produce more and more nuanced decisions that do not reveal a clear pro- or antimember-state regulation pattern. Its decisions will tend to turn heavily on case-by-case cost benefits balancing analysis of how much legitimate state interest in health, etc. is served by a state statute versus how much that statute burdens cross-border commerce, and case-by-case judicial guesses about whether there was or was not member-state intentional but disguised trade discrimination.

During this process liberal or, these days, neoliberal antiregulatory voices will also push the policing court toward conflating free trade and laissez-faire values. They will repeatedly argue that some particular member-state regulation unreasonably increases costs and thus prices and thus reduces the overall volume of production and sales and thus reduces the volume of transmember-state transactions and thus unlawfully burdens interstate free trade. Courts seeking to police free trade must work out ways of avoiding becoming engines of laissez-faire, at least if they do not want to be engines of laissez-faire.

There have been a number of in-depth studies of the history of the Supreme Court's 'negative commerce clause' decisions and the equivalent ECJ decisions policing member-state regulations allegedly impinging on free trade (Blasi 1982; Weiler 1999). Both the US Supreme Court and the ECJ initially took strong stances against state discrimination against the trade of fellow member-states and continue to do so. Both moved to balancing and least means analysis. For reasons already indicated both have become uneasy with such analysis and prefer straight findings of discrimination when they can make them. Both were pushed into more and more laissez-faire positions in the course of receiving larger and larger streams of challenges to state regulation dressed in free trade clothing. In the United States there was resort to other constitutional provisions as well. Both eventually sought to reemphasize that they are not hostile to member-state regulation per se but only to discrimination or undue burdening of interstate commercial movement (*Keck and Mithouard*, Cases C-267 and 268/91, (1993) ECR I-6097).

9.7 Constitutional courts and changes in federalism

While the ability of the Supreme Court and the ECJ to intervene for or against particular regulatory policies is highly significant, constitutional

courts policing federalism can also have a major impact on the very structure of federalism itself. Federal constitutions are, in some sense, always redrafting themselves, because boundaries between the governing authority of member-states and the broader polity necessarily must shift as economic, social, political, and technological circumstances change. At the very least constitutional courts are likely to register such shifts, but they also may play a significant role in shaping what they register.

The US Constitution does not explicitly provide for judicial review. The Court established its powers of review by its own decisions. For reasons already indicated a constitutional free trade federalism monitored by litigation is quite different than one not so monitored. By establishing its own review powers the Supreme Court shifted the federal balance in favor of the broader government. And, reciprocally, those favoring the expansion of the powers of the broader government supported the Court's assertion of review powers. If one traced the history of the Supreme Court period by period, some periods would be found in which the Court favored local authority. Taken as a whole, however, by asserting and expanding its own constitutional review authority, as well as by its free trade decisions and later its impositions of Bill of Rights guarantees on the states, the Supreme Court has moved the federal balance substantially in the direction of greater central authority.

The European treaties explicitly provide for judicial review. By its particular exercises of review the ECJ has had a substantial (many would say a decisive) impact on European integration particularly in the period before the passage of the Single Act (Single European Act of 1987). In landmark decisions, the ECJ held that EU treaties and statutes were both supreme over member-state constitutions and laws (*Flamino Costa* v. *ENEL* C-6164, (1964) ECR, 585) and had 'direct' effect (*N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos* v. *Nederlandse Administratie der Belastingen* C-26/62 (1963), ECR, 585; *Vam Duyn* v. *Home Office* C-41/74, (1974) ECR, 1337) that is, could be invoked by individuals in national courts to establish legal rights and obligations that must be enforced by national courts.

In one sense these decisions are not momentous. Both before and after them the laws enacted by the Union, then Communities, mostly would be implemented by member-state administrations and courts. Directives would still basically become effective only through the passage by member-state legislatures of domestic laws. Thus the Union would remain less 'federal' than the US in the sense that the broader governments' laws largely would continue to be implemented not by its own bureaucracy and judiciary but by those of its member-states.

In another sense, however, the supremacy and direct effect decisions of the ECJ altered the fundamental nature of the communities. Indeed, it is these decisions that allow us to treat the Union as a constitutional federalism rather than an international organization. The communities were established by treaties, legal instruments of international law. Under international law, legal rights and obligations created by treaty do not inhere in individuals but only in the sovereign signatory states. Unless a signatory state chooses to 'domesticate' treaty provisions, that is pass national laws that enact treaty rights and obligations into national law, individual citizens of that nation may not invoke those treaty rights and obligations in the national courts. Treaties only create obligations in international law on states as states, obligations they owe only to other states as states and which can be enforced only in international tribunals. They do not endow individuals with rights or obligations in the domestic law of particular states that private parties may plead in the course of regular lawsuits in regular courts. If Germany and France enter into a treaty promising not to tax imports of hardware from one another, a German hardware importer required by German law to pay a tariff on imported French hardware must pay it. For him only the German domestic law counts. The only obligation not to tax owed by the German government is to the French government, and even the French government can act against the German government only in some international tribunal, if the treaty provides for such action, not in a regular French or German court. The supremacy and direct effect decisions allow the German hardware importer to refuse to pay the tax and, on being sued by the German government in the German tax court for failure to pay, successfully to plead in the German court that he is not legally obligated to pay because the German tariff law violates the EU Treaty provision guaranteeing free movement of goods.

In this way the treaties are transposed from being treaties in international law into constitutional documents for a new sphere of law which is neither only the law of a particular state nor international law but the law of the EU. The EU then must be neither the equivalent of a unitary state nor an international organization but rather some sort of federalism. The treaties themselves contain some language that suggests that the member-state signatories had intended such a transposition, but it is the ECJ that actually achieves the concrete transposition by interpretation of the treaties. The member-states acquiesced in the transposition not by debate and vote but by silent acceptance by their elected governments and case-by-case obedience by their own courts.

The mutual recognition story is comparable. Conflicting member-state product regulations could seriously restrict the free movement of goods among them guaranteed by the treaties. The ECJ could strike down such member-state regulations, but, if it did so, a regulatory void would open in the absence of action by the EU itself to enact transnational regulations. In its early period the EU itself found it extremely difficult to gain sufficient consensus among its members to regulate effectively. The ECJ then announced the principle that products that met the regulatory standards of the member-state in which they had been produced could be lawfully imported into and sold in all other member-states.

This mutual recognition doctrine (*Rewe Zentrale AG* v. *Bundesmonoopolverwaltung fur Branntwein* C-120/78, (1979) ECR, 649) opens the specter of a regulatory race to the bottom. Whatever member-state enjoyed product regulations least costly to the manufacturer would achieve a competitive price advantage in the whole common market for its manufacturers over their competitors from other member-states. Given the treaty guarantees of free movement of capital, ultimately investment in new plant, and thus employment, should flow from the states with more to the states with the least-demanding product regulations.

The member-states then signed a new treaty, the Single Act (Single European Act of 1987), which instructed the organs of the community to quicken the pace of enactment of 'harmonized' product regulations that would apply uniformly to all member-states. That treaty also provides deadlines after which mutual recognition would go into effect on products for which harmonized regulations had not been achieved. The threat of race to the bottom becomes the incentive for the achievement of member-state regulatory consensus. The result was an explosion of EU harmonized regulations. Thus the ECJ provides a template for and an incentive to the member-states to move European integration from the negative phase of knocking down barriers to transnational trading to the positive stage of transnational regulation. The basic nature of the federalism changes.

9.8 Administrative Judicial Review

Like the judicial discretion entailed in constitutional federalism review, such discretion is inherent in administrative judicial review and may be considered an acceptable cost for the services such review provides. The national US legislative process is perceived by the citizens as roughly as democratic as that of the member-states. While the EU legislative process

may suffer from a perceived democratic deficit, surely it is perceived as more democratic than its administrative process. When administrative acts contradict statutes enacted by democratic legislative processes, democracy is defeated. (If you enjoy principal–agent language, feel free to use it.) Here again a litigation market is a better policer of the mass of detailed, frequently changing, administrative acts than the legislature itself or internal administrative auditing or, at least, a cheap supplement to legislative and administrative surveillance. And here again a cost to democracy in terms of a certain amount of judicial lawmaking inhering in administrative judicial review will be accepted in view of its surveillance benefits. Legislatures which accept a certain transfer of their own lawmaking powers to administrators as a necessary cost of implementation of their statutes are likely to accept some further transfer to courts as a necessary cost of reducing deviant lawmaking by administrators. The US federal courts have been extremely active in administrative review since the 1960s. It is alleged by some, including me, that EU courts are now moving in the same direction (Nehl 1999; Shapiro 2001; Harlow 2002; Shapiro and Stone Sweet 2002: 160–2; Estella de Noriega 2005).

9.9 Separation of powers review

Both the United States and the EU have chosen to create a certain amount of separation of powers within their central regimes; the three great branches in the United States; the Commission, Council, Parliament, and courts in the EU. Such constitutional arrangements necessarily must anticipate, indeed encourage, a certain amount of conflict among the separated power holders. A routine device for dealing with conflict is triadic conflict resolution, that is, the bringing of a dispute between two parties before some kind of third party judge. Thus constitutional judicial review will be an obvious but not absolutely necessary feature of constitutional separation of powers regimes. But, unlike federalism review, the constitutional court here is in a relatively weak position. Caught literally in the middle of a dispute between a powerful Congress and a powerful president or a powerful Commission and a powerful Parliament and/or Council, a court is likely to feel its democratic deficit pressing very hard. In fact although the US Supreme Court may and has sometimes intervened in congressional–presidential constitutional conflicts, its record is extremely tentative, particularly in foreign and defense policy matters (Silverstein 1997). By its 'pillar' construction the EU has explicitly excluded judicial review from

foreign and defense policy. The ECJ did actually go out of its way to accept jurisdiction over separation of powers conflicts involving Parliament (*Parti ecologiste 'Les Verts'* v. *European Parliament* C 294/83, (1986) ECR 1339) but, with a very few exceptions, such as its comitology decision (Demmke et al. 1996), it has not been a major influence on the evolution of relationships among the Council, Commission, and Parliament.

9.10 Individual rights review

Among the varieties of judicial review the most important remaining to be examined is constitutional individual rights review. Such review necessarily entails a great deal of judicial lawmaking and of relatively undisguised judicial lawmaking. To strike down a statute enacted by the legislature on rights grounds is necessarily to give a judicial preference to one social interest, which the court chooses to label a right, over some other social interest which is served by the statute. Moreover few social interests given preference in statutes are wholly illegitimate or otherwise unworthy of protection. Thus courts inevitably must admit in most instances that rights review essentially involves the balancing of interests. Does the harm done to some worthy interest by the statute outweigh the benefit granted to some other worthy interest or is some less worthy interest given preference by the statute over some more worthy interest? For instance, is it permissible for the legislature to prefer the interest in personal reputation over the interest in freedom of speech by passing a libel statute or is the prevention of the uncertain risk of sabotage by Japanese-Americans a sufficient benefit to national security to justify the cost to individual liberty of the relocation camps of World War II?

If all rights review inevitably is balancing of interests review, then all rights review will also be 'least means' or least cost review. If interests A and B are both legitimate interests, then obviously even if the legislature is entitled to choose to benefit A at a cost to B, it should achieve whatever level of benefit it chooses to give A at the least cost to B, at least so long as B can be considered an individual right. As we have seen, a court that employs a least means corollary to a balancing test can only do so by imagining all the alternative laws that the legislature might have enacted in order to achieve the particular level of benefit to A that it chose to achieve. For only after such an inventory can the court determine whether the statute actually enacted achieved the benefit to A at less cost to B than would be entailed by some other feasible statute.

The legislature's statute is only valid constitutionally if it matches the one the judges have imagined as the least cost statute. In democratic polities rights review necessarily pits a court against the elected majority of the legislature that enacted the allegedly rights invading statute. And to determine whether such a statute is unconstitutional the reviewing court must pick and choose among interests and allocate costs and benefits among interests just as a legislature is supposed to do. If constitutional rights decisions are a matter of preferring some interests to others and engaging in prudential cost benefit analysis to determine what policy achieves a sufficient benefit to one interest at the least cost to another, why should nonelected judges rather than elected legislators make such decisions?

Of course a reviewing court declares that not it, but the constitution, God, or nature gives preference to certain interests and is doing the balancing. But many cases pit one preferred interest against another. And others pit a preferred interest such as free speech against an interest vital even if not preferred in constitutional language, such as a wartime censorship statute that prevents the advance publication of future troop movements. And, as in the abortion cases in the United States, the claim that the text of the constitution rather than the court has preferred an interest or declared a right may be a tenuous one. No one can really believe for long that the constitutional test rather than the judges did the balancing, least means calculations.

Free trade federalism review and administrative review are likely to find a court with the most allies and the least perceived democratic deficit. Rights review, particularly when its balancing least means aspects are most obvious, is likely to be most dangerous for courts.

Nonetheless courts may succeed at rights review for a number of reasons. First, the potential opponents of rights review may accept it as a cost they are willing to bear in order to reap the benefits of federalism and administrative review. Second, the politically active elites or the citizenry as a whole or both may be committed to the long-term protection of certain interests that they denominate as rights, even as against their own self-acknowledged tendencies sporadically to engage in violations of those rights under the pressure of immediate circumstances. Of course, gauging levels of actual political allegiance to our better selves is a delicate task for rights courts bent on thwarting majorities of the moment who have enacted rights invading statutes.

The US Supreme Court was initially, and through much of its history, reluctant to engage in much rights review. As drafted the US Constitution

contained few rights provisions. The Bill of Rights was added at the insistence of segments of potential ratifiers who might otherwise have voted against ratification. Initially the Supreme Court held that the Bill of Rights did not apply to the states (*Barron* v. *Baltimore*, 7 Pet. 243 (1833)). Until 1890 it rarely struck down federal statutes as violating rights. From 1890 to the 1930's it invoked property rights fairly frequently but rarely any other rights (McCloskey 1960). Beginning in the 1930s it began to develop other rights while largely abandoning the protection of property rights. The Warren Court was, of course, the hero of constitutional rights review, but even its record is mixed. Major cold war invasions of speech rights were somewhat hampered by the Court, but the constitutionality of the basic statutes threatening speech rights were upheld (*Dennis* v. *United States*, 341 US 494 (1951); *Yates* v. *United States*, 354 US 298 (195)). Speech protection was increased for erotic speech and criticism of government officials (*Roth* v. *United States*, 354 US 476 (1957); *New York Times* v. *Sullivan*, 376 US 713 (1971)).

Antiracial discrimination rights were judicially declared, but the pace of actual desegregation was slow (Rosenberg 1990). The Warren Court did constitutionalize a national, partial code of rights of the accused, that subsequently has been somewhat eroded (Fellman 1976). The Court was quite active in voting rights matters (*Baker* v. *Carr*, 369 US 186 (1962); *Reynolds* v. *Sims*, 377 US 533 (1964)). It has been quite active in the area of religious rights with not all together clear and often controversial results (Sullivan and Gunther 2001: 1435–44).

Subsequent to the Warren Court the Supreme Court has remained quite active in areas such as racial and gender discrimination, elections, and abortion and somewhat active on religion, the death penalty, and other assorted rights matters. Attempts to turn statutory welfare and educational entitlements into constitutional rights and to revive constitutional protection of traditional property rights have not met with much success. As a result of the Warren and later Courts' relatively high visibility on rights matters, federal court appointments have become a significant, quite visible political issue. Clearly there are very high levels of public support for rights review in the United States. Clearly rights review has also generated high levels of political controversy.

The original EU Treaty was the Coal and Steel Community Treaty for which there appeared to be no pressing need for rights provisions. Judicial review was seen as devoted to resolving interstate and inter-ECSC organ disputes over treaty economic provisions. In the same historical period the states of Western Europe entered into the European Convention on

Human Rights with its European Court of Human Rights, a system quite separate from the ECSC, then EEC, then EC, then EU. The German and Itallian constitutional courts eventually raised the issue of the absense of rights provisions in EC–EU constitutional (treaty) law. The ECJ eventually responded by declaring that human rights guarantees were implicit and inherent in the treaties although few were explicitly stated (Kokott 1998). The Court declared it would explicate such rights, when necessary case-by-case drawing upon the rights jurisprudence of the member-states and the European Convention. The Court has developed an extremely active gender discrimination case law (Craig and De Búrca 1995: 792–885) and limited case law on welfare rights linked to the free movement of persons provisions of the treaties (see Craig and De Búrca: 653–713). The Union as a whole responded to expressed rights concerns with a Charter of Rights but evidenced its suspicion of rights judicial review by appending the Charter to the treaties rather than incorporating it into the judicially enforceable body of the treaties (The Charter of Fundamental Rights of the EU, OJ C 364/1 (Dec. 18, 2000)). Whether the Charter will be incorporated into a new 'constitutional' EU Treaty remains at issue.

There has been a dramatic growth of constitutional rights review within the domestic law of most of the member-states of the EU, showing strong popular support for rights review (Stone Sweet 2000). At the Union level a number of member-state governments have exhibited considerable anxiety about the levels of judicial lawmaking endemic to rights review. When the Union moved toward greater integration of law on matters of crime and immigration, an area in which individual rights concerns were obviously very crucial, it did so by creating the 'pillar' of Justice and Home Affairs outside the main body of the treaties. Clearly this pillar arrangement was in part devised because of hostility to the judicial review that would have been inevitable if justice and home affairs had been incorporated in the body of the treaties. What greater snub to a Court of Justice than excluding it, as it was excluded, from a pillar labeled 'Justice' (Treaty of European Union, Pillar 3, Title VI Justice and Home Affairs).

Yet along with clear member-state antagonism to the Court, there was also clear member-state support. For the Justice Pillar itself provides that member-states may enter into justice and home affairs bi- or multilateral treaties among themselves and explicitly states that those treaties enacted under the Pillar may provide for judicial review (Treaty of European Union, Pillar 3, Title VI, Article K.3 (C)). And subsequently much of what had been under the Pillar was transferred to the main body of the treaties and thus to judicial review (Craig and De Búrca 1999: 69). But the

transfer included a provision explicitly limiting judicial review under these transferred provisions to a narrower scope than that employed for the rest of the treaty. As in the United States there clearly is strong public support for rights review at both member state and EU level, but rights review continues to engender significant political controversy.

9.11 The Supreme Court and the ECJ

In general the judicial review of the ECJ looks more like that of the US Supreme Court than like that of the high courts of the member-states. Like the US Supreme Court the ECJ is a court of general jurisdiction hearing constitutional, statutory, and administrative review cases that would be handled by separate courts in most European states. Like the US Supreme Court, and unlike most member-state High Courts, in origins and base of legitimacy the ECJ is basically a federalism constitutional court. It, and its 'lower' court, the CFI, have the potential for and are probably developing the active administrative review practiced by the US Supreme Court and, even more, by the US Courts of Appeal. Reminiscent of the history of the US Supreme Court, but over a shorter time span, the ECJ initially did not do much rights review and now, supported by public sentiment but subject to controversy, is being moved more into the rights business.

If the audience for this chapter were primarily scholars who study courts, the final point would be too obvious to bear repetition. Like the US Supreme Court, the ECJ engages in a great deal of lawmaking. Both courts make a lot of constitutional law, that is their decisions are one factor determining the basic political relationships between the member-states and the 'federal' level of government, and their decisions place some rights protecting constraints on government action. As highest, constitutional courts, both have a good deal of lawmaking discretion because they deal with many situations in which the legal text generates a number of alternative, different, relatively plausible legal answers. Both may use their power of statutory interpretation and their power to demand procedural fairness to veto or modify administrative policy decisions.

The most fundamental dimensions of any comparison of the Supreme Court and the ECJ are those of the relationships of judicial review to democratic government, defined here as government in significant part selected by party competitive elections, and to 'human rights'.

Federalism constitutional review in the United States and EU necessarily involves lawmaking by nonelected judges but the costs to democracy are

heavily offset by the role that such review plays in the maintenance of federalism.

Administrative judicial review can and has flourished in both democratic and nondemocratic states. Such review provides whomever makes the statutory law of the polity with a policing mechanism that helps to assure the statute maker that statutory commands are being obeyed and implemented by administrative subordinates. Such review is often said to assure due process or the rule of law, but such pronouncements are misleading. Such review assures that statutory commands are obeyed, whatever those commands are, including commands that contravene what may be considered fundamental human rights. The rule of law is the rule of whatever law the regime enacts. Regimes, like those of Imperial China and Tokugawa Japan, that had no regard for individual rights, maintained rigorous administrative judicial review mechanisms. If regimes choose to read, or allow their judges to read, fundamental rights into due process or the rule of law, then indeed administrative judicial review is rights protecting. If the regime making the law is democratic, then administrative review is democracy protecting. The great advantage of courts employed in administrative judicial review is that their challenges to the administrative organs of government can be dressed not as challenges to the political leadership but instead as assistance to the political leadership is holding its administrative agents in line. Both the US Supreme Court and the ECJ engage in administrative judicial review. Both inject elements of individual rights protection into that review. For both, administrative review provides a potential for judicial policymaking. For neither are their serious challenges to the legitimacy of such review, precisely because such review disciplines statute implementers to obey statute makers, although particular decisions may inspire complaint.

Constitutional rights review is the most democratically problematic. It pits nonelected judges against elected legislative majorities as rival prioritizers and balancers of interests. It may be that the Supreme Court and the ECJ can 'get away with' rights review because other political power holders view such judicial intervention as a cost they are willing to pay to get federalism and administrative review. Or it may be that there is a sufficient dedication to individual rights among both political elites and voting majorities that they are willing to submit to judicial lawmaking on rights as the voice of their better selves. That both federalism and rights review necessarily entail balancing and least means tests that tend to make judicial activism self-limiting may explain part of democratic tolerance.

It is improbable that constitutional judicial review, even federalism review, could flourish in the absence of competitive party democracy. Currently fashionable public choice theory tends to argue that such party competitive situations is what engenders constitutions. Whether or not one subscribes to this argument, it is hard to see how constitutional judicial review can survive in one party or other authoritarian states. If a court should veto the commands of the single party or dictator, why should not the party or dictator and its agents simply ignore the court, or change its personnel or abolish it? For various reasons, such as international reputation, or attractiveness to investors, such states may maintain the semblance of constitutional review, and even occasionally really submit to it, but such situations are not likely to see really effective review for very long.

Both the Supreme Court and the ECJ have over relatively long periods engaged in relatively successful judicial review, successful in the sense that most of their judgments are obeyed most of the time and have significant impact on public policy. Both are successful because they are imbedded in federal, party competitive democracies with considerable elite and popular commitment to individual rights and because over time they maintain middle grounds on issues of member-state versus central authority and majority will versus individual rights.

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10

Federalism and Democratization: The United States and European Union in Comparative Perspective

R. Daniel Kelemen

10.1 Introduction

There is an inherent tension between federalism and democracy. From the perspective of the constituent states that make up a federation, federalism constrains democracy because requirements of federal law may limit a state's ability to adopt policies consistent with its citizens' preferences. From the perspective of the federation as a whole, federalism constrains democracy because state governments may be in the position to block policies favored by majorities at the federal level. Federalism constrains majorities, and in this respect, it is clearly undemocratic. However, as theorists of federalism from Madison to Riker (1964) have argued, such constraints may be vital in protecting individual rights against the 'tyranny of the majority' and thus to safeguarding a central element of liberal democracy.

This chapter examines the impact of federalism on the process of democratization in the United States and the EU. Much of the literature on democratization treats nondemocracy (e.g. authoritarianism) and democracy as dichotomous categories and examines the transition from the former to the latter. This chapter, by contrast, treats democracy as a category with continuous gradations (Elkins 2000) and defines democratization as a 'continuous process of reforms and modifications of the institutions and practices in a given political regime, from fewer to more degrees of free and fair contestation and participation' (King and

Lieberman 2004: 9). This focus allows us to examine how federal institutions have influenced ongoing efforts to extend the degree of democracy in two polities, the United States and the EU, that have long been democratic. The scope of the inquiry is limited to examining one vital dimension of democracy: the participation dimension (Dahl 1971: 4), which encompasses issues surrounding the protection of individual rights and the extent and the openness, transparency, and accountability of policy processes. The federal structures of the United States and EU also have significant impacts on the electoral contestation dimension of democracy. However, these impacts have been subject to a number of incisive analyses,[1] and fall beyond the scope of this study.

The central argument of the chapter is twofold. First, similarities in the fragmented institutional structure of EU and US federalism have encouraged both polities to adopt a particular approach to democratization, one that emphasizes the empowerment of private actors to assert federal rights through the courts. Second, the institutional structures of US and EU federalism have also encouraged the federal governments in both polities to emphasize openness, transparency, and accountability in policymaking and implementation. This claim is sure to be greeted with skepticism by critics of the EU's purported democratic deficit. However, as we see below, while the growth of federal power in both polities has shifted the locus of decision-making in many areas further from the citizen, this has been compensated for in important respects by the enhancement of opportunities for democratic participation.

Comparing the contemporary experience of the democratization in the EU with the historical experience of democratization in the United States sheds light on each. The processes of democratization of the US and EU polities commenced from vastly different starting points in different eras and involved very distinctive socioeconomic conditions. While the two polities differ greatly on many of the variables relevant to analyses of democratization, they share a number of the same basic constitutional structures. Therefore, following a 'most different systems' research design, comparing the two polities enables one to investigate whether similarities in their institutional structures have led to similar patterns of democratization.

The chapter proceeds as follows. Section 10.2 highlights the crucial similarities in the institutional structures of US and EU federalism. Section 10.3 examines the role of individual rights and rights litigation in the process of democratization in the United States and EU. Section 10.4 assesses the impact of federalism on the quality of democratic participation in the two polities. Section 10.5 concludes.

10.2 The structures of US and EU federalism

Most scholars of US and EU politics have at least one thing in common—they view their subject of study as truly unique, falling outside traditional categories of comparative analysis and requiring categories and explanations all its own. Among students of the United States, the American exceptionalism hypothesis has a long and distinguished heritage, dating back at least to Tocqueville, who wrote of the structure of US government, 'Hence a form of government has been found which is neither precisely national nor federal; but things have halted there, and the new word to express this new thing does not yet exist' (1969: 157). Similarly, most scholars of the EU maintain that the EU is a *sui generis* polity that does not fit existing categories and requires a new vocabulary, including terms such as multilevel governance, variable geometry, *condominio*, *consortio*, or, in Jacques Delors' words an 'unidentified political object' (Schmitter 1996). This emphasis on exceptionalism has led to a common weakness in the literatures on both polities—a failure to adequately engage in and profit from comparative analysis.

Recently, a small but growing literature, of which the present volume is a part, is subjecting both the EU and the United States to the lens of comparative federalism (Sbragia 1992; Schmitter 2000; Friedman-Goldstein 2001; McKay 2001; Nicolaïdis and Howse 2001; Börzel and Hosli 2003; Ansell and Di Palma 2004; Kelemen 2004). This chapter contributes to this literature by investigating how similarities in the federal institutional structures of the United States and EU have influenced the process of democratization in the two polities. The structures of US and EU federalism share two fundamental similarities that are critical for our purposes. First, the EU and United States both combine federalism with separation of powers and bicameralism at the federal level. This fragmentation of power programmed into the very institutional foundations of the United States and EU has important consequences for the role of legislative, executive, and judicial institutions and for patterns of policymaking more generally (Kelemen 2004). Separation of legislative and executive power creates agency problems, as legislative majorities cannot rely on the executive to faithfully implement their policies. In order to minimize agency losses when delegating tasks to the executive, legislative institutions will have an interest in establishing a variety of *ex ante* and *ex post* controls on executive discretion, many of which rely on setting detailed, judicially enforceable administrative procedures (McNollgast 1987, 1989; Moe 1989; Epstein and O'Halloran 1994, 1999). This has had important implications

for openness, transparency, and accountability in government. While these dynamics play out initially in relationships between branches of the federal government, they eventually influence patterns of policymaking and implementation at the state government level.

Second, the United States and EU both have extremely powerful judiciaries. The strength of the courts follows from the fragmentation of political power mentioned above. It is precisely because the fragmentation of power so often renders legislative and executive actors incapable of concerted action that courts in the United States and EU are emboldened to play a powerful role in the political process. Knowing that courts are independent and assertive, federal lawmakers eagerly enlist them as agents of policy implementation and enforcement, relying on them to check the actions of executive agencies and state governments. Federal lawmakers will have particularly strong incentives to encourage private parties to enforce federal law via the courts.

10.3 Federalism and rights

Regulation through rights creation and rights litigation is rooted in the very constitutional foundations of the United States and EU. The structure of US and EU federalism has encouraged the federal governments in both polities to pursue their policy objectives by relying heavily on the empowerment of private actors to enforce federal rights in court. Pursuing policy aims through a rights strategy has several advantages in the context of federalism. Above all, it is inexpensive for the federal government. By establishing federal rights and relying on private parties to enforce them, the federal government can avoid the cost of funding the extensive federal bureaucracy and large-scale programs that would otherwise be necessary to systematically implement and enforce policy. By presenting policy goals as individual rights that private actors and state governments are obliged to respect, the federal government can readily pass the costs of compliance on to the private sector and state governments (Kagan 1997: 178).

In policy areas that fall squarely within the domain of state government authority, the creation of federal rights is often the most effective means by which reform advocates can bring federal pressure to bear on recalcitrant state governments.[2] By invoking federally protected individual rights in court, reform advocates are able to trump the policy autonomy that state governments would otherwise enjoy. This strategy is particularly

attractive in the context of federal systems such as the United States and EU with powerful assertive courts that are willing to control the actions of state governments.

Over time, the number and scope of federally protected rights is likely to proliferate. First, the structure of US and EU federalism encourages what Eskridge and Ferejohn (1996) have termed a virtual logrolling in which the legislature and the courts defer to one another's rights-creating preferences. Once created, rights are highly resilient. Rights create what Pierson (1993) has termed 'policy feedbacks', in that new rights create new constituencies of beneficiaries who will then work to defend the new rights from attack. If rights have a constitutional basis, they will be particularly insulated against efforts at repeal. Even statutory rights are more immune to counterattack than other forms of policy in that they often come to be seen as social obligation rather than a policy choice (Burke 2001: 1272).

Generally, the proliferation of rights at the federal level will serve to promote democratization. However, the protection of federal rights arguably inhibits democratization when a 'conflict of rights' occurs in which liberties, or negative rights, enshrined at the federal level clash with positive rights introduced at the state level. In both the United States and the EU, federal courts focused initially on the protection of *laissez-faire* economic rights, often to the detriment of other forms of positive rights. The US Supreme Court's protection of common law economic rights, such as freedom of contract, was often the basis for its striking down state (and federal) level regulations designed to advance new positive rights. In the EU context, the ECJ has struck down member-state social regulations on the grounds that they restricted the free movement of goods and services in the internal market in violation of Community law.

While 'negative rights' enshrined at the federal level in the United States and EU have at times stood in the way of democratically backed programs at the state level, overall, the proliferation of federal rights in both polities has advanced democratization. One important reason that the balance remains positive is that where the enforcement of negative rights at the federal level does quash state initiatives; this creates political pressure for the establishment of new 'positive rights' at the federal level.

10.3.1 Federalism and rights in the US

From the end of the civil war until the battle over the New Deal in 1937, the US Supreme Court placed the protection of *laissez-faire* economic rights such as freedom of contract at the top of its agenda. The Court did

not attempt to use the Fourteenth Amendment to protect other individual civil and political rights against violation by state action. In short, the Court emphasized the protection of the rights of business to be free of government interference, but not the rights of African Americans, women, and other victims of discrimination to equal treatment.

With the adoption of the Fourteenth Amendment in 1868, federal courts gained the authority to protect individual rights against violations by state governments.[3] However, the Supreme Court adopted a very narrow reading of the Fourteenth Amendment that effectively eviscerated it for decades to come. In *Minor* v. *Happersett* (1876), the Court found that a state law prohibiting women from voting did not violate the Fourteenth Amendment. In the *Civil Rights Cases* (1883), the Supreme Court struck down the Civil Rights Act of 1875 arguing that its prohibition on private discrimination in public accommodations was beyond the authority of the federal government. The Court argued that under the Fourteenth Amendment the federal government could only regulate 'state action' and not private action. In *US* v. *Harris* (1882), the Court struck down the antilynching provisions of the 1871 Civil Rights Act on the grounds that, because lynchings were carried out by private citizens, they were not a state action that could be banned under the Fourteenth Amendment. Most infamously, in *Plessy* v. *Fergusson* (1896), the Court held 'separate but equal' accommodations to be acceptable under the Fourteenth Amendment.

Throughout the Gilded Age and Progressive Era, the Supreme Court stood firm as a defender of common law property rights and freedom of contract. The leading case of this era was *Lochner* v. *New York (1905)*, in which the Supreme Court struck down a state law that set maximum working hours for bakers. Many reform advocates responded to these judicial restrictions on state regulation by demanding federal regulation to establish nationwide standards. However, in addition to invalidating many state laws that attempted to regulate business and establish rights for workers, the Court also stood in the way of efforts at reregulation at the federal level. For instance, in *Hammer* v. *Dagenhart* (1918), the Court struck down a federal law restricting child labor. Later, the Court blocked key elements of Roosevelt's New Deal. In *A.L.A. Schechter Poultry Corp.* v. *U.S. (1935)*, the Court ruled the National Industrial Recovery Act unconstitutional, and in *Carter* v. *Carter Coal Co*. (1936) it invalidated federal regulation of working hours and wages in the coal mining industry.

The year 1937 marked a turning point, both in the Court's jurisprudence on economic regulation and in its stance on civil rights. The story of

Roosevelt's clash with the Court over the New Deal in 1937 is well known. As Roosevelt found his New Deal initiatives blocked by the Court, he threatened to 'pack the court' with additional appointees. Faced with the threat posed by Roosevelt's plan, the Court backed down and began to allow New Deal programs to withstand judicial scrutiny (Gely and Spiller 1992).

The less-appreciated aspect of the 'Constitutional Revolution' of 1937 is that the Court accompanied its turnaround on economic regulation with intensified attention to defense of civil rights (McCloskey 1960: 174). The very year that the Court clashed with Roosevelt, it asserted federal control over state criminal procedures in a more forceful way than ever before in *Palko* v. *Connecticut*. In 1938, the Court enforced the Fourteenth Amendment's equal protection clause in defense of African American's rights in the field of education (*Missouri* v. *Canada*), foreshadowing *Brown* v. *Board* and the momentous judicial interventions to come. In part, this new interest in civil rights marked a break from the past. However, in important respects, the Court's new individual rights jurisprudence paralleled and grew out of its long battle to protect individual economic rights against state governments. As McCloskey (1960: 171) observed, 'In a way the development of the due process clause to protect economic rights made the ultimate protection of other rights logically inescapable'.

During the 1960s, the United States experienced a dramatic increase in the number and scope of federally protected rights for individuals. This 'Rights Revolution'[4] involved an explosion of both constitutional and statutory rights. The Warren Court extended the scope of constitutionally protected individual rights in areas involving freedom of speech and the press, rights against racial, sexual, religious, or age discrimination, the right to due process in both criminal and administrative procedures and created a new constitutional right to privacy. Congress responded to the civil rights movement with groundbreaking statutes such as the 1964 Civil Rights Act and the 1965 Voting Rights Act. Meanwhile, modeling themselves on the civil rights movement, other progressive movements of this period increasingly adopted a rights rhetoric and demanded the establishment of statutory rights in fields ranging from environmental protection, to workplace health and safety, to consumer protection to social welfare and rights for the disabled. Congress obliged and created a series of landmark statutes in various areas of social regulation, many of which empowered private parties to bring enforcement litigation by loosening standing requirements, permitting fee shifting, and allowing for various forms of class action suits.

Enlisting private litigants to serve as its foot soldiers was, and remains, a central element in the federal government's enforcement strategy (Dobbin and Sutton 1998; Kagan 2001; Burke 2002). The federal bureaucracy did expand dramatically as new agencies were established to help enforce the new catalogue of rights established in the 1960s and 1970s (Sunstein 1990: 27–8). However, lawmakers recognized that the federal bureaucracy would remain relatively weak and would be unable to control the actions of state governments, local governments, or private sector actors from Washington. Given the limited capacities of the federal bureaucracy and the strength of the judiciary, a heavy reliance on decentralized rights litigation became a crucial tool in the federal government's efforts to democratize the American polity.

10.3.2 Federalism and rights in the EU

Like the US Supreme Court, the ECJ's initial attention to individual rights focused on protecting the rights of economic operators against state governments (Shapiro 2005, forthcoming). The ECJ played a crucial role in the creation of the EU's single market through a process of 'negative integration' (Scharpf 1999, 2003), striking down member-state regulations that constituted nontariff barriers to trade in violation of Community law. Litigation brought by private parties via the Article 234 (ex-Article 171) preliminary ruling procedure was crucial to this market-making project (Alter 2001; Fligstein and Stone Sweet 2001). Given the limits on the Commission's enforcement capacity, the EP and the Commission had a particular interest in enlisting private litigants to enforce EU law against recalcitrant member-states. Even member-states that are less enthusiastic about private enforcement support it as a means through which to promote the uniform application of the law without building up a massive Eurocracy in Brussels. The fragmentation of political power at the EU level provided the ECJ with considerable insulation against political backlash, and thus emboldened it to interpret EU Treaty provisions and secondary legislation so as to expand rights and create additional bases for litigation (Weiler 1991; Alter 1998; Tsebelis and Garrett 2001).

The EU has not limited its rights agenda to striking down national laws that infringed on economic rights. Rather, the EU has pursued an expansive positive rights agenda providing individuals with a range of economic, social, and political rights (de Búrca 1995; Engel 2001; Bignami 2005; Shapiro 2005). The EU's positive rights agenda had

meager beginnings. The Treaty of Rome established a very limited number of rights guarantees, such as the right to equal treatment in employment regardless of sex, and contained no general catalog of fundamental rights. Indeed, in 1959, the ECJ ruled that it had no power to review Community acts with regard to fundamental rights (Case 1/58, ECR 1959, p. 43). However, the ECJ soon came under pressure from the German and Italian constitutional courts. After the supremacy and direct effect of EU law were established in the early 1960s, these constitutional courts became concerned that the EU could adopt laws that would violate fundamental rights protected in their national constitutions. In a series of decisions beginning in 1969, the ECJ assured national courts that the full spectrum of fundamental rights distilled from the 'common constitutional traditions' of the member-states were implicit in the EU treaties and that the ECJ would review EU legislation for conformity with fundamental rights (Craig and de Búrca 1995; Stone Sweet 2000: 170–8; Shapiro 2005 forthcoming). While supranational judicial protection of fundamental rights added little for countries, such as Germany, where national constitutional courts already provided this, such judicial review enhanced rights protection in countries, such as the UK, which lacked formal, constitutionally enshrined rights protection against acts of parliament.

EU secondary legislation continues to expand the catalogue of 'statutory' rights for private parties in areas ranging from equal treatment of the sexes, to consumer protection, to free movement, to disability rights (Kelemen 2006). A few recent developments illustrate the trend. In the field of equal treatment of the sexes, ECJ interpretations of Article 141 (ex-Article 119) and a series of equal treatment directives have extended equal treatment protections from questions of pay to include issues such as pensions, part-time work, and pregnancy and maternity rights (Cichowski 2004). Article 13 of the Amsterdam Treaty empowered the EU to 'combat discrimination based on [...] racial or ethnic origin, religion or belief, disability, age or sexual orientation.' Directives adopted pursuant to this Treaty provision, such as the Racial Equality Directive (2000/43/EC) and the Equal Treatment Framework Directive (2000/78/EC) establish antidiscrimination rights in the workplace and are likely to also create bases for antidiscrimination litigation in areas such as social security, health care, education, and public housing. The latter directive is modeled on the US Americans with Disabilities Act and empowers disabled persons to sue employers who fail to make 'reasonable accommodations' to accommodate their disability. In the area of consumer protection, a 2004 Regulation (261/2004) extends rights (including rights to compensation)

for air passengers who face cancellations, long delays, or are denied boarding on overbooked flights, and a 2005 directive on Unfair Commercial Practices (2005/29/EC) empowers individuals and consumer organizations or competitors to take legal action against firms that engage in unfair commercial practices. In the field of corporate governance, EU directives on prospectuses (2003/71/EC), trans/109/EC and market abuse (2004/72/EC) have created new causes of action and rights for investors, and the Commission has called for strengthening of shareholders rights as part of its Action Plan on Modernising Company Law (COM (2003) 284 final) law. Finally, ECJ case law has significantly expanded the scope of EU social rights protections for migrants; in particular, they have extended migrants' rights of access to social security, unemployment benefits, education, and medical care (Conant 2006, forthcoming).

The range of rights protected under EU law is likely to expand substantially. The Charter of Fundamental Rights, which was signed and 'solemnly proclaimed' by the Commission, Parliament, and Council in 2000, establishes a long catalog of new rights, including social rights and antidiscrimination rights. Because the member-states refused to incorporate the Charter into EU law in the Treaty of Nice, it has no formal legal status. The Treaty establishing a Constitution for Europe would have given the Charter a formal legal status. However, in light of the resounding 'No' in the recent French and Dutch referenda, the Constitutional Treaty is unlikely to be adopted for the foreseeable future. While the prospects for ratification of the Constitutional Treaty appear dim and distant, much of the Charter of Fundamental Rights is likely to be incorporated into EU law in any event.

The EU's CFI has already invoked the Charter in a few decisions. To date, the ECJ has refused to follow the CFI and invoke the charter. Ostensibly, this would appear as a sign of reluctance on the ECJ's part to expand the scope of EU rights protection and the opportunities for litigation. However, I would suggest a more strategic interpretation of ECJ behavior. While the outcomes of national referenda were uncertain, the ECJ had powerful incentives to resist the temptation to apply the Charter. Euroskeptic opponents of the Constitutional Treaty argued that the incorporation of the Charter of Fundamental Rights would lead to a further erosion of national sovereignty. An expansive reading of the Charter would have provided grist for the Euroskeptic mill and imperiled the Constitutional Treaty (also see Eeckhout 2002; de Búrca 2003: 67–73). With the Constitutional Treaty moribund, the ECJ now has little to lose by offering an expansive reading of the Charter of Fundamental Rights. Given its

long-term interest in expanding the scope and power of European law, and its track record of extending fundamental rights protections, it is likely to do so.

The EU has not only created a wide range of new rights for individuals, it has also enhanced their opportunities to exercise these rights through its promotion of 'access to justice'. The EU has long relied on and celebrated the role of private parties as the enforcers of Community Law (Alter 2001; Schepel and Blankenburg 2001). In 1998, the Commission issued a Communication (COM (1997) 609) final emphasizing that consumers, firms, and citizens faced obstacles to justice and that the EU needed to encourage equal access to rapid, efficient, and inexpensive justice. At the 1999 Tampere Summit, the member-states called on the Commission to launch a series of judicial cooperation initiatives to create a 'European area of justice' based on transparency, democratic control, and access to justice. Subsequently, the EU has undertaken initiatives to expand financial support for private enforcement and to spread awareness of the potential for private parties to enforce EU law (Kelemen 2006). The ECJ too has acted to increase incentives for private enforcement of EU rights. Most famously, the ECJ established and expanded of the doctrines of supremacy[5] and direct effect.[6] More recently, by establishing the principle of state liability in *Francovich*[7] and subsequently expanding it (Tallberg 2000; Hunt 2001: 91), the ECJ has given would-be litigants a powerful incentive to pursue legal action against noncompliant states. In addition to the development of the state liability principle, the ECJ has made judgments that pressure member-states to increase damage awards domestically (Kelemen 2003, 2006). ECJ case law is also gradually expanding the ability of individuals to invoke EU directives in disputes with other individuals (through the principle of 'horizontal direct effect') (Kelemen 2003).

The ECJ's effort to complete the single market through the protection of economic rights has proven so successful that some critics argue it imperils democracy across the EU. Most prominently, Scharpf (1999, 2003) has argued that there is an asymmetry between the strength of the ECJ's ability to eliminate national social rights and protections in the name of the market, and the limited ability of EU legislative actors to respond by adopting new social policies and rights at the EU level. In short, according to Scharpf, the same fragmentation of political power that empowers the ECJ to engage in 'negative integration', paralyzes the EU lawmakers and prevents them from engaging in 'positive integration'. As a result, European integration systematically favors the interests of business and undermines the agendas of social democratic governments.

This democratic deficit critique underestimates the degree to which new positive rights are being created at the EU level. Negative integration has, in some cases, undermined national governments' efforts to protect the 'social rights' of vulnerable groups. However, as in the United States decades earlier, such negative integration has generated political pressure for positive integration, and the EU has responded with an expansive positive rights agenda. A series of recent legal developments have increased the substantive basis for EU rights litigation, opened up new opportunities for private parties to bring litigation, and heightened their incentives to do so (Kelemen 2003; Shapiro 2005).

The parallels between the rights litigation strategies of the United States and EU are striking. Like their counterparts in the US federal government, EU institutions (the Commission, the EP, and the ECJ alike) have powerful institutional incentives to encourage private enforcement of EU law. Above all, because the Eurocracy is so small, popular myths notwithstanding, and because the EU lacks powerful fiscal tools, the EU's most effective means for influencing policy in the member-states is to enlist European citizens to enforce Community law on its behalf.

10.4 Federalism and participation: transparency, openness, and accountability

Critics of the EU's supposed 'democratic deficit' and states' rights critics of distant, 'inside the Beltway' politics in the United states routinely argue that policymaking at the federal level reduces opportunities for effective public participation in the democratic process. According to this classical republican, 'the grassroots-is-always-greener' vision of democracy, policymaking at the state or local level is inherently more accessible and accountable to citizens than policymaking at the federal level. Of course there is an alternative vision of participatory democracy, which highlights the venality, provincialism, and even incompetence of state and local government and emphasizes the greater efficiency, professionalism, and accountability of the federal government. For Progressive Era reformers or later Civil Rights advocates in the United States, or for western Europeans imposing the *acquis communautaire* on eastern European states aspiring to membership in the EU, enhancing federal power was seen as synonymous with advancing democracy. These contrasting visions force us to ask whether the shift in authority from state to federal governments that is fundamental to the development of any 'coming together federalism'

(Stepan 2001) will enhance or undermine the quality of democratic participation in the polity.

Certainly, the shift in authority from constituent states to the federal level in the United States and EU has moved the locus of decision-making further from the citizen. *Ceteris paribus*, when decisions are taken at a greater distance from the citizen, opportunities for participation diminish. However, this loss of democracy has been compensated for in significant ways by the great emphasis that the federal governments in both polities have placed on transparency, openness, and accountability in policymaking. Ultimately, in both polities the growth of federal power has actually served to enhance opportunities for democratic participation at the state level.

10.4.1 Federalism and participation in the US

For all of its failings, the US federal government is one of the most transparent, open, and accountable governments in the world. Openness, transparency, and accountability are hallmarks of American law and regulatory practice across a broad range of policy areas. These attributes manifest themselves in the prevalence of highly detailed, transparent legal rules and regulatory procedures, requirements of open consultation entrenched in administrative procedures, extensive disclosure requirements, and the active use by regulators of formal implementation and enforcement proceedings (Kagan 2001; Kelemen and Sibbitt 2004). Openness and transparency enhance the accountability of American government by deterring actions that are unlikely to withstand public scrutiny and by arming a wide array of actors with otherwise unavailable information.

The emphasis on openness, transparency, and accountability so prevalent in American administrative law is rooted in the United States' constitutional structure. The separation of legislative and executive power creates acute agency problems, as legislators may find themselves unable to count on the executive to faithfully implement their policy mandates. Lawmakers can use codified administrative procedures to minimize 'agency losses' (McNollgast 1987, 1989; Moe 1990; Epstein and O'Halloran 1994, 1999; Horn 1995). First, they can stack the deck in administrative procedures by establishing procedures that open the administrative agency to the scrutiny of the political constituencies who backed a statute in the first place. Second, they can enlist the courts and private litigants to control the executive. Legislators recognize that the fragmentation of power insulates the judiciary against political backlash

and that courts may therefore be willing to play an active role in constraining bureaucratic discretion. Lawmakers therefore draft statues that specify in great detail the goals that bureaucratic agencies must achieve, the deadlines they must meet, and the administrative procedures they must follow. They provide for private causes of action (including the sorts of individual rights mentioned above) assuring their allies will have access to the courts to hold the executive accountable (Moe 1990; Horn 1995; McNollgast 1999). While these dynamics originate at the federal level, they eventually influence the degree of discretion of state governments. States implement much of federal legislation, and when states implement federal statutes, they too must meet the standards of openness, transparency, and accountability required in the APA and the relevant statute.

Many of today's rights of participation and transparency requirements trace their origin directly to the 1946 APA. The APA establishes formal, judicially enforceable administrative procedures that apply across the federal bureaucracy and establishes the procedural rights of individuals in the regulatory process. As McCubbins, Noll, and Weingast (McNollgast (1999)) have argued, after Roosevelt's death, New Deal Democrats foresaw that they were likely to lose control of the federal administrative apparatus they had recently created. Moreover, as the judiciary was loaded with Roosevelt appointees, New Deal Democrats trusted that they could enlist the courts to enforce procedural due process requirements and defend New Deal programs against attempts by a Republican administration to undermine them. The APA's formalization of administrative procedures substantially enhanced opportunities for interested actors in society to participate in the bureaucratic policymaking process.

The emphasis on transparency and accountability grew with the expansion of the regulatory state during the Rights Revolution (Sunstein 1990). Despite the controls instituted in the APA, by the 1960s, critics such as Lowi (1969) argued that many federal agencies had been captured by the very agencies they were intended to regulate. In the early 1970s, the Democratic Congress that pushed through a raft of statutes establishing new social regulations was confronted by the fact that a Republican administration would control the implementation of these statutes. Moreover, federal legislators recognized that much of the actual implementation of federal statutes would be delegated to state governments. In light of state resistance to enforcing federal civil rights, federal lawmakers had a well-founded distrust of state governments. Distrust of the federal executive and state governments led Congress to enact statutes with rulemaking procedures more detailed than those mandated by the APA, such

as requirements for oral hearings subject to precise timetables, considering petitions regarding rule-making decisions, taking into account the views of a variety of interests and giving detailed reasons for decisions (Melnick 1983; Moe 1989; Shapiro 1988).

Ultimately, the codification of transparent, inclusive administrative procedures at the federal level (Stewart 1975; McNollgast 1999) had a dramatic impact on policymaking practices at the state level. State governments that might otherwise have maintained much more closed, opaque practices were pressured to enhance transparency and professionalism in order to meet federal standards (Derthick 1999). As the pressure to fulfil federal administrative and regulatory mandates has grown since the 1970s, state governments professionalized their administrations, rapidly increased their revenues and enhanced opportunities for participation in their policymaking processes in line with federal requirements. As a result, as Kincaid (1994) has pointed out, the seeming paradox of the current era of coercive federalism is that the assertion of federal power has actually worked to strengthen state governments.

10.4.2 Federalism and participation in the EU

Some critics of the EU's 'democratic deficit' mockingly suggest that if the EU were a country that applied for membership, it would likely fail to meet the democracy criteria and be rejected. The EU certainly does lack some fundamental features of a democratic polity; however, many of the criticisms levied by the democratic deficit literature are misguided (Moravcsik 2002). The EU's primary shortcomings as a democracy concern electoral accountability. Voters do select their representatives to the EP and the national governments that represent them in the Council of Ministers. However, neither European nor national elections are contested in a way that gives voters an opportunity to choose between parties or candidates with rival agendas for EU policy (Hix 2003; Follesdal and Hix 2005). Much of the literature on the democratic deficit, however, ignores this very real deficit and focuses instead on the red herring of the EU's purported deficit of openness and transparency (Follesdal 1997; Hix 2003).

Such critiques, however, hold up the EU against a nonexistent ideal-type of democracy and do not withstand comparative scrutiny with real, existing democracies. In his comparative study, Zweifel (2002, 2003) found that the EU's policymaking processes were as open and transparent as those in Switzerland and the United States. More generally, in terms of openness, transparency, and bureaucratic accountability, the EU compares

favorably with the governments of most EU member-states. To take but one potential measure, if ranked alongside current EU member-states on Transparency International's Corruption Perception Index,[8] the EU would surely score below paragons of transparent government such as Finland (ranked 1st), but most likely above systems long characterized by opaque policymaking processes and riddled with corruption, such as Greece, Italy, and even France (ranked 50th, 35th, and 23rd, respectively). The EU's relative transparency and accountability is reflected in public opinion. Findings from the 2004 Eurobarometer survey reflected a long-standing pattern whereby on average, more European citizens trust the EU than their national political institutions (with 41% responding that they 'tend to trust' the EU, while only 30% 'tend to trust' national institutions) (European Commission 2004: 5). Thus, while it is tempting to focus on the widespread criticism and distrust of Brussels bureaucrats, we should recall that European citizens reserve even greater distrust for their national politicians.

As in the United States, the combination of horizontal and vertical fragmentation of power rooted in the EU's institutional structure is encouraging the emergence of an approach to administrative procedures that emphasizes transparency, accountability, and strict judicial enforcement. Public distrust of distant, potentially unaccountable Eurocrats in Brussels, coupled with member-states' distrust of each other's opaque regulatory practices, and the EP's distrust of the member-states and the Commission has led to increased demands for transparency and public participation in EU regulatory processes (Harlow 1999; Franchino 2001; Shapiro 2001; Kelemen 2006; Bignami 2004). The EU's legislative actors recognize that, once enacted, policies may be difficult to change and that the EU's bureaucratic agents (e.g. the Commission and the member-state administrations) will have considerable discretion in implementing them (Tsebelis and Garrett 2001; Pollack 1997). Therefore, when drafting legislation, these legislative principals have incentives to constrain the discretion of their bureaucratic agents by drafting detailed, action-forcing laws and enlisting the ECJ and national courts to enforce them (Franchino 2001).

These developments at the European level are having an impact on national approaches to policymaking. While the traditional policymaking styles of EU member-states of course differ significantly (Richardson 1982), the approaches to policymaking that long predominated across western Europe were more informal, cooperative, and opaque than those in America. In many policy areas, closed networks of bureaucrats and

regulated interests developed and implemented policies in close concertation—often with little scope for public participation. The systems of regulation prevalent across Europe—ranging from the corporatism found in Austria, Sweden, and Germany (Lehmbruch and Schmitter 1982; Goldthorpe 1984), to the dirigisme of France (Suleiman 1974; Hayward 1982), to the 'chummy' cooperative style of British regulation (David Vogel 1986; Steven Vogel 1996)—all relied heavily on closed policymaking networks and empowered bureaucrats to pursue informal means of achieving policy objectives. While these national systems had many virtues, these did not include transparency and openness. As member-state administrations are increasingly occupied with the implementation of EU policies, they are finding themselves pressured to abandon their traditional administrative practices and comply with the EU's more strictly codified procedures (Schwarze 1996). The ongoing harmonization of administrative procedures on the EU model is enhancing opportunities for democratic participation in administrative processes throughout the EU. The impact will be greatest in member-states with traditions of closed, opaque administrative processes (such as France), where it promises to open up new opportunities for participation for previously excluded groups.

The growth of federal power in the United States and EU has served to enhance the openness and transparency of administrative procedures throughout both polities. However, federalism has undermined democratic accountability in one important respect. In both the United States and EU, federal and state governments often divide authority in particular policy areas along functional lines, with the federal government playing a lead role in policymaking and the states controlling implementation. This division of authority between state and federal governments leads to a 'credit assignment problem' (Bednar 2006, forthcoming). State and federal governments do their best to claim credit for policy successes while shifting blame for failures to one another. This makes it difficult for voters to assign credit and blame and to hold the responsible authorities accountable for their actions. The experience of the United States, EU, and other federal polities suggests that this problem is immutable (Kelemen 2004). One may begin with a model of dual federalism in which the federal and state governments are to act only in separate watertight compartments corresponding to their respective policy competences under the constitution. However, this model is rarely strictly adhered to in practice, as the potential for credit claiming and blame shifting is attractive to both state and federal governments

and leads them to establish some form of shared competences (Mashaw and Rose-Ackerman 1984.

10.5 Conclusion

The constitutional structures of both the United States and EU combine federalism with the fragmentation of power at the federal level. In both cases, the fragmentation of power among the political branches has encouraged the judiciary to play an active role in the policy process. Working in this institutional terrain, advocates of 'democratization' in both polities have adopted similar strategies, relying on individual rights litigation and codification of transparent administrative procedures to promote the expansion of rights, transparency, and accountability. Both approaches have enabled otherwise weak federal governments to enlist citizens and interest associations as the eyes, the ears and, ultimately, the enforcers of federal law. The role of the US federal government in enhancing democracy at the state level has long been recognized in the scholarly literature. By contrast, research on democracy in the EU has, with the exception of literature on developments in East Central Europe, focused primarily on how the EU undermines national democracy. Despite the EU's shortcomings as an electoral democracy, we should recognize that it is expanding individual rights and opportunities for participation in policymaking in significant ways.

Notes

1. See, for instance, Hix (2003), Moravcsik (2002), and Follesdal and Hix (2005) on the EU and Riker (1964) and Frymer and Yoon (2002) on the US.
2. Reform advocates might also attempt to convince the federal government to preempt state authority in a policy area, or to apply fiscal levers such as conditional grants or cross-cutting sanctions. However, federal governments are often loath to do the former and ineffective at applying the latter. See Kelemen (2004).
3. Originally, the Bill of Rights was designed to limit the actions of the federal government, and did not apply to state governments. This interpretation was supported by the Marshall Court in *Barron* v. *Baltimore* (1833).
4. Sunstein 1990; Burke 2001, also see Epp (1998: 26–30) who takes a different view on dating the starting point of the rights revolution.
5. Case 6/64 *Costa* v. *ENEL* [1964] ECR 585.
6. Case 26/62 Van Gend en Loos [1963] ECR 10.

7. Joined Cases C-6 and C-9/90 *Francovich and others* [1991] ECR I-5357.
8. Available at: http://www.transparency.org/pressreleases_archive/2003/dnld/cpi2003.pressrelease.en.doc

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11

Understanding the European Parliament from a Federalist Perspective: The Legislatures of the United States and European Union Compared

Amie Kreppel

11.1 Introduction

The US Congress is frequently referred to as the most influential democratic legislature in the world (Laundy 1989; Olson 1994; Davidson and Oleszek 1998; Lijphart 1999), while the European Parliament (EP) is often begrudged even its status as a functioning parliament (Westlake 1994; McCormick 1999). Yet a careful comparison of them reveals some unexpected similarities. In terms of its internal organization, partisan voting patterns and policymaking roles the EP resembles the American House of Representatives more than its national European counterparts. An examination of the similarities between the broader political and institutional environments in which these two legislatures exist and the possible impact of this environment on key aspects of their internal structures and external roles can help increase our understanding the EP, as well as of the implications of federal systems in influencing the development of legislative institutions.

The goals of this comparison are threefold. First, to determine to what extent we can usefully compare the American and EU legislatures. Having demonstrated that, despite common rhetoric and superficial appearances, they share a number of core characteristics; the second goal is to provide some possible explanations for these similarities and in particular to link

several institutional and environmental characteristics related to federalism to the character of the American and European legislatures. The final goal is to evaluate the usefulness of a comparison between the US and EU legislatures through the lens of federalism, to consider the extent to which a comparative federalism approach helps us to understand the structure, functioning, and roles of the EP both as a legislature and within the EU system as a whole.

The core of this analysis is an examination of three characteristics of the American legislature (and House of Representatives in particular) that are emblematic of the Congress itself. These include the *legislative power* of the Congress relative to the executive branch, the predominant *role of the committees* within its internal organizational structures and the often-lamented relative weakness or *decentralized nature of its political parties* and frequent recourse to bipartisan/least common denominator decision-making. When compared to the parliaments of Western Europe these are three of the most obvious differences that underpin the notion of 'American Exceptionalism' in the legislative realm.

Yet as the analysis below will demonstrate, the EP shares these characteristics to a large degree. These similarities may well be rooted in the more general similarity between the political systems themselves. Although a 'United States of Europe' does not yet (and may never) exist in full, few question the significant level of shared decision-making between member-states and the existence of pooled sovereignty at the EU level. The generally 'federalist' nature of the EU (regardless of formal designations) has evolved as the result of a political environment of common goals, shared needs, self-interest, and mutual mistrust that closely resembles the environment in the United States as the states moved from the Articles of Confederation to the Federal Constitution (see Magnette this volume). It is, therefore, perhaps less than surprising that the EU comprises several institutional features commonly associated with American federalism including: a *separation of powers system*, *legislative–executive institutional independence*, and internally diverse and *decentralized political parties*. Together these characteristics represent the primary institutional responses to the basic needs and fears that inspired the development of essentially federalist systems in both the American and EU context. They can also help us to comprehend the largely unexpected and poorly understood similarity between the legislatures of these two political systems.

This chapter is organized in three sections. The first examines the relative legislative power/influence of the two institutions in relation to the

executive branch, as well as their internal organizational structures. In addition, the level of party centralization and the voting behavior of their members are compared. This analysis incorporates a comparison with the standard West European parliamentary model as a contrast. In the second section, the concept of federalism is briefly discussed and the link between the primary institutional characteristics of the American system and the environmental causes of federalism are reviewed. The existence of similar systemic and institutional characteristics in the EU, despite the absence of a formalized federal structure, is then demonstrated. This discussion provides the basis for the link between the environmental causes of federalist structures and the defining characteristics of the American and European legislatures. The final section evaluates the utility of using the broader federalist tendencies and institutional environment of the EU as the basis of our analysis of EP, particularly the extent to which this approach helps explain the EP's internal organizational structures and current legislative role in the political system of the EU.

11.2 Comparing the American and EU legislatures

Although the general argument presented in this chapter refers to the legislature as a whole in both political systems, the specific object of study is a comparison between the EP and the American House of Representatives—that is, to say only a part of the legislative apparatus in both systems. However, reference will be made to the Council of Ministers and its legislative role in the context of our discussion of federalist systems and their impact on the development of legislatures below.

The general institutional structures of the House of Representatives are well known and its relative power and influence firmly established. The House, in conjunction with the Senate, as the legislative body of the American system must not only initiate, but also approve all legislation. Although the first requirement is often circumvented by the executive branch using allies within the legislature to have its bills proposed, the latter requirement is inviolate. In fact, while the Executive branch can have its veto overridden by the legislature, there is no similar method for circumventing the requirement of legislative approval for the promulgation of all legislation in the United States.[1] Thus, the American legislature has unquestionable power in the legislative arena. The House of Representatives, as an equal partner in the legislative branch, shares this power with the Senate, although their powers and roles are not identical.[2]

The internal organization of both branches of the Congress is based on detailed committee and subcommittee structures that have evolved over time, increasing rapidly in significance since the beginning of the twentieth century. It has been said that '. . . it is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee rooms is Congress at work' (Wilson 1981: 69 [1885]). The committees of the American Congress are broadly recognized as the most developed and influential in the democratic world (Shepsle 1978; Shaw and Lees 1979; Shepsle and Weingast 1987; Longley and Davidson 1998). The influence of American congressional committees in comparative perspective, their critical role within the Congress and the legislative authority and power of the Congress are all clearly related. The work of Congress takes place in committees because effective legislating requires an environment that promotes both expertise and compromise. The smaller size of committees, their distance from the public eye, and relatively stable membership (since the introduction of the seniority system) facilitate both.

The frequent recourse to bipartisan voting is, in part, facilitated by the reliance on Congressional committees and their ability to promote compromise.[3] The absence of a consistent left–right or Government–opposition divide created by a comparatively high level of bipartisanship is one of the attributes of the American political system that most clearly distinguishes it from the national political systems of the EU member-states. In fact, all three of these almost definitional characteristics of the American legislature are well-studied and familiar *because* of the extent to which they distinguish the American system from those of the EU member-states.

The most significant—and frequently misunderstood—characteristic of the EP is its relative influence over legislative outcomes. Part of the reason for the continued undervaluation of EP influence is its comparative newness. When the EP was created, it enjoyed only a limited power of legislative consultation. Over the years, and in particular since 1987, its powers have increased to include budgetary control as well as legislative delay, amendment, and veto. In other words, today's EP has a high level of legislative 'viscosity', able to not only slow down, but directly and substantively modify legislation (Blondel 1970). It has clearly moved beyond its humble origins as an 'arena' type debating chamber to become a functioning 'transformative' legislature (Polsby 1975).

This transformation, although increasingly recognized by scholars and political practitioners (Tsebelis 1996; Kreppel 1999, 2002*a*; Corbett 2001;

Tsebelis et al. 2001; Shackleton 2002) remains largely ignored by the majority of EU citizens who continue to base their assessments of the EP on outdated descriptions and ill-informed media reports (Robinson and Bray 1986; Riegert 2004).[4] Understanding the relative influence of the EP is difficult because the legislative process of the EU is more complex than that of most EU member-states or the United States and includes a number of different legislative procedures each of which grants the EP a different level of influence and control.[5] Thus, while it is true that under the consultation procedure the EP has only the very limited power to provide its opinion, it is equally true that the number of policy arenas that are currently decided under this procedure has been steadily declining since the late 1980s.[6] At the same time, the use of the codecision procedure (under which the EP has the most influence) has been steadily increasing since the concept of codecision-making was first adopted in 1993.[7] Moreover despite a number of controversial issues remaining fully under the consultation procedure (such as the Common Agricultural Policy and any EU decisions regarding tax policy), more are decided under the codecision procedure (including all common market legislation, much environmental policy, social policy, and freedom of movement–internal migration policy).[8]

Under the codecision procedure, more than 80 percent of the EP's amendments are ultimately adopted by the other institutions and converted into law.[9] This is an unprecedented success rate when compared to the national parliaments of the member-states. In most national parliamentary systems, the majority of substantive amendments are introduced by the opposition, which, lacking majority support, is most often unsuccessful in affecting policy outcomes (Loewenberg and Patterson 1979; Olson 1980, 1994; Copeland and Paterson 1994). In contrast, not only is the EP successful more than 80 percent of the time in amending policy proposals, but textual analyses of these amendments have determined that even when they have significant policy ramifications, some 30 percent of them are adopted (Kreppel 1999, 2002*b*). This level of legislative (as opposed to executive) control over policy output is not generally associated with parliamentary systems, particularly with any of the EU member-states. As a result, it remains largely unrecognized in assessments of EP legislative power.

Criticisms of the EP tend to focus on its inability to propose legislation directly (only the Commission has this power in the EU),[10] despite the fact that the ability of members to independently introduce proposals without government backing in the legislatures of the member-states is in most cases an empty power. In many countries the majority of individual

member bills never even make it to the floor and in general fewer than 15 percent are ever successfully adopted in any form (Interparliamentary Union 1979, 1986; Marsh and Read 1988; Mattson 1995; Andeweg and Nijzinki 1995).[11] At the same time, in most cases government proposals not only pass, but generally pass without substantial or substantive amendments from the legislature. In addition, it has been demonstrated formally that the ability to veto can be more significant than the power to 'set the agenda' (initiate) legislation (Tsebelis 2002). Thus, the EP's ability to definitively veto legislation is a significant power and its success in amending proposals also indirectly allows it to influence the content of policy, even if it cannot independently initiate the policy process.[12]

As was the case in the US Congress, the very real legislative influence wielded by the EP is, at least in part, responsible for the development of a strong and influential committee system.[13] The committees of the EP have existed since its creation, but their role and influence over the legislative process and in the internal workings of the EP as a whole have increased over time as the policymaking powers and workload of the EP have increased. There are currently nineteen committees and a growing number of subcommittees that constitute the EP's 'legislative backbone' (Longley and Davidson 1998: 6). All legislative proposals, as well as resolutions and EP reports, are referred to committee *before* being debated on the floor.[14] The committee of record has effective gatekeeping power and, as in the American case, the majority of substantive changes and compromises (interparty and interinstitutional) are constructed within the committees. Although amendments, even controversial ones, can be and are initiated on the floor of the full plenary, this generally occurs as the result of a failure to reach consensus within the committee (between the core political actors) or as a show of protest by the more extreme political actors on the left and right of the political spectrum.[15]

Each proposal is assigned to a single lead committee with other committees able to give their opinion only (and only when they are formally assigned as secondary committees). Given the potential influence a committee can have over the eventual outcomes of the policy process, the allocation of reports to committees can be contentious. Once assigned, the committees engage in full deliberation and amendment of legislative proposals including calling expert witnesses, statements from members of the Commission, and the independent collection of relevant information by committee staff. The party groups within the EP and the national delegations within the party groups often engage in intense research,

negotiating and bargaining during this critical phase of the EU legislative process. Representatives from the party groups report to their parties and national delegations on the work of the committees and, depending on the level of controversy and importance of a specific proposal, meetings between party-group leaders may be initiated to promote compromise.

The full staff and resources of the EP committees, though small when compared to those of the American Congress, are quite substantial when compared to the parliamentary or committee resources of most national legislatures (Bowler and Farrell 1995; Longley and Davidson 1998). Each committee has between twelve and eighteen staff members dedicated to it full time, as well as an additional three to five supporting staff members. Further supporting the activities of the committees (and the EP in general) are the resources of the EP's library, archives, staff, and research resources located both in Brussels and Luxembourg. These resources are at the disposal of all MEPs and staff members. There is also a separate Directorate General for Committees that provides additional support staff when needed.[16]

Once complete, committee reports are distributed to all members at each stage of the process, and when a proposal comes to the floor the basis of debate is the committee (Rapporteur's) report. Amendments can be offered from the floor but only under significant constraints.[17] Committees additionally have limited informal gatekeeping power and as in the United States, a relative monopoly of information and expertise. Unlike the US case, however, there is no seniority system in the EP and members rarely sit on the same committee for extended periods. Chair positions rotate every two-and-a-half years (as do all internal hierarchy positions) or once midway through every legislative term. This leads to a greater reliance on the expertise of committee staff members who generally have a longer tenure. The absence of consistent and reliable internal sources of expertise as a result of both high turnover rates and the rotation system has also led to a greater reliance on external sources of information and expertise such as lobbying groups and NGOs, which has led to concern about the overall integrity of the process and calls for reform of the rotation system.

As a partial compensation for the absence of general subject area expertise amongst members within the committees, more specific skills are generated through the use of a system of *rapporteurs*. In contrast to the American system, in the EP every proposal is assigned a *rapporteur* who is in charge of guiding it though the legislative process.[18] This is based on the French system and functions almost as a kind of 'mini-chair' for each

proposal that goes through the committee process. Formal and informal meetings with relevant members of the Council of Ministers and the Commission are increasingly common, with the *rapporteur* representing the committee and the EP. These informal interchamber meetings between the EP and Council of Ministers are particularly common under the codecision procedure, as conflict between the two chambers over amendments will force a meeting of the conciliation committee,[19] while early agreement can lead to rapid adoption of proposals and successful completion of the legislative process (Shackleton 2002; EP Activity Report 2004). After the initiation of a proposal by the Commission (especially under the Codecision II procedure), the legislative process becomes one of negotiated compromise both within and between the two legislative chambers.[20]

The causes or logic behind the frequent recourse to bipartisan voting in the American context are well studied and generally linked to three aspects of the American system itself. First, and most importantly, the existence of an independent executive provides the institutional structure that allows variable coalitions to form on a vote-by-vote basis within the legislature without fear of destabilizing the executive, since this is, by definition, not dependent on the confidence of the legislature to remain in office. As a result, the need for party discipline within the legislature is reduced.[21]

The absence of an institutional requirement for strict party voting within the legislature is combined in the American context with the existence of umbrella or catchall parties and significant cleavages that cut across traditional left–right ideological categories. The freedom to vary between coalition partners, or in the American context vote across party lines, is significant only if there are motivations to do so. In a homogeneous society divided only along the traditional left–right spectrum, partisan voting (with little recourse to compromise or variable coalitions) would still be the norm since there would be little motivation to cross party lines. However, when the ability for cross-party voting is paired with cleavages that cut across party lines (e.g. regional or state interests) this capacity is likely to lead to frequent cross-party and/or bipartisan voting. This trend may be further increased by the need to reach consensus between institutions with diverse partisan majorities to successfully complete the legislative process (as occurs under divided government).

All of these elements are present in the EU. Both the bureaucratic and the political arms of the executive (Commission and European Council) are functionally independent of the legislative branches (Council of

Ministers and EP).[22] As in the American case, there can be little doubt that there are very strong regional variations in the EU, not just between the subunits (member-states) individually, but also between the broader geographic regions (the industrial north versus agricultural south), and interests (poorer versus wealthier countries). The interests of the member-states are directly represented in the Council of Ministers (the EU equivalent of the American Senate), while the regional variations that cross member-state lines (and often ideologically derived political parties) must find representation within the EP. The effective bicameral nature of the EU and the need to involve at least three institutions in the legislative process also mirrors the American case. And, as in the American context, the formal requirement of interinstitutional agreement on policy requires compromise and coordination between the legislative and executive branches as well as between the two chambers of the legislature itself, regardless of the partisan majorities in each.[23]

Given these institutional similarities, the high level of diversity between political parties within the same general family in Europe and the existence of clear cross-party interests, the tendency of the center-left and center-right parties in the EP to form the European multiparty equivalent of bipartisan coalition is less than surprising. In fact, 'bipartisanship' follows a generally similar pattern in the American and European cases, with Democrats and Republicans clearly opposing each other only an average of 54 percent of the time between 1980 and 1998 (Stanley and Niemi 2000) and Socialists and Christian Democrats clearly in opposition to each other approximately 45 percent of the time between 1980 and 1996 in the EP (Raunio 1998; Kreppel 2002*a*; Kreppel and Hix 2003; Hix Roland, and Noury (2005)).[24] The critical point here is the relatively low level of ideologically based partisan opposition in the American and European (EP) cases when compared to most Western European Parliaments, where voting is strictly along party lines according to the standard government–opposition dichotomy.[25]

It is notable that this similarity occurs despite the fact that the EU is a multiparty system and the US a clear two-party system. Within the EP (and the Council of Ministers), the Socialists and the Christian Democrats are by far the largest parties, controlling close to 70 percent of the seats in the EP (and one or the other participating in nearly every national member-state government and thus included in the Council of Ministers).[26] The smaller parties of the left and right tend to follow the patterns established by the larger parties, with the exception of the greens and the extreme groups of both the left and right. These parties tend to vote against many

popular bipartisan or cross-party initiatives. The centrist Liberal Democratic Group has fluctuated over time between a general preference for the Socialists or the Christian Democrats, but generally votes with them when they vote together (Hix 2002; Kreppel 2002*a*; Hix, Kreppel, and Noury 2003;).

This brief comparison between the House of Representatives and EP demonstrates that, despite the common assumption that the two are fundamentally different, there are some important similarities between them. This prompts the question why do these similarities exist? Given that the EP was created by European governments, its members were initially (until 1979) appointed from amongst the ranks of the membership of the national parliaments and continue to be groomed within and most familiar with the parliamentary and party frameworks of the member-states, why has the EP been granted direct legislative powers far beyond those exercised by most of the national parliaments? Why has it developed a strong and permanent committee system when the home parliaments of the members do not, in general, possess similar structures? And why, in a larger environment of ideologically driven politics and clear dividing lines between government and opposition, do the major party groups of the left and right join together 60–70 percent of the time to create and support compromise legislative proposals? At least some of the answers may be found in the general political environment of mutual mistrust and common need that led to the creation of the federalist superstructure of the EU as a whole.

11.3 The causes and consequences of federalist tendencies in America and the EU

Federalism as a type of political system can be understood as an intermediary point between two extremes on a kind of 'axis of independence' that describes the relationship between the central government and the subunits. At the one end of this axis are highly centralized states where all decisions of any import are made at by the central government with little opportunity for lower-level government actors to do much beyond implementing the decisions made in the center. The former Soviet Union was an extreme undemocratic example, while modern France provides a more moderate and democratic example. At the other end of the extreme are very loose confederations of basically independent states with a central government that can do little beyond making recommendations to the

subunits, which are then more or less free to ignore them. Most examples of this type of weak confederal system are historic, including Switzerland prior to the nineteenth century or America under the Articles of Confederation.

While the level or extent of centralization can vary between systems, in general federalist systems can trace their origins to a shared goal of uniting diverse groups of peoples or states together. The decision to pursue a federalist system may be the result of internal strife within a single centralized state that threatens the state as a whole (Belgium in the 1970s) or a decision among previously independent actors to join together because of a common goal or shared threat (the EU, the Swiss Confederation). Regardless of the relative power of the central government or the original motivation for developing a federal system, in all cases the formal and informal political institutions within a federal system must carefully balance the need (or desire) of the subunits to work together to achieve common goals/shared benefits against their need (or desire) for individual autonomy and mutual mistrust and self-interest.

This delicate balance may be more or less difficult to obtain depending on the differences that exist among the subunits and their historical interactions. When there are significant variations in size, relative wealth, international presence and/or significant cultural, linguistic or religious differences, tensions between the subunits within a federation may be exacerbated by conflicting interests or priorities. Mutual mistrust based on historical legacy or lingering doubts over differences increase these tensions still further. The political institutions must incorporate and accommodate these differences and concerns to assuage fears and avoid internal conflicts that can threaten the system as a whole. In many ways, the political structures within a federal system can provide useful information about the extent of the diversity between the subunits and their resulting willingness to trust each other with control over political outcomes (at least at the time the institutions were created).

Given that federalism is itself a more or less formalized construct to promote collaboration among many while protecting against tyranny by one or a few, we should expect the political institutions constructed within a federalist system to suffer from a similar internal tension. That is, federalist systems should have political institutions that are designed to guarantee some level of access and decision-making power to the subunits individually, enabling them to protect and promote their individual interests, while at the same time fostering collective decision-making among them to facilitate the realization of the benefits of collaboration. This is, in

fact, the nature of the basic political institutions in America, and although the full spectrum of federally inspired institutions that exist in America is not replicated in every federal system, elements or a subset of them generally are.[27] In the EU, despite the fact that the institutions have different names and the underlying (federalist) concepts are rarely stated directly, the resulting political system, as well as the relationships between the institutions within it are quite similar. One of the results, as described above, is that EP resembles its American cousin more closely than is generally recognized in terms of some of its core institutional characteristics.

The institutional characteristics of the EU political system reflect the need to balance individual member-state interests and the protection of national sovereignty with the desire to obtain the benefits of cooperation and coordination. The inherent tension between these goals has led to the development, planned or otherwise, of political structures which disperse power and guarantee representation on the basis of multiple criteria. The impact of these institutional characteristics on the nature of the EP is increased by the comparatively high level of diversity within the EU, between both individual member-states and interests that may or may not be bound by official state boundaries.[28]

Two interrelated institutional characteristics of the EU are of particular importance and merit specific attention because they directly relate to the kind of legislative branch likely to evolve within a given political system. More specifically they regulate the relationship between the legislative and executive branches. Both the creation of a 'separation of powers' system and the formal or functional independence of the executive and legislative branches fundamentally influence the general character of the political system. The two characteristics are often assumed to be synonymous with presidential systems just as their converse; 'fused powers' and mutual dependence are generally associated with parliamentary systems.[29] This association, however, merely reflects a correlation between the two and is not a requirement. A brief comparison of these two institutional characteristics in the American and EU contexts demonstrates this fact quite clearly.

There can be little doubt in the American case that the existing legislative process established formally by the Constitution, as well as by current norms and established practice integrates all three core institutional branches. Initiatives must formally come from a member of the congress but often are drafted by the executive. Both legislative chambers (another product of a federalist system discussed below) must eventually agree on a common text that must also be adopted (signed) by the president.

Only qualified majorities in both chambers can override a formal presidential veto, and of course the court has the power to reject any legislation that is deemed to be contrary to the Constitution. Thus, all three branches are integrally involved in the process, and none has sole jurisdiction or the ability to act unilaterally—the very definition of separation of powers.

Unlike the political systems of the member-states, but similar to the United States, the EU is based firmly on the notion of separation of powers. Even in the days of the Coal and Steel Community and the early European Economic Community, the institutions were wholly distinct, allowing no overlapping membership (unlike parliamentary systems). The Council of Ministers, Commission, ECJ, and EP are each selected through different means, representing different constituencies with distinct powers. That said, as in the United States, all of these institutions are integrally linked and the successful completion of the legislative process incorporates all of them to one extent or another. Thus, as in the American case, effective cooperation between institutions in the policy process is a requirement of the broad structure of the political system itself.

As discussed above, the Commission must formally initiate all legislative proposals, which are then sent to the EP and the Council of Ministers.[30] The legislative process will then vary depending on the procedure being used, but under the critical Codecision II procedure, proposals can be sent back and forth between the EP, Commission, and Council of Ministers several times in the hope of achieving a consensus. Amendments can be made by either the EP or the Council of Ministers. Ultimately, if required, the EP and Council of Ministers will make a final attempt at compromising in a conciliation committee joined by a representative of the Commission to facilitate compromise (but not as a voting member).[31]

Thus, the policy process requires the participation of the Commission (initiation and amendments in the first round), the EP (amendments in the first and second round and ultimate adoption or rejection), and the Council of Ministers (amendments in common position and conciliation procedure as well as ultimate adoption or rejection). If we view the Commission as the bureaucratic arm of the executive and the EP and Council of Ministers as the two chambers of the legislature then (unlike in the US case), it is an agent of the executive that formally initiates legislation and the legislature that ultimately adopts it or rejects it. Despite this, the fundamental division of labor in the policy process, between different institutions with nonoverlapping membership, effectively creates a separation of powers system in which decision-making power is dispersed.[32]

Closely related to the separation of powers system is the notion of executive–legislative independence. To be fully functional a separation of powers system must guarantee the ability of each institution to make its decisions without fear of politically or ideologically driven retribution from another institution. This requires that each branch be free from control or dismissal by the others (except in the case of legal wrongdoing). The justification for fully independent institutions is further supported within federalist systems by the existence of different constituencies serving as the electoral base for the various institutions. It is a general requirement of democracy that officials elected by the people can be removed only by those same people via another election, except in the case of legal wrongdoing.[33]

Clearly all of these requirements are met in the American context. The President, House, and Senate are elected by different constituencies, for different periods and they are functionally and formally independent from one another.[34] Although the president may be impeached, this requires the collaboration of both houses of the Congress and is designed to as punishment for the commission of 'high crimes and misdemeanors'. In no case can a representative be removed on political grounds and there is no need for the executive to have the support or 'confidence' of the legislature to continue or complete his tenure in office.

The independence of the various institutions within the EU, while different structurally than that which exists in the United States fulfills the same fundamental purpose of insuring that the formal separation of powers is a functional reality. The members of the EP (since 1979) are directly elected on national lists in the member-states. They cannot be dismissed (except in cases of legal wrongdoing or incapacity) except by the people through the normal electoral cycle.[35] Likewise, the EP cannot remove the members of the European Council or the Council of Ministers. They too are elected, albeit indirectly, at the national level (since they are members of the national government) and can only be removed through political change at the national level, not by the EP.[36] As a result, and similar to the American case, there is no need for a stable coalition supporting the 'Government' within the EP. This sets it apart from all of the national parliaments which operate within parliamentary systems with more or less fused powers.[37] It also means that, as in the United States, members of the EP are free to form coalitions on a vote-by-vote basis without any fear of destabilizing the executive or initiating a chain reaction that might culminate in dissolution of the parliament and early elections.

The relationship between the EP and the Commission is somewhat different because of the combination of its appointed nature and

unusually direct role in the legislative process.[38] Members, as noted above, are appointed by the European Council and confirmed by the EP. In addition, the EP formally has the power to censure the Commission, however, this has never been done and the only time it was seriously considered involved legal wrongdoing and criminal mismanagement (i.e. impeachment), not an ideological clash.[39] Nonetheless, the formal power of the EP to censure the Commission on the basis of political differences serves to increase the confusion that surrounds the Commission and its role in the EU. Its control over the official initiation of all legislation, in conjunction with the EP's ability to censure it has resulted in the frequent, albeit mistaken conclusion that it is the political government of the EU comparable to the governments of the member-states. This would imply a level of power centralization that the political and historical environment surrounding the creation and development of the EU effectively excludes. The natural and constant tension between cooperation and conflict among the member-states in the EU required (and requires) the creation of a more diffuse, federalist set of political institutions. The differences between the member-states and various regional blocks increases the pressure for institutional decentralization by ensuring that the political parties of Europe are unlikely to be able to mimic the cohesive party organizations prevalent in the member-states and necessary for a healthy parliamentary, or fused powers, system.

True parliamentary systems in the absence of strongly organized political parties tend to quickly disintegrate into political, if not systemic, instability (Sartori 1976, 1996). Stable parliamentary governments require the members of one or more parties to consistently vote to support the executive branch and its policies. In strong centralized party systems rank-and-file members vote with their party leadership because to do otherwise would risk both weakening the government (of which their party is a member) and damaging their own political career, since advancement in politics is generally synonymous with internal advancement within the party (Ware 1987, 1996). However, separation of powers systems free the members of the legislature from the requirements of strict party discipline since there is no institutional requirement that the executive enjoy the support of the legislature (leading to the potential for 'divided government'). In other words, the decentralization of political and especially legislative power in a separation of power system also allows political parties to be decentralized and voting coalitions to vary without threat of destabilizing the government.

The decentralization of parties in the American case is largely self-evident. Despite the existence of national organizational structures, the

activities of both the Democratic and Republican parties are coordinated primarily at the state and local level.[40] The leaders of the Democratic and Republican National Committees (DNC and RNC) are not generally well known outside the beltway and are generally not politicians of national stature with broad public recognition as is the standard for European political parties. Regional and ideological differences within the parties are often more significant than the differences between moderate members of both. From the rainbow coalition to southern 'blue dog' Democrats and from the moral majority to log cabin Republicans, the two main American parties are rife with internal divisions that find ample representation in the decentralized organizational structure of the national parties themselves. The established norm of running even presidential campaigns from the candidates' home states rather than a central DC office is emblematic of this decentralization.[41]

Despite the long history of highly organized parties in Western Europe, the role of political parties at the EU level is still very much in flux. There can be little doubt, however, that the supranational European parties are fundamentally decentralized. Members of the EP are elected at the national level from electoral lists generated by their *national* party leadership. However, once they enter the EP they join supranational party groups that do not mirror the domestic political parties with any precision. Although the major political party families of Europe are all represented at the European level (within the EP) they are essentially an amalgamation of over 100 national parties that gain representation in the EP into between eight and ten European level parties. Each of the EP party groups consists of between three and fifteen national delegations creating, even within the EP itself, a decentralized system. The links between individual members, their EP party leadership, and their national party leadership are complex, but the clear outcome is the inability of any single leadership group to fully control member activities (voting behavior). Each has a selection of potential benefits and sanctions and neither can unilaterally determine the fate of an MEP.[42] Adding to the decentralization of the European level political parties is the absence of any supranational elected office and the inability of citizens to join the European level parties.

Clearly there are significant differences between the broad historical context, general political systems, and legislative branches of America and the EU. What the preceding two sections suggest, however, is that, despite these very substantial differences, there are also important similarities both in terms of the legislatures themselves and within their broader political environments. The question which remains is whether

a better understanding of these similarities and their potential causes aids us in our quest to understand the EU in general and the EP in particular. In other words, does the comparative federalist approach provide us with greater explanatory power than the far more common tendency to compare the EP, implicitly and explicitly to the national parliaments of the member-states?

11.4 Comparative federalism—A useful tool?

To the casual observer, the EP and American House of Representatives could not be more different. In the literature the EP is still often assumed to be a second class citizen, a legislature that could easily 'be misconstrued as the EU equivalent of a national parliament' implying that it fails even that test of political significance (Dinan 1999: 267). At the same time the US House of Representatives is generally considered to be almost the definition of an 'active', 'transformative', and 'viscous' legislature (Blondel 1970; Polsby 1975; Mezey 1979). And yet, when compared across a number of key characteristics, the two legislatures are surprisingly similar. These similarities are not immediately apparent and in fact, are often obfuscated by the natural (but incorrect) tendency to implicitly and explicitly compare the EP to the national parliaments of the member-states.

This kind of comparison leads to a set of expectations poorly suited and largely inapplicable to a legislature functioning within an internally diverse federalist system that emphasizes the dispersal of power among institutions and decision-making levels. In this context, understanding the origins and underlying motivations of the federalist environment, as well as the decision-making mechanisms of the political system itself are critical in selecting an appropriate comparative case. Despite the obvious and significant differences between the United States and the EU in general, both the inspiration for the development of a federal system and its consequences in terms of the general character of its political institutions actually makes it a better basis of comparison than the parliaments of the member-states themselves.

The EU today functions essentially as a federal system. Clearly in the subunits, or member-states have a much greater claim to independent sovereignty than the American states had or have. With centuries of divergent histories that often include wars between them, the differences between the EU member-states are more profound than those that separate the American states. But this should not dissuade us from comparing

the two. Despite the fact that use of the 'F' word in the European context remains controversial, from a functional standpoint there can be little doubt that the EU is effectively a federalist system in which a good deal of decision-making authority resides at the center.[43] As in the US case, EU law enjoys supremacy over national law. Political decisions taken at the center, often against the will of the leaders of one or more of the member-states, must be implemented equally across the EU. Legislation on everything from car emissions standards, social policy, telecommunication networks, and worker safety standards is decided at the supranational level.[44]

Structurally, the EU institutions, like those of the United States, include a method for representing the total population (the EP) as well as the individual subunits (the Council of Ministers) within the legislature.[45] The supranational court is the highest court of the land and its decisions override those taken at national level. Admittedly missing from the EU is a single, directly elected president that can effectively represent the entire population. Instead the European Council remains a collegial executive based on the member-states and the Commission a very public and powerful executive bureaucracy.[46]

Although the balance of powers is different in the EU and the United States, both face a similar dispersion of legislative power with the executive and both chambers sharing between them the powers of initiation, adoption, and veto. The executive and the legislative branches are basically independent from each other and from the constraints imposed by a strongly centralized party system. Like the United States, agreement between all three institutional actors is required in the EU for policy proposals to be successful. In Tsebelis's terms there are three primary institutional veto players in the legislative process in both cases (Tsebelis 2002). In both cases this dispersion of legislative power is largely a function of the separation of powers system, the independence of the different institutions that this implies and the existence of a federalist system that was inspired by the inherent tension between the competing goals of protecting state sovereignty and reaping the benefits of collective coordination and decision-making. The question remains whether the existence of a broadly similar (largely federalist) environment in both the United States and the EU makes America a better base of comparison (and evaluation) for the EP than the national parliaments of the member-states.

The comparisons concluded in the first section suggest that at least in some regards the answer must be positive. Comparisons between the EP

and the parliaments of the member-states have not only largely ignored the existence of similarities between the US and EU legislatures, they have actively misinterpreted them. For example, the failure of the EP to control the Commission (or executive branch more generally) through active use of its formal censure powers has been interpreted as a sign of weakness and demonstration of the incomplete institutional development of the EP as a whole (Westlake 1994; Dinan 1999; Nugent 1999) instead of a consequence of the inherent independence of the executive and legislative branches. Similarly, the common recourse to bipartisan voting coalitions between the center-right European Peoples Party (EPP) and the center-left Party of European Socialists (PES) is most commonly perceived as a weakness of parties in the EU context and within the EP in particular, rather than the institutional requirement of a separation of powers system in which compromise is a necessary component of the policy process. Similarly, the tendency of parliamentary debate on the full floor of the EP to fall short of the rhetorical flourish found in most national parliaments is seen as further demonstration of the absence of significant policymaking power of the EP and stunted nature of its party groups. The critical role of the committees in the legislative process is generally completely overlooked or fundamentally misunderstood.

The misconceptions and misunderstandings that surround the EP today have numerous sources. Clearly part of the confusion arises from the rapidly changing nature of the EP, its political role, and relative powers within the EU as a whole. Beyond the difficulty of attempting to understand the institutional equivalent of a moving target, however, is the confusion caused by inappropriate comparisons. The national parliaments exist (for the most part) within consolidated and largely uncontested states with little need to create institutional structures that disperse power and promote compromise across both ideological and geographic divides. The EU, in contrast, requires political institutions that can balance the need to protect national sovereignty and individual state interests with the shared desire to reap the benefits of coordination and compromise that result from limited shared sovereignty.

Notes

1. Like most other systems there are opportunities for executive orders (known as decrees elsewhere). While these can be significant in impact, they are not generally used as a tool to implement legislation against the will of the legislature.

2. For example, the House must initiate all budget and tax bills, while the Senate has the unique power of treaty ratification or approval of presidential nominees for key appointments.
3. This can be due either to the benefits of information exchange or because of the shared goals of committee members that cut across partisan ideology. See Shepsle and Weingast (1994) for an overview of the various debates and interpretations of committee power and its causes and results.
4. It is worth noting that even venerable media outlets such as *The Economist* repeatedly make errors when reporting on the decision-making powers of the EP. The national press are often more wildly incorrect and tend to sensationalize perceived extravagances (the $20,000 shower) and inadequacies (absence of a common Member Statute) rather than examples of real EP power (use of veto, successful amendments of key proposals, rejection of proposed Commission, etc.).
5. The consultation procedure, originally the sole procedure in the old European Economic Community (EEC), grants the EP only limited powers of consultation (it can give its opinion) while initiation resides with the Commission and decision-making with the Council of Ministers. Where an EP opinion is required by the treaties, the Council of Ministers must wait for it before a final decision can be made, granting the EP the additional power of delay. The cooperation procedure, introduced by the Single European Act in 1987 granted the EP the additional ability to effectively amend legislation through 'conditional agenda setting' based on the EP's ability to strategically make amendments that are easier for the Council of Ministers to accept than reject (Tsebelis 1994, 1996). The codecision procedure, introduced by the Maastricht Treaty (1993) and reformed by the Amsterdam Treaty (1999, called codecision II) grants the EP the additional power to definitively veto legislation and (with codecision II) places the EP and the Council of Ministers on essentially equal footing in the legislative process. There are additionally the assent and budget procedures. These have very restricted application and do not change the fundamental relations between institutions significantly. For more on these and all of the legislative procedures of the EU, see Hix (2005) and Corbett et al. (2003).
6. Both in terms of raw numbers and overall percentages the use of the consultation procedure has been declining since at least the 1992 introduction of the Codecision I procedure (Hix et al. 2005).
7. Reference to the 'codecision procedure' throughout is to the procedure as revised by the 1997 Amsterdam Treaty (also known as codecision II).
8. The complete list of policy arenas under the codecision procedure can be found at: http://www.europarl.eu.int/code/default_en.htm; however, it should be noted that the current Draft Constitution adopted by the European Council expands its jurisdiction even further.
9. Amendment success includes those for which a mutual acceptable compromise position was found (generally during conciliation). During 2003–4 28% of all EP

amendments were adopted outright. For a full analysis of the Codecision procedure and the EP's role within it see, EP, *Activity Report, 1999–2004 (5th Parliamentary Term)*, PE 287.644.

10. Although the present discussion does not allow for an in-depth discussion of the role of the Commission, it is best understood as an extremely powerful and influential bureaucracy, and thus as a part of the executive branch. This understanding of the Commission is based on the indirect and appointed nature of appointments, the formally nonpartisan character of its members and its additional tasks of implementation and monitoring–two tasks most frequently associated with national or subunit bureaucracies.
11. In the most extreme cases, such as Greece, Denmark, the Netherlands, France, and Norway the percentage is consistently below 10% falling as low as 0% (Andeweg and Nijzinki 1995: 172).
12. It should be noted that the EP, like the Council of Ministers, can ask that the Commission initiate a proposal on a specific topic and that in a number of cases EP amendments are easier to adopt than to reject meaning that the EP has 'conditional agenda-setting' powers in some cases (Tsebelis 1994, 1996).
13. I am focusing here on the committee structure of the EP because of the overall focus on this institution as opposed to the Council of Ministers. It should be noted however that the Council of Ministers has its own somewhat unique committee structure that serves very similar purposes in its Committee of Permanent Representatives (generally referred to by its French acronym Coreper). For additional information, see Lewis (1998, 2000) and Bostock (2002).
14. The timing of committee review is critical as committees that merely enact decisions made on the floor are generally indicative of a weaker, less institutionalized parliament (Shaw and Lees 1979; Strøm 1995).
15. The small anti-integrationist Europe of Democracies and Diversity (EDD) group on the right (renamed the Independence and Democracy Group after the 2004 elections) and the Nordic Greens-United Green Left (GUE-NGL) frequently use the full plenary as a stage for public protest, though the ability of small groups and individual members to initiate amendments has become increasingly constrained in the name of efficiency over the past two decades (Kreppel 2002*b*).
16. Lawrence Longley and Roger Davidson go so far as to suggest that the growing strength of the EP committees is actually inspiring the development of stronger committees among the parliaments of the member states (1998: 6).
17. For example all amendments must be submitted in advance and generally require a minimum number of signatures. Interestingly the EP does not yet have any provisions for closed rules on regular legislation, although it is used for all third readings (after conciliation) and under the Assent procedure. There is some discussion of also adding the possibility for the closed rule in certain legislative situations.

18. For very controversial or significant proposals two or more *rapporteurs* may be assigned to both make the associated workload more manageable and to share the critical role of *rapporteur* amongst the largest political groups.
19. The conciliation committee is functionally the same as a conference committee in the American context. An equal number of members from each chamber (the EP and the Council of Ministers) meet in a special committee to attempt to resolve remaining differences between the final drafts of a proposal in each chamber. Under the current codecision II procedure, if an agreement cannot be achieved the proposal fails and work must begin from scratch with a new Commission proposal. If a compromise is achieved within the committee the result must then be approved by an absolute majority in the EP under a closed rule (an up or down vote).
20. Part of the confusion that often arises in understanding this process arises from the fact that the members of the Council of Ministers are members of the executive branch in their home countries (as ministers in the cabinet), but take on a primarily legislative role at the EU level (which is very different from the clearly executive role of the European Council and the primarily bureaucratic role of the Commission).
21. This does not mean there is no party discipline or that parties are not important, but simply that party discipline is not required to maintain a stable executive. On the importance of parties in the American presidential system, see Cox and McCubbins (1993).
22. The European Council officially appoints the Commission president (by qualified majority) who is then approved by the EP. The president-designate (together with the European Council) names the full membership of the Commission, which must also be formally approved by the EP. This process, despite being more unwieldy, is not functionally substantially dissimilar from the appointment and approval of the Cabinet in the American context.
23. It is interesting to note that the EU also mimics America in the frequency of periods of 'divided government' in which the ideological balance between the left and right within the European Council and Council of Ministers is at odds with the balance within the EP. The Council of Ministers and the EC necessarily have more or less the same ideological majority since they are both reflections of the ideological majorities and coalitions within the member states.
24. In both cases the tendency toward ideologically driven left-right party voting has increased over the last 5–10 years. See especially Hix, Gerard, and Noury (forthcoming) for details on this phenomenon in the EP.
25. Italy stands out as an exception here prior to 1988 when there was a norm of secret voting for most legislation allowing members to defect from unpopular coalition proposals without fear of retribution from party leadership.
26. This generalization excludes France because the Gaullist RPR (Chirac's party) has not joined the generally right of center European People's Party group in the European Parliament.

27. For example the Federal Republic of Germany lacks many of the core institutional characteristics to be discussed shortly, but nonetheless maintains a bicameral system (a standard among federal systems) and specific powers to the representatives of the Länder (subunits) when legislation is passed that will affect the Länder directly.
28. The overall level and variety of diversity was increased substantially by the 2004 enlargement and could potentially be increased still further if and when Turkey gains full membership.
29. Separation in this context does not imply (as is sometimes assumed) isolation or autonomy, but rather 'separate institutions that share functions so that these departments be so far connected and blended as to give each a constitutional control over the others' (Davidson and Oleszek 2002: 20).
30. Increasingly the broad policy agenda is determined in the European Council, which serves as the political executive, and the Commission (the more bureaucratic arm of the executive) then formalizes the agenda into specific proposals.
31. Under the codecision II procedure, after the Commission initiates a proposal the EP conducts its first reading, makes any amendments it sees fit, and sends the proposal back to the Commission. The Commission can adopt EP amendments or not and sends this (possibly amended) version of the proposal to the Council of Ministers. The Council of Ministers then votes on a common position, by qualified majority if simply accepting the (revised) Commission proposal or by unanimity if amending it. The common position is sent back to the EP, which then holds its second reading of the proposal. If amendments are made during the second reading the Council of Ministers must adopt all of them or a conciliation (conference) committee is created. If a joint text can be agreed to within the conciliation committee it must then be confirmed by the full EP, if a joint text cannot be agreed to then the proposal fails. The full EP can reject a joint text by an absolute majority vote against. Codecision II is used for most significant EU legislation, but there are other procedures that differ in complexity and the extent to which the EP plays an effective role. See Corbett et al. (2003) for more details on the procedures and the variations between them.
32. As in the United States, the participation of the court in the legislative process is generally a sign of conflict between legislation (or more often in the EU, the legislative process) and the effective higher governing law (be it the Constitution or the Treaties).
33. It should be noted that parliamentary systems partially conform to this norm as the 'people' who 'elect' the government are the members of parliament and it is these same people who have the power to censure or remove the executive. The potential for the executive to dismiss the parliament, however, fails this democratic test.
34. Before the direct election of US Senators was introduced in the early 1900s the differences between the electorates was even more pronounced, and functionally more similar to the current situation in the EU.

35. It should be kept in mind that because the members of the EP are elected by proportional representation much of their electoral success depends on their placement on their parties' electoral lists. This does give the national parties (not the other EU institutions) a greater ability to control future electoral fortunes than occurs in plurality single member district elections with no party constraints on candidacy.
36. This is generally through elections, but there is also the possibility for national governments to fall in between elections in parliamentary systems because of a vote of no-confidence or even changes within their own parties.
37. The semipresidential French system is a partial exception, although here as well the prime minister is dependent on parliamentary confidence to maintain her position.
38. The monopoly that the Commission has over the formal initiation of legislation leads many to mistakenly assume that it is the EU's nondemocratic equivalent of the national member-state governments. The international role of the president of Commission increases this misconception and further confuses both the actual and perceived character of the EU executive adding to concerns about the democratic deficit of the EU as a whole.
39. It is also important to remember that although they are appointed, members of the Commission cannot be removed by the European Council during their tenure, even when those who originally appointed them lose power at the national level and are replaced within the European Council.
40. Of course there are variations across time in the overall level of cooperation between the state and local organizations, with the 2004 elections representing one of the high points of national party coordination.
41. Although decentralization does not necessarily result in diversity it is clear that both major American parties suffer from significant internal cleavages that often coincide with regional variations and norms. The level of internal diversity and dissension historically has varied both over time and across the two parties.
42. The party groups system of the EP is complex and very much still in the process of development. For additional information, see Kreppel (2002*b*), Raunio (1998), Hix (1999), Hix, Kreppel, and Noury (2003), Kreppel and Hix (2003), and Hix (2002).
43. The relative balance of power between the subunits and the EU level is defined by the notion of 'subsidiary' as laid out in successive treaties since Maastricht. The basic principle is that all legislative and governing activity should be done at the lowest level at which it can be effectively and fairly accomplished.
44. For the 12 members of the eurozone this litany also includes all monetary policy.
45. What is distinct about the EU is the balance of powers between the two legislative chambers. While in the United States the Senate and the House have distinct, but largely equal powers, in the EU the EP is unquestionably the junior member of the legislative partnership.

46. It is interesting to note that one of the key proposals discussed in the constitutional convention was the possibility of establishing a directly elected leader along the lines of the American president. There was some confusion, however, over whether this person should become the president of the Commission or the president of the European Council. In the end no new provision for a *directly* elected president was adopted.

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Part IV

Public Policies

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12

The Politics of Central Banking in the United States and in the European Union

Nicolas Jabko

The US Federal Reserve was created in 1913 and has become one of the most established and well-respected public institutions in America. It is arguably the only example of a Weberian bureaucracy in the US federal government. In Europe, the protracted birth of Europe's EMU created turmoil for central bankers through the advent of the euro in 1999. Yet the newborn ECB has quickly adapted to its role and has become the staunchest defender of the new institutional order around the European Union's official currency. As a result of their established status and the sheer weight of the US and EU economies, the US Federal Reserve and the ECB are the two most powerful central banks in the world today. Not only do they both play virtually the same role in their respective economic areas, but their internal governance structures look strikingly similar and they are independent from elected political bodies. It is therefore very tempting to analyze American- and European-style central banking as the functional expression of modern economic rationality in the world's two biggest and most advanced economies.

Based on a comparison of money and central banks in the European Union and the United States, this chapter calls into question this idealized vision of central banking as a self-contained universe with its own functional logic. The US dollar and the Federal Reserve appear quite established today, yet they are the product of a long and contentious history. On the other side of the ocean, EMU was not preordained, and the EU has become increasingly subject to debates and tensions similar to those that marked the United States' political development as a federal polity. This chapter argues that similarities between the two frameworks can actually be read

as the outcomes of similar political dynamics and concerns rather than as the result of an overwhelming economic rationality. In addition, certain key differences remain that can be interpreted as the products of enduring institutional differences between the United States and the EU. Whatever the future may hold for the Fed and for the ECB, a comparative analysis of the US and EU frameworks of monetary governance as they stand today can thus serve to reveal political dynamics.

In the following three sections, this chapter develops a comparative perspective on the politics of central banking in the European Union and the United States. First, it highlights the political origins of key similarities between EU and US central banking frameworks, including central bank independence. Second, it points out that the different relationships between central bankers and governments in the United States and the EU can be analyzed as different stages of federalization. Third, it suggests that different patterns of central bank accountability and behavior reflect different responses to the common challenge of democracy as it has emerged in the course of US and EU political development.

12.1 The political roots of structural similarities

The US Federal Reserve and the ECB are in the business of modern central banking. Through a variety of technical instruments, they provide financial institutions with short-term capital against a certain interest rate, which in turn directly impacts the rent cost that every business or person has to pay for borrowing money in the economy. However, Since this function is common to all modern central banks, it is not the most interesting commonality between the Fed and the ECB for our purposes. More intriguing are the rather striking structural similarities between these two central banks. On the face of it, the Fed and the ECB appear to be cast in roughly the same mold—both from an internal and from an external perspective.

Internally, the US and EU governance structures of central banking are strikingly similar, since both systems are based on a duality between central and decentralized bodies. In the United States, the most important decision-making body is the Federal Open Market Committee. Twelve people sit on the FOMC—the seven members of the Washington-based Board of Governors of the Federal Reserve System (including its chair); the president of the Federal Reserve Bank of New York; and four of the twelve the presidents of the regional Reserve Banks (who serve on the FOMC on a

rotating basis). The organization of the Fed is therefore an attempt to strike a balance between a national orientation—embodied by the Board of Governors—and a regional representation of interests—through Federal Reserve regional district banks. The European Union's central banking structure closely resembles that dual structure. The functional equivalent of the FOMC is the Governing Council of the Eurosystem. Currently, the Governing Council has eighteen members—the six members of the ECB's Executive Board (including its chair), and the governors of national central banks in the twelve countries that have adopted the euro. Unlike the United States, the national central bank governors are a majority on the Governing Council of the Eurosystem, but in any case decision-making is by 'consensus' in both cases and the federal inspiration is the same.

Externally, the relationship of both central banks to political bodies is similarly distant. Both the Fed and the ECB are independent central banks. Their executive officers—the governors in the United States and the members of the Executive Board in the EU—are political appointees, but they are entrusted with complete freedom in the fulfillment of their assigned tasks. The members of the Executive Board are appointed by Europe's heads of government for a period of eight years. In the United States, the chair and vice chair of the Board of Governors are appointed for a mandate of four years, but only among Board members who themselves enjoy a fourteen-year tenure in office. The governors must be confirmed by Congress, but this occurs only at the beginning of their mandates. As for the ECB's Executive Board members, the EP is entitled to conduct 'hearings', but is not legally able (strictly speaking) to invalidate the governments' choices or to dismiss central bankers in the course of their mandate. In addition, the independence of the ECB is particularly entrenched, since the Statute of the European System of Central Banks is a European treaty that can only be modified if all EU member-states agree to it. In both cases, then, American and European central bankers are purposefully removed from the mire of everyday politics.

12.1.1 From rough-and-tumble politics to the common mold

How can such striking structural similarities be interpreted? One way is to consider these similarities from the perspective of economic rationality. This is a standard approach in economics. Typically, economists who study central banking ask whether institutional structures and policy choices are 'optimal' for the task of monetary governance and

macroeconomic steering of the economy. For example, central bank independence can be seen as a way of 'tying one's hands' in the face of a 'time consistency' problem; one way for governments to credibly establish their commitment to fighting inflation is to step out of monetary management altogether (Kydland and Precott 1977: 473–91; Giavazzi and Pagan 1988: 1055–82). From this perspective, the US Federal Reserve (like the German Bundesbank) can be seen as merely a precursor in the global movement toward central bank independence. More generally, this line of inquiry is very useful if the analyst's ultimate goal is to improve the economic performance of central banks in achieving aggregate social welfare or maximizing other economic criteria.

But whether this is a suitable approach in order to understand the *actual* development of central banking is debatable. Some scholars envision the US Federal Reserve System and the Eurosystem as relatively self-contained monetary orders that were purposefully designed with a view to maximizing economic performance. The euro and the dollar are both managed by independent institutions, removed from everyday politics. The creation of the Federal Reserve System in 1913 can be interpreted as the ultimate step of a rationalization process. Even after the gold standard was established in 1879, the US banking system still faced important financial imbalance and moral hazard problems, and the Federal Reserve was in a sense a way to solve these problems (Friedman and Schwartz 1962). Likewise, in the 1980s and 1990s, Europe's policymakers were struggling to come to terms with a new era of capital mobility and inflation. Thus, the creation of an independent central bank at the European level can be seen as the expression of functional economic requirements.[1] This interpretation is, in fact, perfectly consistent with a view of the European Union as a limited albeit particularly strong international regime, whose primary function is to further the economic interests of its member-states (Moravcsik 1998). And of course, in both cases, it is impossible to deny the existence of functional economic reasoning behind some of the key features of the Fed and the ECB.

Yet the central banks with which we have become familiar in the EU and the United States also have political roots and cannot be interpreted as pure products of economic rationality. In addition to being a currency, the euro is the most widely tangible manifestation of Europe's political unification process so far. This is not to say that Europe's system of political and economic governance is anywhere as unified as the United States. The United States is fully established as a federal system and the US dollar and the Federal Reserve are just two manifestations, among many others, of that federal

system. But even the familiar American federal institutions that we now take for granted actually took more than a century to emerge. The fact that the Federal Reserve was created only as late as 1913 illustrates the oft-forgotten difficulties of state-building in American history (Skowronek 1982).

The currency was the object of intense social unrest in the post-Civil War era and the establishment of the Fed in 1913 came after several decades of political struggles over the centralization of economic and monetary powers. From this perspective, the very existence of the euro signals the existence of an embryonic federal state in Europe, which may or may not develop into a full-fledged European version of political federalism.

In fact, many of the common features of the Fed and the ECB can be traced to distinctive dynamics of currency federalization that are shared by the United States and the European Union. In both cases, the historical emergence of America's and Europe's systems of monetary governance went hand in hand with a process of political unification and federalization. Internal and external structural similarities, then, do not reflect only a concern with economic effectiveness. More accurately, they express a pervasive dialectic between the appeal of centralized monetary policy powers and the discomfort with potentially excessive concentrations of powers—which happens to be a trademark of federalism. Underlying the structural similarities that we observe today, there is a common political subtext of balancing efficiency and representation. In turn, that political subtext played itself out differently in the historical processes that led to the birth of the Federal Reserve and the ECB.

In the US case, historical scholarship strongly suggests that the political subtext of federalism in central banking initially materialized in the form of class politics. In the late nineteenth century, the tide of populist discontent was swelling against big corporations that were accused of stifling small entrepreneurs and other economic freedoms. The currency had become an important focus of protest with the movement for 'free silver'. According to historian James Livingston, the creation of an independent Federal Reserve was essentially the class reaction of a rising national corporate elite to the political challenge posed by the populist movement (Livingston 1986). Faced with growing political threats to their interests, prominent members the new corporate elite started to draw plans for a reform of the banking system that would create the conditions for financial stability and continued control of the system at the same time. Other historians, like Richard Timberlake or Gabriel Kolko,

emphasize the prominent role of local interest groups like Wall Street (Kolko 1963; Timberlake 1993). In this line of argument, there was no unity among the financial elite. The Federal Reserve is seen as the outcome of a political struggle among different groups of financiers as much as a class response to the challenge of the populist movement.

While historians debate the question of which class or social group was most influential in engineering the Federal Reserve System, there is little doubt that class interests played a prominent role. 'Big business' reacted against the risk of 'big government' by entrenching a banking system that secured financial stability while at the same time ensuring that the new system would not interfere with the interests of business. First, the gold standard and the centralization of monetary policy at the national level enabled the new corporate elite to ensure a certain stability and effectiveness in the national banking system—something that the American public demanded because the self-regulating market was seen as ineffective in preventing financial crises.[2] Second, the independence of the Federal Reserve, in combination with a structure that empowered regional Federal Reserve banks controlled by local bankers, ensured that the new system effectively remained in the hands of the corporate elite. Elected officials were kept at bay both by the dual structure of the Federal Reserve System—which practically meant that political appointees would remain a minority within the system at large—and by the independence provision—which cut the umbilical cord between these appointees and the politicians who appointed them.

Just like in the United States, the federalization of central banking in the EU did not primarily stem from economic considerations—even though economic considerations were obviously not absent from the design of Europe's EMU.[3] In the EU case, the dialectic of federalism was born out of international political consideration as well as bureaucratic politics. Even though this is sometimes forgotten today, the appeal of sovereignty for the member-states of the European Union played an important role in the birth of the euro and the ECB.[4] As it had developed since 1979, the status quo of the European Monetary System was difficult to sustain in countries like France and Italy. In effect, the Bundesbank had become the 'bank that ruled Europe' (Marsh 1992). Very concretely, the Bank of France and the Bank of Italy were forced to align their monetary policies with that of the German Bundesbank. This subordination affected governments' degree of freedom in a variety of ways. In particular, fiscal policy was constrained for fear of triggering higher interest rates and/or currency speculation. For relatively small states like Belgium or the Netherlands,

the status quo was acceptable because they discounted the political costs of subordinating their monetary policies to Germany. This was not the case, however, for bigger countries like France and Italy.

Unless we take into account France's and Italy's sense of sovereignty, it is impossible to understand why EMU became such a high political priority for these countries in the late 1980s. In this sense, EMU was especially attractive for political rather than for economic reasons. This is not to say that EMU was economically irrational for France and 'weak-currency' countries. It did carry the promise of lower interest rates and of a more balanced monetary policy that would take their interests into account. But from a 'pure' perspective of economic rationality, a strategy of tying France's hands to the EMS was arguably a much less risky and less costly way to achieve the same outcome. The important fact is that many politicians (and voters) saw the status quo as unbearable, not because its economic costs outweighed its benefits—this was actually far from obvious—but because it involved a clear subordination to the will of Germany and to the markets. The context of German reunification started only after EMU was well on track, but it certainly heightened the stakes of EMU and the widely shared sense that it was important for Germany to reaffirm its commitments to the EU.

The paradox is that this political drive to regain a sense of sovereignty actually led to a transfer of sovereignty toward the ECB and the European level. The birth of the euro and the ECB was a way to allay this crucial concern over sovereignty while at the same time entrenching an orthodox monetary policy at the EU level. For those who were most concerned about sovereignty, this was the price to pay in order to get Germany on board. The structural characteristics of the ECB can thus be seen as the expression of a compromise between two political aspirations. To those who were most concerned about sovereignty, the euro was offered as a shield against currency crises and against the tyranny of the markets. Just as importantly, the supranational nature of the independent ECB, with the important role reserved for national central banks at the Governing Council, was intended to guarantee equality among member-states and to end the disproportionate power of the Bundesbank. Meanwhile, Germany successfully insisted on entrenching an independent ECB with a primary mission of fighting inflation squarely in the Maastricht Treaty. Whereas the US Federal Reserve Act of 1913 can be repealed or changed simply by an act of Congress, it would take a unanimous agreement among EU member-states to revoke the independence of the ECB or to change its statute.

12.2 Different relationships to government—different stages of federalization

While the Fed and the ECB appear to be cast in the same mold, this is not the case for the ways in which they relate to their respective political systems. The Fed's relationship to the US administration is strong and rather balanced. The Federal Reserve is independent, but its Board of Governors sits in the nation's capital and is constantly interacting with policymakers in the administration on an informal basis.[5] Of course, the Fed makes its own independent monetary policy decisions on the basis of its board's judgment of the best course of action. But the administration constantly feeds the Fed with its own statistics and there is a constant two-way dialogue between the Fed and the administration on economic policy. Even if the Fed and the administration disagree on the best course of action, the Fed makes its decisions in full awareness of the US government's policy priorities, which in turn increases the likelihood of a coherent macroeconomic policy mix between fiscal and monetary policies.

The issue of the dollar's exchange rate policy stance is particularly revealing of the balance between the Fed and the US government. While the Fed makes interest rate decisions completely on its own, it leaves exchange rate policy to the US government. The Fed chair generally refrains from making declarations on the relative value of the US dollar to other currencies; this is seen as a prerogative of the administration and the Secretary of Treasury more specifically. This is an important restraint of course, because the value of the currency has repercussions for the level of employment and for the price of imported goods and thereby on domestic inflation. But the value of the dollar is considered politically too sensitive to be left to the Federal Reserve and the US government has insisted on keeping this prerogative since the end of the Bretton Woods system of fixed monetary parities in 1971. Thus, the US government has often resorted to a strategy of 'talking up' or 'talking down' the dollar, depending on economic and political circumstances. In addition, the US treasury is able to intervene directly on foreign exchange markets on its own initiative—although most of its interventions are carried out in coordination with the Fed.

By contrast, the relationship between the ECB and other economic policymakers is lopsided simply because the ECB does not face a unified political counterpart responsible for other aspects of economic policymaking. From this perspective, the institutional architecture of EMU does not seem economically rational or even logically coherent. On the one hand,

the framework of monetary capacity is entirely centralized in the hands of the ECB. Eurozone member-states are all subject to the same interest rates set by the ECB. This centralization of monetary policy powers in Europe is very similar to the centralization of monetary powers in the US Federal Reserve. Yet aside from monetary policy, the broader framework within which economic policy is made in Europe has not radically changed. While common fiscal rules were introduced in the form of the 1997 Stability and Growth Pact, fiscal policy has remained mostly in the hands of the member-states. Different member governments have different priorities and are therefore unlikely to adopt the same fiscal policy stance. In addition, the Pact's rules were both very rigid and not extremely far-reaching, since individual member governments were not subject to any serious sanction mechanisms as long as their fiscal deficits remained under 3 percent of national GDP. The psychodrama in the fall of 2003, with Germany and France both breaching this limit without suffering any serious consequences, showed that the Pact lacked teeth and is arguably not the most appropriate tool for achieving good macroeconomic policies in the eurozone.

The fact is that today the ECB stands in remarkable isolation from the rest of the political system. Of course, this was the whole intent behind the strong independence provisions of the ECB. But in Europe this logic is pushed so far that it may be economically counterproductive. With its seat in Frankfurt, it is relatively removed from the hustle and bustle of Brussels' as well as national politics. Central bankers and politicians do talk on a very regular basis, especially within the context of the Eurogroup—the body that gathers the finance ministers of the eurozone member-states—and at more technical levels. But these discussions do not take place between two unified actors with clear priorities as in the United States, but between a unified central bank and a largely artificial cohort of governments. This is clearly revealed by the ongoing behind-the-scenes contest between the ECB and the government for the right to speak on behalf of the euro on the international stage. Thus far, both Wim Duisenberg and Jean-Claude Trichet, the first two successive ECB presidents, have claimed the title of 'Mr Euro'. The issue of the external representation of the euro is actually a gray area in the Maastricht Treaty, so this is perhaps not so surprising. Yet the contrast with the United States is striking, since EU governments have been unable so far to assert their voice in this area—although this may change with the appointment of Jean-Claude Junker as first nonrotating chair of the Eurogroup.

12.2.1 Political versus efficiency considerations

Why are the Americans apparently so much more adept in the management of the relationship between the Fed and the US government? Why did the Europeans choose such a lopsided design for EMU in the first place, and can it be changed? In fact, these differences are not really a result of incoherent European thinking. Rather, they are best explained by the fact that the EU and the United States today find themselves at very different stages of federalization. If we take a comparative federalism perspective, then, the lopsided design of EMU becomes easier to understand.

It is easy to fault the EU for the incoherent design of EMU, but the US system that we see today did not emerge all at once. In the US case, fiscal federalization took place before monetary federalization. Both processes were intensely political and chaotic. Despite two important precedents with the First Bank of the United States and the Second National Bank, genuine monetary federalization was only achieved with the creation of the Federal Reserve in 1913. The centralization of fiscal as well as monetary policy met a huge opposition, except in times of national crisis. Up until the mid-nineteenth century, the US federal government was unified but its budget was virtually nonexistent. In a recent paper, Kathleen McNamara highlights the importance of the US Civil War as a crucial impetus that led America on the path of centralizing economic policymaking (McNamarra 2004). The rapidly expanding financial needs of the American federal government in fighting the southern states provided an urgent security rationale for improving the extractive capacity of the American state. By the time the Fed was created a half-century later, it was facing an already well-developed federal government, one with unified fiscal policy powers that would further expand in the twentieth century with the conduct of two world wars and with federal programs like the New Deal.

In the EU, the situation is completely different, since the federalization of monetary policy means that fiscal policy has become the last bastion of national economic powers. Political opposition to the centralization of fiscal policy is very strong in Europe. As mentioned above, the member-states decided to centralize monetary policy to a large extent because they wanted to regain some freedom in the determination of their fiscal policies. Counting on the member governments' rational recognition of the economic benefits of a more centralized fiscal policy is beside the point, since there are deep collective action problems in this case. The Maastricht Treaty's provision for national fiscal autonomy was designed to reassert political discretion over the parameters of economic policy. This

situation may change over time, but it may take an economic or a political crisis. The member-states are unlikely to give their fiscal sovereignty away to central institutions merely on grounds of superior economic rationality. Everybody recognizes that some sort of collective fiscal rules like the Stability and Growth Pact are needed, but in hard times member-states are naturally tempted to defect. In addition, the EU is unlikely to follow the US trajectory of fiscal federalization through the build-up of defense expenditures, since the member-states also remain responsible for defense and foreign policy. Therefore, it may take quite some time before the ECB face a political counterpart in the same way that the Fed faces the federal government in the United States—if it ever happens.

12.3 Different patterns of central bank accountability and behavior—different responses to the challenge of democracy

So far we have seen that many of the similarities and differences between central banking in the EU and the United States can be traced back to an underlying political dialectic between federalization and state rights in the emergence of the two systems. But normal political life can also affect the political framework of central banking over time. Both the Europeans and the Americans ascribe value to the deepening of democratic ideals and this creates a challenge for central banking. Even independent central banks like the Fed and the ECB are subject to accountability and behavioral standards. Yet responses to the challenge of democracy have been different in the United States and in the EU.

In the United States, the Federal Reserve is independent from the government yet accountable to the US Congress. The Federal Reserve exists by virtue of Congressional act, namely the Federal Reserve Act of 1913. The Federal Reserve Reform Act of 1977 reasserted Congress's oversight role and redefined the Fed's mandate. The meaning of central bank accountability in the United States is far-reaching, at least in theory. Congress has the power to confirm or invalidate the appointment of the Fed's chair and can monitor its behavior or even change the Fed's mandate at any time. In practice, of course, this is done very rarely and the Fed actually has huge clout in macroeconomic policymaking and on the markets. Critics of the Fed's powers and actions always question whether it is held to a sufficient level of accountability.[6] Yet at least on a symbolic level, there is a strong relationship of accountability of the Federal Reserve vis-à-vis the US Congress.

In the European context, the issue of accountability has also been raised and the US accountability framework is often taken as a reference point. According to two ECB Executive Board members, 'independence and accountability are two sides of the same coin' and the ECB has the ambition to become 'the most transparent and accountable central bank in the world' (Issing 1999: 503–19: 505; Padoa-Schioppa 2000: 28). Ultimately, however, patterns of central bank accountability and behavior are quite different in Europe and the ECB does not always stand the comparison with the Fed. Consider for example the difference between Congressional hearings of the Fed and hearings of the ECB at the EP. In the United States, the power of Congress can be felt in the staging of Congressional hearings. The chair of the Federal Reserve stands in the witness box and must answer questions asked by a small number of Congressmen who sit above him like judges. These hearings last as long as the people's representatives deem necessary. In the EU, the president of the ECB addresses members of the EP from above. He sits on a platform, next to the chair of the Economic and Monetary Affairs Committee, and takes questions from the floor. The hearings only last two hours and MEPs are only allowed to ask two questions, which are therefore not very difficult to fudge. The contrast with the US situation could hardly be more striking.

If we now compare the two central banks' mandates and patterns of behavior, important differences also stand out. The Fed's mandate is extensive, since its task is not only to fight inflation but also to pursue growth and employment. This contrasts with the ECB's much narrower treaty-defined objective of 'price stability', with other objectives like growth and employment only permissible 'without prejudice' to price stability. On the one hand, it could be argued that in practice these different definitions do not matter much.[7] The Fed's defense of its growth-enhancement mandate is often largely a matter of rhetoric. There were times when the Fed acted as a hawkish inflation fighter–especially under Paul Volcker in the 1980s. The Fed can always argue that it is impossible to make progress on all fronts at the same time, and thus evade its responsibility. Conversely, ECB officials never miss an occasion to say that they pursue their 'secondary objectives' whenever possible. And the ECB has certainly demonstrated that it cares about growth, not just inflation—for example, cutting rates when the euro was first introduced to a much greater extent than most observers expected.

On the other hand, behavioral differences remain between the Fed and the ECB, especially in the pace of monetary policy adjustment. Most observers would say that the US Federal Reserve is very responsive to

cyclical developments. (Its critics say that the Fed is 'fickle'.) By contrast, the ECB's monetary policy is seen as very cautious and much less prone to dramatic changes in its monetary policy. (Critics would say 'overly conservative'.) Caveats are necessary of course, since the ECB has only been active since 1998 and the European economy has undergone much less pronounced cyclical upturns and downturns than the US economy in that period. But in comparison to Alan Greenspan's explanations of the Fed's monetary policy stance, the discourse of European central bankers is much more focused on inflationary risks and much less on the requirements of economic growth. Although it is still very early to judge, the ECB's cautious behavior does seem to reflect its narrower mandate.

12.3.1 Different responses to the challenge of democracy

The relatively stronger patterns of parliamentary accountability and responsiveness to political preoccupations in the United States so far can be explained by the fact that the EU and the US polities have a very different experience of the challenge of democracy. The Fed is more immersed within the US political debate, whereas the ECB is much more aloof from politics. This basic difference is expressed both in the formal institutional status of each central bank vis-à-vis the rest of the body politic and in the central bankers' conception of their own role within it.

First, the institutional status of the Fed leads to a stronger pattern of accountability to Congress than the accountability of the ECB to the EP. After almost a century of existence, the Federal Reserve is a well-respected public institution in the United States, yet it has no constitutional status whatsoever. As former chair Paul Volcker famously put it, 'Congress has made us, Congress can unmake us'. In Europe, the situation is almost reversed. Because the ECB was created as a result of the 1992 Maastricht Treaty, it is particularly entrenched. Treaties are the functional equivalent of constitutional documents for the EU and it requires a unanimous agreement between the member-states to change them. And yet the ECB is part of an EU political system that still lacks the historically produced power and legitimacy of its constituent member-states. All EU institutions remain relatively weak, including the ECB itself but also the body to which it is accountable, namely the EP. Despite the continuous upgrade of its powers since the 1980s, the EP does not in any sense match the power and prestige of the US Congress. The EP gained its oversight role over the ECB only by courtesy of the member-states and, furthermore, this oversight is

limited to mere 'reporting requirements'. All this explains the weaker patterns of accountability in the EU case.

Second, the self-definition of their role by central bankers in the EU is different in Europe and in the United States. While the Fed is an independent central bank, it has had to live with a particularly broad mandate that includes growth and employment as well as low inflation. In order to be effective, monetary policy must gain the confidence of financial market actors who have clear preferences and expectations. At the same time, America's central bankers have to live with the administration and Congress within a context of partisan politics. Thus, the Federal Reserve cannot really pretend never to be making trade-offs among its different objectives. While the breadth of its mandate makes the Fed vulnerable to political criticism, it also enables it to claim credit in times of economic growth. In Europe, the situation is very different because the ECB's mandate is narrower—with price stability defined as a 'primary objective'. But arguably even more important is the fact that central bankers have come to see a narrow technical definition of their task as a guarantee of their hard-won independence. Unlike their American counterparts, they are in an EU sphere where nobody has sufficient legitimacy to make clear—let alone partisan—policy choices. The consequence is that central bankers attempt to escape political debate and hard choices altogether.

The question is whether the EU patterns of central bank accountability and behavior will converge on the US model. It may be just a matter of time, since the situation that we now take for granted in the United States took a long time to solidify. Many politicians, especially among the Left in the EP, want to increase the accountability of Europe's independent central bankers. They can be counted on to work toward that goal, at least within the framework of the treaties. Meanwhile, the US model of accountability is not without flaw from a democratic perspective. The absolute independence of central banks may have become a necessary fiction, to paraphrase Hobbes—it may be best to accept the utopian premise that central bankers operate truly above the fray. But if the fiction is pushed too far, it tends to backfire. As long as the ideal of democracy remains a core concern, the frameworks that govern central banking will probably continue to evolve not only in the EU but also in the United States.

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The preceding comparison of the politics of central banking in the United States and in the EU has served to highlight three important points. First, the structural similarities between the two systems—central bank independence and the dual structure of governance—cannot be

explained merely in terms of functional economic requirements. In both cases, these structures have political roots; they can be explained in terms of class politics in the United States, whereas they can be seen as a result of international politics in the EU. Second, the different relationships that central bankers have with government officials reflect the fact that federalization has gone much further in the United States. Unlike the Fed, the ECB does not face a truly unified economic government with clear policy priorities—which in turn makes it probably more difficult to achieve a coherent policy mix. Third, patterns of central bank behavior and especially of accountability differ in ways that are not merely the result of different economic circumstances and legal frameworks. These patterns can also be seen as the expression of different and very timely responses to the challenge of democracy as it emerged in each polity.

More broadly speaking, the comparison carries important lessons for the way in which we study political economy and also, more specifically, the EU and the United States. Like all studies of comparative political economy, it is a welcome antidote against the widespread temptation to naturalize the established dichotomy between 'economics' and 'politics'. Central banks are economic institutions that obviously perform similar function, but they also have political origins and do not all belong in the same stock. The EU was born and remains a strange creature of international politics with its own developmental logic, so there is no strong reason to expect a complete convergence between the political practices of central banking across these two cases. Yet the comparison also suggests that the dichotomy between 'international' and 'domestic' politics is not always so stark. When we look at the US federal government today, we tend to forget that America's political development was long and rather chaotic. In the European Union, federalization has gone the furthest in the realm of money, which is probably the clearest sign of the European Union's potential for developing into a full-fledged federal state.

Notes

1. On central bank independence as a facet of a 'regulatory state' or as a consequence of the need to establish 'credibility', see for example, Majone (1996); and Maxfield (1997).
2. This is also Polanyi's interpretation of the emergence of modern central banking. See Polanyi (1944): xxx.
3. For a very complete history of Europe's march toward monetary union, see Dyson and Featherstone (1999).

4. For a more developed version of this argument, see Jabko (1999).
5. Joseph Stiglitz mentions the fact that, as chief economic adviser to President Clinton, he had weekly lunch meetings with the Fed. See his chapter on 'the all-powerful Fed' in Stiglitz (2003: 56–86).
6. See for example Stiglitz (2003: 85). For a frontal critique, see Greider (1987).
7. In response to a question about the ECB's accountability relative to the US Federal Reserve, former ECB President Wim Duisenberg declared, 'Politically speaking, I do not think there is much difference in the degree of accountability vis-à-vis the Parliaments of the countries or the areas involved' (Hearing of W. F. Duisenberg, president of the ECB, European Parliament, February 17, 2003)

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13

Fiscal Federalism in the United States and in the European Union

Mark Hallerberg

13.1 Introduction

One relevant comparison between the European Union and the United States focuses on fiscal relationships among different levels of government. On the European side, there is an increasingly vigorous debate about the proper design of intergovernmental fiscal relationships. Countries that adopted the euro have given up both monetary and exchange rate policies as possible tools to influence the economy. This development increases both the importance of fiscal policy and the necessity of using it. Based on concerns about possible negative externalities from fiscal policy use, the member-states instituted a set of fiscal rules at the European level designed to constrain the ability of governments to run large budget deficits. There seems to be a growing consensus that the new rules require reform, but there is little consensus on what form that reform should take. On the American side, recent fiscal crises in most state governments and many local governments have led both academics and policymakers to reexamine the American system.

This chapter compares fiscal federalism in the United States and in Europe. At first glance, one may think that the United States approximates an ideal fiscal federation. There is a strong central government, and fiscal relationships among the different levels of government seem clear. The European Union, in contrast, would appear to be only an international organization in which the member-states make all decisions, and one could question whether it is even appropriate to speak of the European Union as a fiscal federation.

This chapter argues that it is useful to consider each polity as a fiscal federation both for practical and for theoretical reasons. In practice, EMU has led to the creation of explicit rules at the European level to regulate fiscal behavior at *all* levels of government. The rules in place at the 'central' government level in Europe (if one may conceive of the European Union as 'central') are, in fact, more extensive than those in place in the United States. The view of the European Union as an economic agent therefore is generally in accord with Jakbo (this volume). On a more theoretical level, the fiscal federalism literature is a useful lens through which to examine fiscal relationships in both polities regardless of whether or not one can speak of a true 'federation'. One cannot ask why one or the other falls short of an ideal fiscal federation without first assessing where a given polity fits the ideal and where it does not. One conclusion of this chapter also is that state governments (member-states in the EU, state governments in the United States) are important actors on both sides of the Atlantic. Key fiscal rules, such as no bailout restrictions, are credible only so long as they are in the best interests of states governments both in the European Union *and* in the United States. This chapter therefore echoes the emphasis on the important role of the constituent parts discussed in Sbragia (this volume).

The chapter begins with a brief review of the theoretical literature. It then evaluates the development of fiscal federalism based on the actors that are most important in each polity, the relevant arenas in which these actors make decisions, and the rules that structure fiscal relationships. In the American case, there is not a single set of fiscal rules across all states, and federal legislation that amounted to a bailout of many state governments in 2003 leads one to question whether it remains an ideal that others should strive to emulate. For the EU member-states, there are two recent developments that deserve more treatment. The first is the introduction of fiscal rules at the European Union level. The second is how those rules have created incentives for changing national–subnational relationships within these countries. After a discussion of the fiscal rules in member-states, the chapter discusses recent changes in intra-national intergovernmental relations that have arisen after EMU, including the introduction of 'internal stability pacts' in four countries.

13.2 Theory

'Fiscal federalism' is a term that has several uses. First, the fiscal federalism literature can simply describe the horizontal (across local governments)

and vertical (across different levels of government) fiscal relationships among levels of government. A second use of the term is normative. It prescribes the ideal level of decentralization as well as the structure of that decentralization in institutional terms. There is a general presumption that the tasks of government should be at the lowest level of government that encompasses the relevant benefits and costs. Focusing on the role of the central government, the most prominent scholar of fiscal federalism, Wallace Oates (1972, 1999; see also Musgrave 1959), emphasizes that the central government should manage macroeconomic policy and should ensure some redistribution for the benefit of the poor. Importantly, both functions belong at the central government level because only the central government can provide them. Lower levels of government lack either the tools (exchange rate policy, monetary policy) or the means to execute such policies.

Subnational governments, conversely, should provide local public goods. More heterogeneous populations imply greater decentralization because preferences concerning the level of local public good provision vary. Oates (1972) even goes so far as to insist that, absent negative spillovers, local government provision of public goods improves welfare over central government provision. Efficiency gains are possible with decentralization because it is more likely that actual policy will match preferred policy. There is some literature that contends that these types of efficiency gains lead to real changes in governmental structure. Such local provision is also preferable from a democratic theorist's perspective. Local government is the closest to the people and potentially the most accountable to voters (Inman and Rubenfield 1997).

The qualification that decentralization is preferable when there are no externalities is critical, and indeed much of the literature deals with what to do with such externalities. In general, the central government should adopt policies that minimize negative externalities from the actions of governments at both the national and subnational levels. In practice, there are often concerns with the effects of spending and the effects of borrowing in one governmental unit on other units. A crisis in one locality may affect all members of a given state or country through lower credit ratings, a weakened currency, and a general drop in confidence in the country that could affect the investment climate for years to come. If the effects of the crisis on other governments are severe enough, it could put pressure on the others to bail the failing locality out. This pressure leads to a classic *moral hazard problem*, where localities are tempted to be more undisciplined in their fiscal behavior than if a bailout were not available.

Recent empirical work suggests that the structure of intergovernmental relationships concerning taxation and borrowing affects the likelihood and the severity of these negative externalities. One important feature of the system is whether or not there are binding restrictions (or so-called *hard budget* constraints) on the ability of lower levels of government to borrow. Eichengreen and von Hagen (1996*a*) assert that fiscal restrictions from the national government are necessary only when subnational governments do not have their own resources, and, in their study of thirty-six federations, they find that such restrictions are absent when subnational governments have access to their own tax base.

A second mechanism that is linked to the discussion about whether subnational governments have their own resources is the potential use of market pressure to discipline such governments. Rating agencies rate the bonds of American state and local governments. Bond ratings vary across local governments based on the markets' expectation of the ability of the local government to repay its debts, and they make it more expensive for profligate governments to issue bonds. They can also refuse to finance debt, which is what occurred when Philadelphia tried to float $375 million in bonds in September 1990 (Inman 1995). Market discipline would seem to be a way to buttress, or even replace, hard budget constraints.

As this summary indicates, the recommendations from the theoretical literature are fairly straightforward. Governments should impose hard budget constraints and, where possible, supplement them with well-functioning, integrated capital markets.

Section 13.3 assesses the workings of fiscal federalism in the United States and in the European Union based on several features described above. The first is the extent to which the central government has the capacity to manage macroeconomic policy. The second feature is the extent to which fiscal transfers occur in practice. The third issue is the design of fiscal relationships and the extent to which they reduce possible negative externalities. Important questions here concern what actors design the fiscal relationship, the interests of those actors, and the arenas in which they interact. Wibbels (2003) and Rodden, Eskeland, and Litvack (2003) each provide important reminders that politics, and not abstract economic theory, determines the actual shape that fiscal relationships take in federations. Hard budget constraints in particular will not appear unless it is in the best interests of the actors themselves to have such constraints. As Wibbels (2003: 477) notes, 'hard budget constraints become binding on national and regional governments when enough

regions are opposed to federal bailouts that their representation at the national level is sufficient to ensure that their preferences shape federal policy.'

13.3 Practice in the United States and the European Union

Given most of the theories reviewed above are American in origin, one would presuppose that the United States fits many of the precepts of fiscal federalism. In contrast, there are legitimate questions as to whether the European Union can be considered a federation (Menon this volume), let alone a 'fiscal federation'. Indeed, until the early 1990s, it made little sense to speak of a fiscal federation in the European Union. Economic and Monetary Union, however, has changed the terrain and introduced new fiscal relationships among the Union's constituent parts. The EU is not an ideal fiscal federation by any means, but a comparison with the American case illustrates both how the EU is different and how the United States could function under a different set of fiscal rules. I begin with a review of the clear institutional differences between the two countries and how those structure the set of actors that make relevant decisions. I then discuss whether the American and European cases fit the precepts of fiscal federalism outlined above and whether the institutional differences explain the fiscal relationships we observe.

As Menon (this volume) and Sbragia (1993, this volume) explain in more detail, the European Union's decision-making mechanism places a greater stress on the constituent parts, that is, on the member-states. Member-states agree unanimously to treaties, which detail the competencies of the different EU institutions. All legislation must receive the Council of Ministers' approval, and member-state governments constitute the Council. The European bureaucracy is tiny, and it must rely on member-state enforcement of most laws. A ECJ can rule in a given policy area only so long as it is discussed in the treaties. To understand what the European Union can do in the fiscal realm, one must first begin with the treaties. There were three Treaties member-states agreed to over the course of roughly a decade between 1991 and 2001, in fact, and, as we shall see later, these changes affected fiscal relationships.

The United States, in contrast, has a constitution that establishes the relationships among different constituent parts. There has not been a significant revision to it in the form of an amendment in many decades. Under the US Constitution, state representation at the federal level is

indirect. State governments do not elect representatives directly to the upper chamber of the legislature as they do in some countries (e.g. Germany); instead, voters in states directly elect senators. State constitutions similarly often structure the relationship between state and local governments. Courts interpret both state and federal constitutions and have played an active role in adjudicating on fiscal issues for over a century.

With these institutional differences in mind, one can evaluate the fiscal relationships based on fiscal federalism precepts at the EU level, member-state, and state levels in the European Union, and at the federal and state levels in the United States. Beginning with capacity to affect the macroeconomy, the American federal government does have the ability to use fiscal policy to smooth economic shocks as fiscal federalist theory would suggest. Indeed, this ability has increased over the past century—while the federal government accounted for about one-third of total government spending in 1900, it accounts for roughly half of government spending today (Strumpf and Oberholzer-Gee 2002: 1). A common currency throughout the fifty states and a Federal Reserve Bank System mean that the central government makes both fiscal and monetary policy (see also Jabko this volume). The American system foresees no role for state governments to address macroeconomic shocks. There is no formal arena, and no informal attempt among governors, to coordinate state fiscal policies. There is, however, a growing sense that state government fiscal activity *should* be more coordinated. While the federal government has the most power to influence the macroeconomy with fiscal policy, there is some evidence that fiscal policy at the state level does affect both state GDP and through both positive and negative externalities, the GDP of other states (Levinson 1998). The intellectual justification for the transfer of funds from the central government to the states that occurred both in the 1970s and in 2003, in fact, was to smooth out the budget cycles in the states so that the tax increases and/or spending cuts that were necessary at the state level to meet state constitution-mandated balanced budgets did not exacerbate the national recession.

In terms of assistance to the poor, actual practice in the United States does not adhere entirely to what fiscal federalists would proscribe. The federal government provides funding for assistance to the poor, but this assistance is often in the form of block grants made to the states as well as waivers to some federal requirements. Moreover, this is not the only public source of funding assistance—local and state governments have their own programs in some locales that mean that assistance across the United States is not uniform (Oates 1999). On the state side, roughly one out of

five dollars goes to a means-tested health care program, Medicaid (National Governors Association and National Association of State Budget Officers 2004: 3). There continue to be concerns at the state level about unfunded federal mandates as well as about the credibility of federal government commitments to help fund programs such as Medicare.

In contrast to the United States, the EU's budget is clearly not designed to smooth out macroeconomic shocks, and there is no direct EU assistance to the poor. These functions are left to the member-states. Even if the Union had such aspirations, its budget would today be too small—under the current fiscal framework, which the member states affirmed at the 1999 Berlin European Council meeting, the budget cannot be larger than 1.27 percent of European Union gross national product (GNP). Moreover, the spending that does exist is targeted to narrow competencies like agriculture, structural funding, and development aid. For this reason, Moravcsik (2001: 169) notes that the European Union's fiscal capacity is 'insignificant'.

Because of monetary union, however, there is some movement toward fiscal policy coordination at the member-state level. As the Treaty of Maastricht notes, '[m]ember states shall regard their economic policies as a matter of common concern and coordinate them in the Council' (Article 99 (1)). In terms of the relevant actors and the relevant arena, The Broad Economic Policy Guidelines ('Guidelines' in short) that the Commission proposes, and that the Council passes, each year represent the institutional mechanism for this economic coordination. Moreover, at the end of the year, the Commission evaluates, and the Council approves, comments on whether member-states have complied with the Guidelines.

This process is generally considered toothless, and one could argue that, in concrete terms, there is little difference in practice between the United States and EU—while the United States does not have such a coordination device for the American states, the European Union countries simply ignore theirs. The only formal sanction possible is for the Council of Ministers to issue a public rebuke of a member country, which is intended to amount to a public shaming. This mechanism has been used just once, in 2001, against Ireland. The Guidelines indicated that the Irish economy was in danger of overheating, and it stated that the country should tighten fiscal policy. The Irish refused to run a budget surplus higher than 4 percent of GDP, which is what the Guidelines required. The public declaration on Ireland had, if anything, the opposite effect than was intended—the complaints strengthened the position of the government domestically and enabled it to maintain the status quo. While the sanction mechanism

is clearly lacking, the process does force policymakers, and specifically the relevant economic and finance ministers, to talk about the economic priorities of the member-states as a collective.

The third relevant dimension concerns the relationship between the central government and lower levels of government in terms of a hard budget constraint. In the United States, this dimension is dynamic and has evolved over the past two centuries. The American Constitution places no formal fiscal restrictions on state fiscal policies, and this includes the absence of a ban on federal bailouts of state governments. Yet, despite the lack of a federal government ban on bailouts, there is a general assumption that the federal government will not bail out state governments. Moreover, all the states with the exception of Vermont have some form of restriction on deficits, designed to make bailouts unnecessary.

If the federal government did not impose the restrictions, why are they in place? There are two sides to story, with Wibbels (2003) providing the bailout explanation and Sbragia (1996) focusing on the state government side. In the 1840s, several state governments faced a fiscal crisis after a decade of investment projects, such as railroads, canals, and state banks. Nine states defaulted while another four partially repudiated their debts. The states in greatest trouble clamored for a federal rescue, and a full bailout would have required the federal government to issue $200 million in stock. The proposal that Congress debated was to give state governments $1 million per senator and $651,982 for each representative (Wibbels 2003: 492–3). The federal government failed, however, to act on the states' behalf. Wibbels attributes this outcome to two factors. First, there was an uneven distribution of the debt burden, with a clear majority of states having either no debt or little debt, while a minority had unsustainable levels. Second, the system of representation at the national level guaranteed that the low-debt states could block a federal bailout of the high-debt states. Legislators from low-debt states refused to support the proposed grants to the states, and the bill never came up even for a formal vote.

There is a common perception that there have been no federal bailouts of states governments in the United States. This perception is wrong, and some discussion of the details is useful to understand how fiscal federalism works in the United States. In the last thirty years, there have been two occasions where the federal government gave mostly unrestricted grants to the states during what the states perceived as fiscal crises—in the 1970s, under the General Review Sharing and Antirecession fiscal acts, and again in 2003, under the Jobs and Growth Tax Relief Reconciliation Act of 2003.

The most recent legislation required the federal government to provide $10 billion in unrestricted funds and another $10 billion earmarked for state Medicaid programs. Given that the total deficits of states at the beginning of 2003 were estimated at between $21.5 billion (National Conference of States Legislatures 2003) and $25.7 billion (General Accounting Office 2004: 1), this inflow of cash represented a large portion of the states' fiscal gaps. There were several possible ways to distribute the funds, such as according to the depth of the fiscal crisis, the amount of employment lost, or fiscal capacity in terms of the size of the tax base. The method of the payout was similar to that proposed in the 1840s, namely *every* state ultimately was to get funding regardless of the depth of their actual fiscal troubles, and the distribution of funds was according to population, with adjustments that assured that small states received a minimum payment. As in the 1840s, this design was probably meant to maximize support both in a House of Representatives that is distributed according to population and in a Senate, where, because every state has two senators, the small population states have proportionately more influence. Wibbels (2003) explains that most states would need to benefit from the bailout in order for them to support a bailout. Indeed, most states did face budget difficulties—forty-one states had budget deficits that they had to close in April 2003. Moreover, those deficits were generally severe, with thirty-seven states having gaps that were above 5 percent of the states' general fund. Because all states but Vermont are expected at least to propose a balanced budget, most statehouses faced the unpalatable choice either of deep expenditures, visible tax increases, or some combination of the two. The federal legislation meant to assist the states passed at the end of May, or just a month before the fiscal year was to begin in most states. Wibbels' argument nicely explains the recent federal bailout.

Going back to the 1840s and to the fiscal crises in some states, the reaction of statehouses to their financial plights came relatively quickly, and came in the form of state-supplied restrictions on deficit financing that were constitutional in nature. In 1840 no state constitution had such restrictions. By 1857, nineteen state constitutions had been amended to include them, and states admitted after 1864 generally included debt limits in their constitutions (Sbragia 1996: 41). It is noteworthy that, in contrast to the European case that is discussed below, statehouses passed these restrictions on themselves. The federal government does not impose such restrictions on the states. Nevertheless, while the restrictions continue to exist today, one should be careful in assuming that they are created, and executed, equally. Forty-four states do require that the

governor submit a balanced budget to the legislature, but only twenty-four prohibit state governments from carrying forward deficits (Besley and Case 2003: 57).

In terms of fiscal restrictions and fiscal relationships in the European Union, the situation is seemingly the reverse—the 'central' government imposes explicit rules on the state governments, while no state government has rules in place that require balanced budgets. Is it important to remember that it is the member-states themselves that agreed to such rules at the EU level in the form of two consecutive treaties. In the Treaty of Maastricht dating from December 1991, Article 103 is generally considered a 'no bailout clause'. It states that neither the European Union nor other member-states will rescue a state that faces default. Monetary union eliminates the ability of member-states to maintain independent monetary policies, and there are fears that member-states will be tempted to run larger budget deficits than in the past. A given country would accrue the benefits of additional spending, but the costs of bailing out a country in crisis may be borne by all of the member-states (Eichengreen and Wyplosz 1998). Several countries feared that the no bailout clause would not be credible once they introduced the common currency, and there was increasing pressure to adopt additional rules to prevent a bailout.

With this argument in mind, the member-states agreed to a Stability and Growth Pact as part of the Treaty of Amsterdam roughly five years after Maastricht. The Pact sets a limit of 3 percent on budget deficits for general government, which includes national, state, and local levels. It also sets a mechanism to punish countries that exceed these limits. If the Commission recommends, and the Council of Economic and Finance Minister's (ECOFIN) agrees, that a country has an 'excessive deficit', it must make a noninterest bearing account that can be as high as 0.5 percent of GDP depending on the size of the deficit. If the country does not make corrections that ECOFIN considers corrective, this deposit becomes a fine. The SGP does allow countries to run larger deficits when economic conditions are weak, but 'weak' is defined quite stringently as a contraction in the economy of 2 percent.

In practice, the European-level rules have not succeeded in restricting member state deficits to below 3 percent. While some smaller countries like Portugal and the Netherlands have had their problems, the main culprits have been France and Germany. They both violated the limits for 2002 and 2003, and most forecasts (including the forecasts of both governments) assume that the deficits will remain above 3 percent through at least 2005. The European Union's reaction to these violations provides a clear lesson

about the power of the member-states. The Commission recommended that the punishment mechanism begin against France and Germany, but ECOFIN refused to back the Commission in November 2003 when the other large countries (Italy and the United Kingdom) joined Franco-German opposition to beginning the punishment mechanism.

Wibbels's argument (2003) was written with the American system in mind, but this outcome provides European support to his argument that such fiscal rules do not work if the constituent states themselves do not want them. Under the qualified majority rules that were in place in a European Union of fifteen states, three large states together represented a blocking majority. The European Commission, for its part, took the offending states as well as the Council to court. The crux of the Commission's complaint was that ECOFIN agreed to the Commission's diagnosis of the fiscal problems but refused to begin the process to impose penalties. The Commission interpreted the Treaties as indicating that the penalty process is automatic once there is agreement on the problem. In July 2004, the Court ruled the procedure the Council used to reach its conclusions was incorrect. Importantly for the member-states, however, the Court also stated clearly that 'Responsibility for making the member states observe budgetary discipline lies essentially with the Council'. The SGP remains in place, although there are several proposals to reform it that range from an agreed (re)interpretation of the existing texts to a radical renovation.

Another comparison between the European Union and the United States is revealing. The American case indicated that state governments imposed restrictions on local governments after an important court case established that local governments were subordinate to state governments. One question to ask in the European context is whether the Stability and Growth Pact, and the EMU legal framework more generally, has had an effect on intergovernmental relations within member-states. The restrictions are on general government, not central government, debt. This means that, even if a central government has a budget balance, deficits at the subnational level could push a country's deficit level over 3 percent of GDP. This arrangement begs the question which level(s) of government should pay any potential fine the European Union might impose on a country. This interdependence under the SGP makes the various levels of government more sensitive to the fiscal plights of each other.

Has EMU led to the imposition of hard budget constraints in European Union countries? Table 13.1 presents data for the EU15 in 1991 and in 2001. There are three general types of regimes. Under the first, subnational

governments are required to run balanced budgets. Under the second regime, national governments restrict borrowing at the subnational level. In practice, it is usually the case that subnational governments need permission from the national finance ministry to borrow funds. The third regime is an internal stability pact that specifies the level of debt each level of government is allowed to have. Unlike the first two regimes, where subnational governments have no discretion to borrow on their own, the third regime includes such governments as actors in their right.

The table indicates that the fiscal constraints on lower levels of government have tightened since the beginning of EMU. Three countries added the ability of the central government to restrict borrowing, while another three added negotiated internal stability pacts. A non-EMU country, Sweden, introduced a balanced budget requirement for local government in 2000. The only two countries that do not have one of these three restrictions on subnational borrowing in place in 2001 are Finland and Germany. Finland has a small subnational sector. Deficits at

Table 13.1. Relationship between national and subnational governments

	Balanced budget required, regional governments		Central government can limit borrowing		Internal stability pact negotiated between natl and subnatl govt	
Country	1991	2001	1991	2001	1991	2001
Austria	No	No	No	No	No	Yes
Belgium	Yes	Yes	Yes	Yes	No	**Yes**
Denmark	Yes	Yes	Yes	Yes	Yes	Yes
Finland	No	No	No	No	No	No
France	Yes	Golden Rule	Yes	Yes	No	No
Germany	Golden Rule	*No*	No	No	No	No*
Greece	Yes	Yes	Yes	Yes	No	No
Ireland	No	No	No	**Yes**	No	No
Italy	No	No	Yes	Yes	No	**Yes**
Luxembourg	Yes	*No*	No	**Yes**	No	No
Netherlands	Golden Rule	Golden Rule	No	Yes	No	No
Portugal	No	No	No	Yes	No	No
Spain	No	No	No	Yes	No	**Yes**
Sweden	No	**Yes**	No	No	No	No
UK	Golden Rule	Golden Rule	No	**Yes**	No	No

Note: Changes from 1991 to 2001 that increase the fiscal constraint appear in **bold,** while changes that decrease the constraint appear in *italics*. Data are from Von Hagen (1992) and Hallerberg, Strauch, and von Hagen (2001). It should be noted as well that the second question was worded somewhat more restrictively in von Hagen (1992) than in Hallerberg, Strauch, and von Hagen (2001)—the former asked whether subnational governments must get central government authorization to borrowing, while the latter asked whether the government can restrict subnational borrowing. The latter subsumes the former.

* Germany did introduce a 'National Stability Pact' in 2002.

the Länder level continue to be a problem in the Federal Republic, and in 2002 the different levels of government did agree to a 'National Stability Pact'.

Internal stability pacts are especially relevant for a study of comparative federalism because they represent explicit agreements between central and subnational governments. Four countries—Austria, Germany, Italy, and Spain—have put them in place. Italy is potentially the most interesting case because there seems to be a move from soft to hard (or at least harder) budget constraints. There is almost nothing written comparatively about these developments, and I consequently review each case briefly below.

In terms of the structure of financing at the regional level, through the early 1990s Italy had what amounted to soft budget constraints. Regional governments received transfers from the central government to pay for most expenditures. When regions ran deficits, they expected, and usually received, government bailouts. Regions first began to receive their own resources in the form of some earmarked taxes, such as revenues from car registrations, in 1992. In 1996–7, the regions for the first time received a tax they could levy on their own as well as a share of the national income tax. By 2000, almost all central government transfers to the regional governments ended. The point of the system was to move away from yearly discussions between the national government and the regions about the size of transfers to the regions (and, by implication, how much previous debt would be bailed out) to a system where the regions would levy their own taxes to pay their own expenditures.

The framework that helped define the overall relationship between the different levels of government was the Domestic Stability Pact (*Patto di Stabilità Interno*). It was first introduced in 1998 'to coordinate the budgetary policies carried out at the different levels of government' (Balassone and Franco 1999: 249). In terms of deficits, the regions and the central government negotiated deficit targets for the various levels of government. If Italy were forced to pay a fine to the European Union, the distribution of that fine would be based on the proportion that a given level of government exceeded its target. Most regions in 1999, 2000, and 2001 either reached their targets or came close (Compania was the consistent exception). The targets were deficit targets, however, not spending targets, and overall spending increased rapidly, with health care spending representing the biggest increase. The system in Italy remains in flux, with inflation in health costs a persistent, and as yet unresolved, issue. Yet it does seem that the old practice of regular central government

bailouts is dead. The internal stability pacts also specify which governments would pay any European Union–imposed fine. This represents a blunt punishment mechanism for regions to keep their deficits in check.

The Spanish system is similar, if also more complicated. The regional governments have grown in importance since Spain's new constitution in 1978 mandated their creation. While they represented only 3 percent of general government spending in 1981, they spent roughly one out of every three government euros by 1999. Prior to 2002, the regions and the central government conducted regular negotiations approximately every five years on the terms of their fiscal relationship. They established the terms of conditional transfers, tax resources, borrowing rules, and expenditure responsibilities for the regions. Over time, there have been two changes. The first is a gradual decentralization of both spending and taxation. As of 2002, all regional governments are responsible for education and health spending. The second development is a widening difference between the terms for 'ordinary' regions and for autonomous regions. While the central government continues to collect taxes and to provide many basic services in the ordinary regions, matters are different in the autonomous regions. The Basque Country and Navarro now collect most revenue and cover most expenditure. They pay a portion of their revenue to the national government to pay for items that the central government provides such as defense.

The story is similar for Austria, although the actual targets are tighter than in Italy and Spain at the regional level and real domestic fines are possible regardless of the implications for the European level. The regions and the central government agreed to the first Domestic Stability Pact in 1999 and revised it in 2001. According to the 2001 version, the states (Länder) promised in aggregate to run budget surpluses of at least 0.75 percent of GDP each year from 2001 to 2004 while the local governments are to run balanced budgets. There are also explicit enforcement mechanisms. If a government at either level fails to reach its target, it can be fined in proportion to the amount it exceeded the target. Whether a fine will ever be imposed is open to question. The important catch is that the fine is only imposed if a commission, which is composed of representatives from the central, state, and local governments, unanimously approves the fine. Moreover, there is an escape clause that allows a state to renege on its obligations during an economic slowdown (Journard and Kongrud 2003: 217).

In contrast to their Austrian counterparts, the German state and local governments have not adopted as rigorous a procedure. The German National Stability Pact is generally considered the weakest of the internal

stability programs. It does set spending targets for both the national and state governments, but there is no punishment mechanism for either side. Finance Minister Eichel proposed in June 2004 that Länder governments be forced to pay their portion of any EU fines in the future. This proposal would parallel the agreements in Italy and Spain, but Länder governments remain skeptical (the *Der Spiegel* June 14, 2004).

These internal stability pacts are found only in the European case. American states are not divided into additional territorial units that have some constitutionally guaranteed autonomy as are some European federations. I have provided here only an outline of the arrangements in four countries, but interesting questions for future research include both how Stability and Growth Pact and other EU-level policies affect fiscal policy in preexisting European federations as well as the practical effects of any new arrangements.

13.4 Conclusion

This chapter has reviewed the development of fiscal federalism in the United States and Europe. The discussion indicates that the United States would seem to approach the ideal of a fiscal federation more so than the European Union. Looking at the evolution of the fiscal relations the past decade, the European Union countries are adding fiscal restrictions on their subnational governments while little has changed in the American context. The creation of the common currency as well as the broader effects to coordinate economic policy certainly have spurred changes in the European Union. The member-states remain the key players in the discussion, but they have supported a limited set of rules at the European Union level that are, at least in theory, more restrictive than anything the federal government imposes on lower levels of government in the United States.

The European rules and relationships are by no means fixed, however, and there are three findings from the American experience that have specific lessons for Europe. First, federal government bailouts depend on the distribution of preferences among representatives from the states for those bailouts even in a federation like the United States where the state governments do not have formal representation at the central government level. If enough European states believe that it is in their best interest to bailout a defaulter like Italy, they will do so regardless of the formal rule in place. Second, fiscal rules that seem to make a difference in policy

outcomes arose within the populations themselves at the state level. There was no need for a central government imposition of balanced budget requirements and the like. These restrictions have been remarkably resilient, dating back more than a century in most cases. Indeed, recent work on domestic fiscal rules in European Union countries suggests that the domestic rules, rather than any EU-imposed Pact, are a better predictor of fiscal performance (Hallerberg 2004; von Hagen and Wolff, 2004). Third, the experience of local governments suggests that externally imposed limits lead to creative ways for governments to avoid the limits. This would suggest that creative accounting would increase after the introduction of the externally imposed Stability and Growth Pact. Indeed, a recent chapter suggests that such tricks are becoming more common in Europe. One would usually expect that changes in the deficit levels would translate into changes in debt levels. The enforcement of the Stability and Growth Pact, however, focuses only on the deficit levels. Von Hagen and Wolff (2004) find that the correlation between deficits and debt level has decreased significantly under the Stability and Growth Pact. The reason is that many states are passing along items that previously would have been booked under 'deficits' directly to the debt burden.

There is also a lesson from Europe for the 'old' fiscal federation of the United States. The European example indicates some limited success at the coordination of fiscal policies, and this is especially true if one considers all levels of government and the growth of internal stability pacts. Efforts to coordinate fiscal policies across states can allow more planning than what occurs under the American system, where there is no practical coordination and where bailouts can indeed arise from the central government.

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14

Agricultural Biotechnology: Representative Federalism and Regulatory Capacity in the United States and European Union

Adam Sheingate[1]

The conflict over genetically modified foods and crops in many ways exemplifies the divide that separates Americans and Europeans on a variety of issues. Whereas US regulators have adopted a promotional approach to agricultural biotechnology, seeking to develop the commercial potential of this new technology, European officials have adopted a precautionary stance toward the potentially unknown risks of genetic modification. For some, these divergent approaches reflect different perceptions about science and technology or cultural associations with food and the environment on either side of the Atlantic. Others explain this divergence by pointing to levels of public trust, the mobilization of interest groups for and against, and the orientation of policymakers toward risk and regulation in the United States and Europe (Jasanoff 1995; Echols 1998; Pollack and Shaffer 2000; Lofstedt and Vogel 2001; Bernauer and Meins 2003).

My purpose in this chapter is not to challenge the validity of these arguments, but rather to assess the effects of institutional differences on the divergent approaches to the regulation of agricultural biotechnology. In particular, I focus on two sets of institutional characteristics I argue contributed to the divergent policy approaches in biotechnology: (*a*) the representative components of federalism and (*b*) the character of federal regulatory capacity in food safety. With respect to the former, it is the

degree to which constituent units participate in policy decisions made at the center that most clearly distinguishes the variety of federalism found in the European Union from the United States. In the case of biotechnology, this element of European federalism provided a mechanism through which public anxiety and member state opposition led to a de facto moratorium on GM foods and crops by the late 1990s. By contrast in the United States, where individual states do not play a formal role in regulatory decisions, the skeptics of genetic modification enjoyed few points of access to the policy process. This contributed to a policy focused on the commercial potential of agricultural biotechnology.

Compounding the effects of representative federalism, however, was the relative immaturity of federal regulatory capacity in the European Union. Lacking such capacity, particularly in the area of food safety, Commission officials created a regulatory framework for biotechnology that became increasingly difficult to sustain amidst mounting consumer concerns and divergent member-state preferences. When coupled with the representative elements of European federalism, specifically the numerous veto points built into the regulatory process, biotechnology policy in the EU collapsed under the weight of an institutional stalemate, leading to a de facto moratorium on genetically modified foods and crops by the late 1990s. In the United States, on the other hand, American policymakers could draw on a long history of federal involvement in consumer protection and food safety to subsume the products of biotechnology under the same regulatory instruments as those for foods and crops produced with conventional methods. More important, perhaps, the federal authorities responsible for biotechnology in the United States enjoyed a reputation for scientific expertise and regulatory efficacy that helped them to assuage public concerns about the uncertain effects of genetic modification.

For students of the EU, these findings should come as no surprise. Scholars have long noted the pitfalls of decision rules that require the assent of constituent units for central government action as well as the persistent weakness of European regulatory authorities and their widely perceived lack of legitimacy in the wake of recent food scares and other scandals (Scharpf 1988; Skogstad 2003). However, the divergent experiences with biotechnology draw our attention beyond the *formal* characteristics of institutions alone. In addition, the case of biotechnology highlights an important *temporal* dimension of institutional development.

Due to the complexity and uncertainty surrounding genetic modification, institutional reputation is a critical component of regulatory capacity in biotechnology. Bureaucrats will be able to make regulatory

decisions only when politicians and mass publics trust that 'agencies will execute its tasks competently, provide innovative solutions to reduce uncertainty, or command the allegiance and confidence of its citizens' (Carpenter 2001:17). Such reputations do not emerge fully formed out of a moment of agency creation. Instead reputation and regulatory capacity evolve incrementally over time. Whereas American regulators enjoyed a long history of consumer protection, European officials faced the complexity and uncertainty of agricultural biotechnology before they had developed a reputation for regulatory capacity, making it difficult to convince a European public leery about the safety of genetically modified foods and crops.

In Section 14.1, I briefly describe how responsibility for the regulation of agricultural biotechnology is distributed across various levels of government in the United States and the European Union. This brief discussion of federalism explores some of the regulatory issues in biotechnology and reveals some basic similarities between US and EU federalism. Subsequently, I turn to the representative components of federalism and describe how the role of member-states in the regulatory process contrasts sharply with the limited participation of individual American states in regulatory decisions. Moving beyond the formal characteristics of institutions, I turn to the historical development of regulatory capacity in food safety and consumer protection. This temporal component of institutions sheds light on a key difference separating the United States and European Union: agency reputations and their relationship to regulatory capacity in biotechnology. In the conclusion, I consider the implications of biotechnology policy for our broader understanding of the European Union. In particular, I address whether the moratorium on genetically modified foods and crops was a sign of institutional weakness or an expression of member-state prerogatives consistent with a distinctly European vision of federalism.

14.1 Federalism in US and EU environmental and biotechnology policy

Federalism describes a set of institutional arrangements that distribute political authority across multiple levels of government. In both the United States and European Union, the supremacy of national or supranational authority in some areas is balanced by the preservation of powers for the states and member-states in others. And in both the United States

and EU, courts play a critical role in adjudicating jurisdictional conflicts and enforcing regulations. We see these characteristics of federalism—the supremacy of federal authority, the reserved power of the constituent units, and the role of high court adjudication—clearly illustrated in the case of environmental and biotechnology policy.

In the United States, for example, a number of laws passed in the 1960s and 1970s established federal standards for air, water, or the handling of toxic substances. The Federal Insecticide Fungicide and Rodenticide Act (FIFRA), for example, regulates agricultural chemicals and expressly preempts states from imposing additional labeling requirements from those approved by the EPA (7 USCS § 136v(b)).[2] However, FIFRA's preemption provision also leaves room for state pesticide regulation. Specifically, FIFRA allows a state to 'regulate the sale or use of any federally registered pesticide or device' (7 USCS § 136v(a)). This seeming contradiction has been the subject of several court cases that have attempted to define the boundaries of federal preemption in pesticide regulation.[3] Other federal environmental policies similarly establish federal standards while carving out state-level prerogatives. Famously, the 1967 Clean Air Act Amendments established a floor for auto emissions while allowing California to maintain its higher standards; subsequent amendments gave other states the option to adopt either the federal standards or the higher California ones (Vogel 1985; Chanin 2003: 712–20).

Whereas US environmental policy has a statutory basis, environmental protection in the European Union has enjoyed a constitutional imprimatur since the 1987 Single European Act. Article 2 of the Treaty of Rome sets forth 'a high level of protection and improvement of the quality of the environment' as a central task of the Community, and Article 95 (ex-Article 100a) authorizes Community directives and regulations to achieve environmental goals (Treaty of Rome, Article 2 and Article 95 (ex-Article 100a)). However, Community action in the environment does not fully preempt member-state law or prevent them from passing more stringent environmental requirements. Article 30 (ex-Article 36) of the Treaty stipulates circumstances under which a member-state may enact national provisions that erect prohibitions or restrictions on imports in contravention of the common market. These include 'the protection of health and life of humans, animals or plants' (Treaty of Rome, Article 30 (ex-Article 36)). Moreover, Article 174 (ex-Article 130r) requires that environmental measures include a safeguard clause that permits member-states to maintain or enact national provisions for protection of the environment provided the member-state can convince the Commission of their

scientific basis (Treaty of Rome, Article 174 (ex-Article 130r), Article 95, paragraphs 4 and 5).

Of course, disputes over the legality of safeguard provisions as well as other matters of environmental enforcement are left to the ECJ to decide. Article 226 (ex-Article 169) of the Treaty permits the Commission to bring infringement proceedings against member-states for failure to comply with EU legislation and Article 228 (ex-Article 171) empowers the ECJ to fine member-states that continue to violate EU law after an ECJ infringement decision.[4]

The example of environmental policy is helpful because it parallels many of the issues in the regulation of biotechnology. Like chemicals or pollutants, biotechnology policy seeks to establish federal regulatory authority over the possible environmental or health risks of genetic modification. In the United States, in fact, federal authority for biotechnology regulation rests in part on environmental statutes like FIFRA and the Toxic Substances Control Act (TSCA) (Office of Science and Technology Policy 1986). Similarly in Europe, EU biotechnology policy derives its authority from the same Treaty provisions, Article 95 (ex-Article 100a), as many environmental directives.[5]

However, federal authority still leaves room for (member) state-level biotechnology policies. In the United States, thirty-four states had more than seventy biotechnology statutes on the books as of 2003. Of these, thirteen states had legislated specific regulatory requirements for biotechnology such as permitting or notification for the environmental release of genetically modified organisms.[6] Moreover, given the nature of FIFRA preemption, a state might try to prohibit growing certain kinds of GM crops even if it has received EPA approval. A 1992 court decision, for example, noted that, 'FIFRA expressly authorizes state pesticide regulation. . . . Consequently, a state could prohibit the sale of a pesticide within its borders.'[7] Given this reading of FIFRA, a state might make a similar claim for a GM crop. In fact, a recent ballot initiative passed in California declared the entire county of Mendocino to be GM-free. Meanwhile, the California Department of Food and Agriculture recently declined a petition by a biotech firm to grow rice genetically modified with a human protein to treat diarrhea (Elias 2004a and 2004b).

However, in other areas, state regulation of biotechnology is more limited. For example, FIFRA only applies to plants genetically modified to have the properties of a pesticide. The Coordinated Framework for the Regulation of Biotechnology, a policy announcement issued by the White House Office of Science and Technology Policy in 1986, established a product-based regulatory approach that subsumed biotechnology under

existing environmental and food safety statues (Office of Science and Technology Policy 1986).

In so doing, the White House split regulatory authority over biotechnology among several executive agencies. In addition to the EPA, which administers FIFRA and TSCA, the US Department of Agriculture (USDA) and the Food and Drug Administration (FDA) regulate biotech crops and foods under the Plant Pest Act (PPA) and the Federal Food Drug and Cosmetic Act, respectively.

As a result, different kinds of biotech products fall under different statutory jurisdictions. For example, the EPA only regulates GM crops that have the properties of a pesticide. Other GM crops that do not have the properties of a pesticide are the responsibility of the USDA under the PPA. Moreover, whereas FIFRA establishes a regulatory floor, the PPA establishes a regulatory ceiling. In the former, Congress intended 'to leave the states the authority to impose stricter regulation on pesticides uses than that required under the Act.'[8] By contrast, the preemption language in PPA stipulates that, 'A State . . . may impose prohibitions or restrictions . . . that are consistent with and *do not exceed* the regulations or orders issued by the Secretary [of Agriculture]' (7 USCS § 136v; 7 USCS § 7756, emphasis added). In the case of Monsanto's Roundup Ready soybeans modified to withstand the effects of Roundup herbicide, for example, such language would likely preempt state prohibition of the most widely planted GM crop.

In the case of EU biotechnology policy, member-states retain a more significant role in the regulatory process. Prior to the de facto moratorium imposed in the late 1990s, a firm wishing to market a biotech product would submit an application to the competent authority of a member-state. Only after this initial safety assessment by the member state did an application move to the Commission for Europe-wide approval. Under the new European regulations on agricultural biotechnology, the European Food Safety Agency (EFSA) will take over this initial regulatory risk assessment, although final approval decisions will remain with the Commission in conjunction with a regulatory committee and, when necessary, the Council (Regulation 1829/2003/EC). A more important source of member-state authority in biotechnology, however, comes from the inclusion of safeguard clauses that allow member-states to 'provisionally restrict or prohibit' the growing or sale of a genetically modified crop within its borders. In the case of Directive 90/220, which governed the environmental release and marketing of GM crops until 2001, six member-states invoked the safeguard clause nine times.[9]

Member-state concerns over the safety of genetic modification have resulted in a number of conflicts with the Commission that required ECJ adjudication. In *Greenpeace France* v. *French Ministry of Agriculture*, for example, the Court decided that a member-state could invoke the safeguard provision even if its own regulatory authorities had earlier made a favorable assessment of a GMO and forwarded the application to the Commission for marketing under EU law.[10] However, the decision in *Greenpeace* also affirmed that it was the Court's responsibility to decide whether national regulatory procedures for approving genetically modified foods and crops were consistent with EU standards. The ECJ also has been active in matters where the Commission has found member-states to be in violation of EU biotechnology directives. In fact, the Commission has brought thirteen infringement proceedings against seven countries for failing to transpose biotechnology directives into national legislation. In all but one, the Court found member-states in violation of EU law.[11]

Courts have played an important role in adjudicating disputes over biotechnology in the United States as well. In particular, the courts have been an important locus of activity for the opponents of biotechnology. In the 1980s, for example, anti-GM activist Jeremy Rifkin filed a number of lawsuits designed to block federal approvals of biotechnology products. In the first such case, *Foundation on Economic Trends* v. *Heckler*, Rifkin's lawyers argued that NIH approval of a genetically modified bacterium had taken place without an environmental impact statement as required by the National Environmental Protection Act. Although a federal judge granted an injunction against the NIH, this was later vacated on appeal (587 F. Supp. 753 (DC Cir. 1984); *Foundation on Economic Trends* v. *Heckler*, 756 F.2d 143 (US App. DC 1985).

A number of similar lawsuits filed by Rifkin during the late 1980s and early 1990s were also unsuccessful. In general, courts have appeared unwilling to undermine federal regulatory authority in biotechnology. A 1996 Federal Appeals Court decision, *International Dairy Foods* v. *Amestoy*, struck down a Vermont law that required labels on milk produced from cows treated with rBST, a genetically modified growth hormone that boosts production (92 F.3d 67 (US App. 1996). In a recent victory for anti-GM activists, however, a district judge decided farmers could claim damages in state courts for certain losses caused when a GM corn variety inadvertently entered the food supply in 2000 (*In re Starlink Corn Products Liability Litigation* 212 F. Supp. 2d 828 (Northern District Illinois, Eastern Division 2002).

In sum, there are clear similarities between the United States and European Union in the way regulatory authority is distributed across

various levels of government. In the case of biotechnology, US and EU laws establish rules for the growing and marketing of GM products. At the same time, the constituent units in US and European federalism retain important regulatory functions. Courts address the ambiguous boundary that remains between federal and (member) state authority and can provide a venue for opponents of biotechnology. Although EU member-states arguably enjoy greater latitude in their ability to prohibit growing GM crops than American states do under US federalism, this is mostly a difference of degree rather than in kind. In both systems, constitutional provisions set forth federal authority in some areas, yet preserve state and member-state autonomy in others. High courts—the Supreme Court and ECJ—play a critical role in adjudicating jurisdictional disputes in both systems.

These political dynamics are characteristic of federal systems, a fact noted by US and EU scholars alike. Writing about the United States, for example, Robert Kagan has described the American policy process as one of 'adversarial legalism' which he describes as 'policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation' (Kagan 2001: 3). More than simply the product of a litigious culture, Kagan argues, adversarial legalism rises out of the fragmented authority of the American political system, namely federalism. According to Kagan, 'organizationally, adversarial legalism typically is associated with and is embedded in decision-making institutions in which *authority is fragmented* and in which *hierarchical control is relatively weak*' (Ibid: 9). Recently, Daniel Kelemen has used the concept of adversarial legalism to describe the growing importance of legal remedies in European regulatory politics, especially in the area of environmental policy (Keleman 2004: 159).

In the case of biotechnology, however, Kagan's formulation presents something of a puzzle. If the formal distribution of regulatory authority looks similar in the United States and Europe, this authority has been wielded differently on either side of the Atlantic. Although both systems display the characteristic fragmentation found in federal systems, conflicts between central authorities and constituent units over biotechnology have been more prevalent in Europe than in the United States. European member-states have either been slow to put EU biotechnology directives into force (as evidenced by the Commission's resort to infringement proceedings) or invoked the safeguard clause to prohibit the growing or marketing of GM crops within their borders. By contrast, with the exception of Vermont's attempt to require labeling for rBST milk, no state has challenged federal regulatory authority or adopted a standard of testing and approval that exceeds federal standards. In part, this may

reflect widespread acceptance of biotechnology across the American states that diminishes conflicts with the federal government or obviates the need for court-ordered enforcement of biotechnology rules. However, as mentioned above, several states have enacted biotechnology legislation and states like Vermontor or California have displayed a more precautionary approach to genetic modification. Moreover, the American states retain a regulatory role in biotechnology and in certain cases could arguably ban a GM crop.

That none have done so suggests that we look further to understand the divergent approaches to biotechnology in the United States and European Union. As I describe in Section 14.2, it is the representative components of federalism that enabled member-states of the European Union to challenge regulatory decisions on biotechnology. Although some American states like California or Vermont may have a more circumspect view of genetic modification, they lack the same opportunities to influence federal policy enjoyed by EU member-states where the large number of veto points in the European regulatory process permitted countries concerned about the health and environmental effects of agricultural biotechnology to block the approval of GM foods or crops. As I describe, this element of representative federalism contributed directly to the breakdown of EU regulatory policy in biotechnology.

14.2 Representative federalism: (member) states in the policy process

Federal systems vary in the degree to which they provide constituent units a voice in the policy process. In German federalism, for example, most policy decisions require the assent of the *Länder* governments, representatives of which comprise the *Bundesrat*. Such an arrangement stands in sharp contrast to American federalism where policy decisions do not require agreement by the states, and state influence in federal policy decisions is limited to ad hoc negotiations with federal agencies or informal lobbying of Congress or the Executive. Nor does the system of direct election to the US Senate provide for the representation of states qua states. Instead, individual senators are the directly elected representatives of state *constituencies*. By contrast, members of the *Bundesrat* represent the institutional interests of *Länder* or state *governments*. As Fritz Scharpf has noted, this representative quality of German federalism has an obvious parallel with European institutions such as the Council of Ministers. More

important, Scharpf identified two essential characteristics of such joint-decision systems: (*a*) central government action requires the agreement of constituent governments and (*b*) the agreement of the constituent governments must be unanimous or nearly so. Such decision rules strongly bias the status quo and make adaptation exceptionally difficult in the face of differing interests and changing circumstances (Scharpf 1988: 254).

These elements are clearly evident in the case of biotechnology where European regulations require member-state assent for the approval of genetically modified foods or crops. As indicated in Figure 14.1, the rules governing the regulation of biotechnology in the European Union through the 1990s included multiple points at which a member-state could effectively oppose the approval of a particular GM product. Member-states had sixty days to register an objection against an application that had been forwarded to the Commission with a favorable judgment. Following an objection, the Commission forwarded the application to a scientific committee. If the scientific committee view was favorable, the Commission submitted a draft decision for product approval to a regulatory committee composed of representatives of the member-states (Directive 90/220/EEC, Articles 13 and 21). EU scholars have debated whether these regulatory committees and other elements of the 'comitology procedure' are a forum for supranational deliberation or a way for the Council to ride herd over a potentially wayward Commission (Joerges and Neyer 1997: 609–25; Pollack 2003: 125–55). Although the truth likely resides somewhere in the middle, regulatory committee decisions on biotechnology have reflected distinct member-state concerns and often reproduced the pattern of member-state preferences evident in the Council and elsewhere. Put simply, scientific experts from countries that adopt a more precautionary approach to biotechnology are more likely to reject applications for GM products within the regulatory committees. In a February 2004 committee decision on GM corn, for example, the Belgian, Spanish, French, Irish, Portuguese, British, Finnish, Swedish, and Dutch representatives voted in favor of authorization, Denmark, Italy, Austria, Luxembourg, and Greece voted against, and Germany abstained.[12]

If a regulatory committee failed to reach a qualified majority in favor of an application, or failed to act at all, the Council voted on the draft proposal. Here again, member-states had an opportunity to weigh in on regulatory decisions. However, in the event that the Council could not reach a decision, the Commission could approve the application and authorize EU-wide marketing of the product. Of course, even after

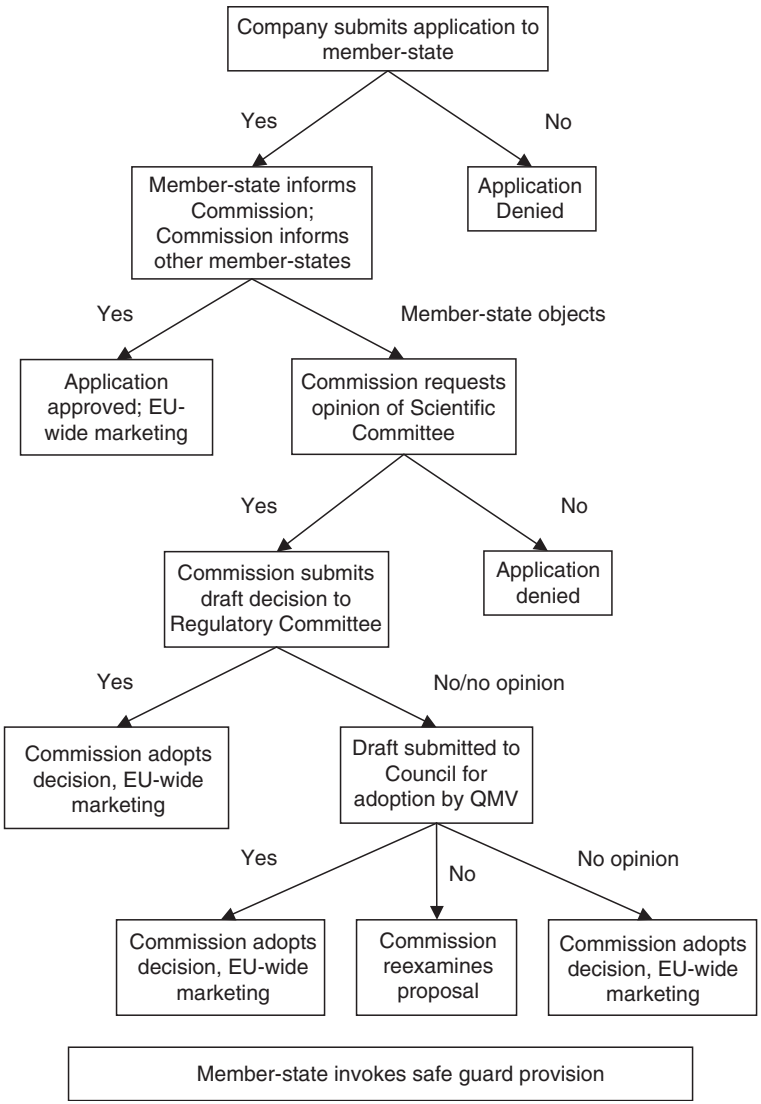

Figure 14.1: EU rules for marketing GM crops, 1990–2003

Commission approval a member-state could invoke the safeguard clause and temporarily ban a GM product within its borders. Evaluation of safeguard measures followed a similar procedure as the approval process, with Commission opinions on their legality subject to the comitology procedure and/or Council approval.

New regulations governing genetically modified foods and feed differ slightly from the procedures sketched out above. The most important change, perhaps, is the role of the new European Food Safety Agency. As mentioned above, EFSA performs a risk assessment on applications for genetically modified foods and crops, submitting its opinion to the Commission and other member-states. Final approval, however, remains with the Commission and member-states retain ample opportunities to weigh in on approval decisions. In addition, the new regulations include 'emergency measures' that, like the safeguard clauses, enable member-states to suspend the marketing of a previously approved GM food or feed, subject to scrutiny by the Commission and its regulatory committees, if they are deemed to pose a serious risk to human or animal health or the environment (Poli 2003).

Like Scharpf's 'joint-decision trap', these procedures for the regulation of biotechnology have had crippling effects on European policymaking. In particular, the breakdown of the European regulatory regime in the late 1990s was in many ways a direct consequence of the multiple veto points and the representation of member-state interests in the biotechnology approval process. Beginning in 1996, concerns emerged among the member-states over a proposal to approve the marketing of a biotech corn produced by the Swiss company Ciba-Geigy. Although the Commission drafted a proposal for marketing the GM corn, a regulatory committee was unable to reach a decision on its approval. Consequently, the Commission forwarded the application to the Council, which despite overwhelming opposition to the proposal (only France, which had originally forwarded the application to the Commission, voted in favor) nevertheless sent the dossier back to the Commission.[13] After several months of delay and three additional reports from scientific committees, the Commission authorized the marketing of the GM corn without additional input from the Council.[14]

Austria voiced the loudest complaints against the Commission decision and in early 1997 invoked the safeguard provision to ban the import of the GM corn.[15] But with member-state opinion on biotechnology still divided, neither the regulatory committee nor the Council could reach a decision on the legality of the Austrian claim. Two years later, in February 1999, the Commission finally ordered Austria (and Luxembourg, which had also invoked the safeguard clause) to remove the ban on imports of GM corn.[16] By this time, however, member-state concerns over the safety of GMOs had prompted the Commission to draft a new biotechnology directive. With the effective breakdown of the European regulatory

process, the Commission called a halt to its approval procedures, putting in place a de facto moratorium on GM foods and crops in the European Union.[17] Six years later, the Commission effectively lifted the moratorium with the approval in May 2004 of imports of a genetically modified corn for food use only.[18]

This sequence of developments stands in stark contrast to the evolution of biotechnology policy in the United States during the 1990s. To be sure, most states have promoted the commercial development of biotechnology. In fact, an active area of state policymaking in recent years has been the passage of laws intended to criminalize the destruction of crops by anti-GM activists.[19] Nevertheless, there is variation across the American states in the acceptance of biotechnology. As mentioned above, Vermont passed legislation that required labels on rBST milk, but the law did not survive court challenge. Meanwhile, the recent ballot initiative in California has yet to face judicial scrutiny. However, if federal regulatory decisions in the United States were subject to the same procedures as the European Union, a more precautionary approach to biotechnology in the United States is possible. If, for example, FDA approval of rBST or biotech rice required the assent of the fifty state secretaries of agriculture under population-weighted voting, one could imagine a coalition of California, Vermont, and perhaps a few others sufficient in size to block a biotechnology product. In other words, the representative components of federalism in the European Union and the United States contributed to divergent approaches to biotechnology regulation during the 1990s.

Yet formal institutional differences alone do not fully explain the very different politics surrounding agricultural biotechnology in the United States and European Union. Even casual observation confirms that Europeans harbor deep suspicions about the effects on genetic modification on human health and the environment even as Americans have by and large accepted the safety of genetically modified foods and crops. In depth examinations of public attitudes toward biotechnology have revealed, moreover, that gaps in levels of trust in various actors are critical for understanding national differences in perceptions of biotechnology (Priest, Bonfadelli, and Rusanen 2004). However, levels of trust themselves reflect the characteristics of institutions. Rather than simply a function of formal rules, public trust is linked to the historical development of organizational reputations for regulatory capacity. As I discuss below, public trust in regulatory authorities and the concomitant acceptance of agricultural biotechnology in the United States reflects a

long history of federal involvement in consumer protection and food safety that stands in sharp contrast to the European Union today.

14.3 Federal regulatory capacity in the United States and European Union

As scholars of American political development point out, federal regulatory capacity in the United States did not emerge fully formed; rather, it developed over time, sometimes haltingly, through institutional and political conflicts (Skowroneck 1982). Even then, the pattern of state building has been uneven, with pockets of regulatory capacity emerging in a few agencies and departments where the gradual accumulation of successful policy innovations helped establish political legitimacy and relative autonomy from politicians and organized interests (Carpenter 2001). In the case of the United States, the agencies responsible for agricultural biotechnology historically enjoyed such reputations for regulatory expertise and policy efficacy; reputations that in some cases date from the early-twentieth century.

The importance of these reputations for expertise and efficacy and their relation to regulatory capacity can be seen in public opinion on biotechnology in the United States. In 2003, respondents to an American survey on agricultural biotechnology revealed significant misgivings about genetically modified foods and crops. For example, only 25 percent of respondents favored the introduction of genetically modified foods in the US food supply. This skepticism reflected a generally limited knowledge of biotechnology: only one-third of respondents reported having heard anything about genetically modified foods sold in grocery stores and only one quarter believed they had ever eaten genetically modified foods. In fact, once survey respondents were given information about the prevalence of genetically modified foods in the food supply, their support for agricultural biotechnology increased. Informed that, 'more than half the products at the grocery store are produced using some form of biotechnology or genetic modification,' the number of respondents who believed that GM foods were basically safe jumped from 27 to 44 percent (Pew 2003).

This jump in approval reflects broad public trust in the regulatory authorities responsible for agricultural biotechnology in the United States. Put another way, informed that genetically modified food is already in the food supply, many people assume it must be safe. In fact, the survey revealed public support for even stricter government regulation of

agricultural biotechnology than is currently the case. For example, 89 percent of respondents believed that the FDA should require companies to submit safety data before genetically modified foods are allowed on the market and 48 percent of respondents said they would be more likely to eat genetically modified foods if the FDA changed its rules so that the submission of safety data was mandatory rather than voluntary (Pew 2003).

For a nation historically wary of central state authority and generally believed to embrace free market principles, these US results present something of a surprise. Moreover, the trust expressed in regulatory authorities in the United States stands in sharp contrast to European sentiments about government regulation of biotechnology. A 2002 Eurobarometer survey found that barely half of respondents thought that the European Commission was 'doing a good job for society' in biotechnology policy, less than half of respondents felt the same about their national governments. Although not strictly comparable, the European and American surveys do suggest lower levels of trust in public authorities in Europe than in the United States, a conclusion supported by public sentiments toward different kinds of actors. Whereas respondents to the US survey ranked government regulators higher than consumer or environmental groups as reliable sources of information of biotechnology, European respondents expressed the opposite sentiment (Gaskell, Allum, and Stares 2003).

Probing deeper into the sources of this trust, Americans' faith in government regulation of biotechnology appears to revolve around a particular agency, the FDA. Whereas 63 percent of respondents said they trusted what government regulators said about biotechnology 'some or a great deal', fully 83 percent of respondents similarly trusted the FDA.[20] This high regard for the FDA reflects that agency's long history of federal involvement in the regulation of food additives, pharmaceuticals, and other issues of health and safety. From the campaigns against adulterated foods in the early-twentieth century through the Thalidomide scandal of the 1960s, the FDA developed a robust reputation for consumer protection firmly rooted in the scientific expertise of its staff.

Recent research on the federal bureaucracy in the United States has examined this relationship between reputation and regulatory capacity. In his book, *Forging Bureaucratic Autonomy*, Daniel Carpenter explored why central administrative capacities in the United States emerged in particular departments and agencies of the federal government. According to Carpenter, these pockets of bureaucratic autonomy shared certain

characteristics. In particular, middle level bureau chiefs and agency heads that consistently secured incremental policy innovations established reputations for policy efficacy. These reputations, in turn, allowed bureaucrats to recruit and retain skilled staff and forge diverse coalitions among politicians, interests groups and other supporters that afforded them with the requisite political legitimacy to expand the scope of agency activities (Carpenter 2001).

An early example of how bureaucrats grounded their policy innovations in reputations and networks was the USDA, which by the late nineteenth century was widely recognized as a repository of scientific knowledge within the federal government. In particular, the department's Bureau of Chemistry developed a reputation for expertise in consumer safety and adulterated foods. Largely through the political efforts of the Bureau's enterprising chief, Harvey Wiley, Congress passed the 1906 Pure Food and Drug Act prohibiting interstate commerce in misbranded or adulterated food and drugs. In the 1930s, the Bureau was renamed the FDA and, under the Federal Food Drug and Cosmetic Act of 1938, its regulatory remit expanded considerably. In the 1960s, FDA action to keep Thalidomide off the US market prompted Congress to pass new rules requiring manufacturers to prove the safety and efficacy of new drugs before they could be placed on the market. Located today in the Department of Health and Human Services, the FDA remains the principal federal agency for consumer protection in food and drugs (Ibid).

Significantly, the same departments and agencies with a long-standing reputation for scientific expertise and consumer protection play the lead role in biotechnology regulation in the United States today. Although space does not permit a full recounting of the development of biotechnology policy, a brief summary will illustrate how regulatory responsibility came under the jurisdiction of the USDA and FDA, departments and agencies with extensive experience in the administration of federal statutes for the protection of human health and food safety. Lacking a similar degree of regulatory capacity at the EU level, European biotechnology policy came to rely on national regulatory agencies and various committees of experts for scientific risk assessment and other aspects of the regulatory process.

During the 1980s, the politics of biotechnology looked remarkably similar on both sides of the Atlantic. In both places, policymakers weighed the promise of biotechnology as a strategic sector for economic development against the uncertain risks that accompanied the manipulation of genetic material in new ways. A nascent interest group politics arrayed

a loose coalition of environmentalists against a relatively new biotechnology industry. Regulatory confusion left unclear exactly where jurisdictional authority over this new technology should reside (Cantley 1995; Patterson 1998; Jones 1999).

In fact, biotechnology had its supporters and detractors in both the United States and Europe. Within the institutions of the European Community, opposition to biotechnology was concentrated in the European Parliament and the newly created Environmental Directorate (DG XI) of the European Commission. Meanwhile, officials within the Directorates for Industrial Affairs, Agriculture, and Research and Development (DGs III, VI, and XII) took a more positive view toward the commercial opportunities of biotechnology (Cantley 1995: 540–9). Similarly in the United States, concerns about the potential risks of biotechnology were centered in Congress, where Representative Al Gore held a number of highly visible hearings in the mid-1980s, and the Environmental Protection Agency, which as early as 1983 contemplated the regulation of genetically modified organisms under the TSCA. Meanwhile, officials in the USDA, FDA, and the Reagan White House saw biotechnology as a key area of international economic competition (Jones 1999: 145–50).

Against this similar political backdrop, however, US and European biotechnology diverged in the late 1980s. In the United States, the 1986 Coordinated Framework for the Regulation of Biotechnology subsumed biotechnology under existing environmental and food safety statues and split regulatory authority over biotechnology among three agencies: the EPA, the USDA, and the FDA. This division of authority was due in large part to the efforts of the Reagan White House, which took a keen interest in biotechnology policy. Through the interagency Biotechnology Science Coordinating Committee, the White House effectively marginalized the EPA in the regulatory process and elevated the role of FDA and USDA, agencies and departments keen to promote the commercial potential of biotechnology (Jones 1999: 226–65).[21]

Meanwhile, the European Commission contemplated regulatory instruments that specifically addressed the potential risks of genetic modification. With little controversy, the Environmental Directorate became the *chef de file* for drafting the directive on the environmental release and marketing of genetically modified crops. Consequently, environmental concerns exerted an important influence over European biotechnology policy; officials who might have taken a less precautionary view of genetic modification were either unaware of these developments or preoccupied with other issues (Cantley 1995: 564). Whereas the United States adopted

a product-based approach that treated GM foods and crops the same as products produced by conventional means, the two European directives eventually promulgated in 1990 adopted a process-based approach by which any genetic modification would trigger regulatory review (Jasanoff 1995).

In sum, the creation of a regulatory framework for biotechnology was, in part, a product of political struggles over jurisdiction. But these decisions also reflected a wide gulf that separated regulatory capacity in the United States and European Community in matters of food safety and consumer protection. Whereas federal agencies like the FDA had regulatory experience dating back almost a century, there were no European institutions that could perform a similar regulatory function in biotechnology. Consequently, the testing and approval of agricultural biotechnology remained with the competent authorities in the member-states before Commission review and Europe-wide approval. Today, the Commission is trying to build its institutional capacity with the creation of several regulatory agencies (Majone 1997). Although risk assessments for biotechnology products are now the responsibility of the new European Food Safety Agency, such an alternative was unavailable to European policymakers in the 1980s.

Differences in these initial institutional endowments, I suggest, shaped the subsequent evolution of biotechnology policy as well as the divergent public perceptions about genetic modification in the United States and European Union. The longer history of federal capacity in the United States made it possible to develop a product based approach to biotechnology using existing regulatory authority. A probiotechnology White House settled jurisdictional disputes in favor of agencies with a reputation for scientific expertise and a long history of involvement in consumer protection. As the survey evidence above suggests, locating authority in the FDA and USDA also helped reassure a public uncertain about the effects of genetic modification and made possible the further development and commercialization of agricultural biotechnology. By contrast, the European Union lacked both reputation and regulatory capacity in biotechnology. As described above, European biotechnology directives left scientific decisions about risk assessment to the competent authorities of the member-states as well as bodies of national experts organized under the comitology procedure. Without an established authority of its own, the Commission lacked a reputation as an independent source of expertise to evaluate the safety of genetically modified foods and crops.

However, as the final arbiter of whether to approve a biotechnology product, the Commission was forced to rely on the same conflicting scientific evidence that divided national experts and produced the deadlock in the Council. As a result, the decision by the Commission to approve a transgenic corn in 1996 after a lengthy and unresolved debate about its environmental effects appeared unwarranted, prompting Austria and others to invoke the safeguard clause and eventually leading to the moratorium on approvals of genetically modified foods and crops.

Although a number of scholars have pointed to the relationship between levels of trust and public acceptance of biotechnology, the sources of this trust remain underexplored. The BSE crisis and other scandals no doubt contributed to declining public trust in the Commission. However, the puzzle to be explained is why an American public usually suspicious of state authority trusts the government in matters of food safety when Europeans who frequently hold a view of positive government do not. Much of the answer, I argue, can be found in the relationship between reputation and regulatory capacity. With a long experience of federal activity in food safety, the FDA and USDA enjoyed a robust reputation for expertise and efficacy that could be applied to emergent issues of biotechnology.[22] Without a similar federal experience with food safety in the European Union, the Commission lacked a reputation to reassure a skeptical European public. Because of the novelty and uncertainty regarding genetic modification, these institutional legacies loom large in the public's acceptance of biotechnology.

14.4 Conclusion: federalism and the regulation of agricultural biotechnology

In the preceding account, I have viewed the moratorium on genetically modified foods and crops in the European Union as a breakdown of community procedures and an example of institutional weakness. However, an alternative interpretation should be explored as well; namely, that the decision to halt approvals and marketing of agricultural biotechnology in the late 1990s illustrates the robust character of EU federalism, especially its capacity to reconcile distinct member-state preferences and prerogatives with a continued dedication to a common European project. To borrow Daniel Halberstam's language, the debate over biotechnology illustrates the 'fidelity approach' to the division of powers in European federalism: member-state prerogatives are not simply rights or

entitlements to be exercised 'without regard to . . . the system of democratic governance as a whole', but are understood in terms of a public trust whereby 'a duty of loyalty to other actors and institutions in the federal system tempers institutional actors' political self-interest' (Halberstam 2004: 103–4).

Far from a breakdown, then, opposition to biotechnology by Austria and other member-states began a deliberative process of 'vibrant democratic interaction' that illustrates how 'democratic struggle and debate within a federal system are valuable safeguards of liberty and lead to concrete, positive policy outcomes'(Halberstam 2004: 197). The safeguard clause assured that the concerns of Austria and other member-states about genetic modification were given their due. And as these concerns became more widespread, the Commission wisely suspended further regulatory decisions until a member-state consensus could be reestablished and new regulations drawn up to address the potential risks of genetically modified foods and crops. With these new regulations in place, including stricter rules about the labeling and traceability of genetically modified organisms, approvals can now proceed.

Although member-state disagreement can be deliberative and produce outcomes consistent with collective ends, the dispute over biotechnology presents a difficult case in this regard. True, the decision by Austria and other countries to invoke the safeguard clause might reflect a public concern about ceding regulatory authority over a controversial technology to the Commission. Yet respondents to Eurobarometer surveys consistently expressed little faith in national governments as sources of information on biotechnology, casting doubt on the notion that the European public preferred to leave authority for biotechnology in the hands of the member-states. Moreover, the dispute over biotechnology may have been motivated less by concerns about ceding authority to the Commission as much as mutual distrust among the member-states themselves over different regulatory standards. In a recent ECJ case, for example, the Italian Ministry of Health raised objections over the British evaluation of a genetically modified corn (*Monsanto Agricoltura Italia SpA c. Presidenza del Consiglio dei Ministri*, European Court of Justice, C-236/01. See Poli: 97).

Under such circumstances, invocation of the safeguard clause would appear to be an instrument of unilateral action against other member-states rather than an effort to balance supranational and national institutions in the federal system. Finally, given the continued limited knowledge about biotechnology among the public, it is difficult to see

how disputes over the regulation of biotechnology played out at the European level contributed much to deliberation and public information about genetic modification.

Rather, the disputes over biotechnology—given voice through the instruments of member-state representation in the regulatory process—in fact may have diminished deliberation, hampered public education, and, in the process, contributed to an erosion of public trust in regulatory authorities at both the national and European levels. As the authors of a Eurobarometer report on biotechnology note, 'without confidence in key actors—scientists, regulators, etc., people are likely to have exaggerated perceptions of risk, as the assurances provided by the experts that the risks are low or manageable are treated with skepticism' (Gaskell, Allum, and Stares 2002: 29).

We see this skepticism registered by Eurobarometer surveys in which respondents consistently rank national governments below NGOs as a source of information on biotechnology and levels of trust in the Commission remain below 50 percent. Although these sentiments no doubt reflect the BSE and other scandals, disputes over biotechnology likely contributed to public skepticism as well. If regulatory capacity hinges in part on reputation as I have argued, then elements of the decision-making process—a deadlocked Council, a Commission decision that lacked a scientific consensus on the regulatory committees, and the continued invocation of the safeguard clause by member-states even after scientific committees questioned their basis—were detrimental to the long run development of European regulatory capacity. In some cases, member-state governments (particularly those previously supportive of biotechnology) may have pandered to public fears in their continued opposition to genetic modification. Such an expression of political self-interest did little to further the system of European democratic governance as a whole.

This is not meant to suggest that fears about the health or environmental concerns of genetic modification are misplaced. Rather, my point is that public concerns about biotechnology would be better served by a robust European regulatory framework rather than a system in which member-states may be tempted to put European decision-making rules in the service of short-term political gains. The case of biotechnology illustrates the pitfalls of joint decision-making where the constituent units of a federal system are directly represented in the policy process. The requirement of near universal agreement in the face of divergent member-state opinions about biotechnology produced stalemate within the regulatory committee and the Council, first over the approval of

GM corn and subsequently over the decision by Austria and Luxemburg to invoke the safeguard clause. Ultimately, this stalemate led to the breakdown of the regulatory process and a de facto moratorium on GM products. Moreover, it is important to place these developments in the context of an evolving European federalism. In contrast to the established authority of the FDA and other US agencies, European authority over biotechnology was tentative and ambiguous from the beginning. If the representative components of European federalism and member-state involvement in biotechnology policy provided the means and opportunity for the moratorium, then the relative immaturity of regulatory authority and the lack of institutional capacity at the EU level provided the motive.

Consequently, the creation of the EFSA is an important first step toward the building of European institutional capacity in biotechnology. Critics of the new European agencies rightly point out that the regulatory remit of EFSA remains limited (Majone 2003). In addition, a system of fragmented authority and multiple, competing principles often produces a politics of bureaucratic structure in which agencies are designed to fail (Moe 1989; Keleman 2002). But here the experience of the FDA again stands out. By building a reputation for expertise and efficiency, the FDA enjoyed the support of business, consumer advocates, and politicians of various stripes.

A similar trend may be European Agency for the Evaluation of Medicinal Products evident with (EMEA). Although today there is a general consensus among member-states about the desirability of a centralized procedure for new drug approvals, initial efforts to harmonize drug regulation were hampered by mutual suspicions about the scientific competences of other member-states. However, through a series of incremental policy innovations begun in the 1960s, these concerns were gradually assuaged as the Commission first promoted baseline criteria for drug safety and efficacy, then established the capacity to review applications for compliance with European standards, and eventually created a centralized procedure for medical biotechnology products that 'placed final regulatory approval at the Union level for the first time' (Vogel 1998). Today, the EMEA performs a coordinating role, delegating the actual processing of applications to national regulatory bodies. In doing so, however, it is building a reputation for efficiency and efficacy that enjoys the broad support of the European pharmaceutical industry and provides a bridge between the Commission and the regulatory authorities of

the member-states. Indeed, the EMEA illustrates the possibility for European agencies to fill the 'institutional vacuum . . . that still separates the supranational and national . . . levels of regulatory governance' (Majone 2003: 70).

In sum, although formal institutions are important, by themselves they cannot explain the comparative politics of public policy. In addition, analysts should remain attentive to the temporal dimensions of politics and the way institutions evolve over time. In the case of biotechnology, differences between the United States and European Union reflected both the formal representation of constituent units in the policy process and the degree of regulatory capacity in food safety. In the United States, this capacity developed over time as agencies, like the FDA, established reputations for policy efficacy in spite of fragmented institutions and competing principles. Examples like the FDA, and even European agencies like EMEA, warrant greater attention to the historical dynamics of EU institutional development. If reputation and regulation evolve hand in hand, then the widely perceived lack of legitimacy in contemporary European institutions cannot be addressed through institutional fixes alone but must evolve over time through incremental policy innovations that gradually build public trust in the capacity of EU institutions.

Notes

1. Note: I gratefully acknowledge the financial support of the Robert Wood Johnson Foundation Scholars in Health Policy Research Program at the University of California, Berkeley. For valuable research assistance, I thank Patricia McGinnis.
2. There is a vast literature on preemption. See for example, Gardbaum (1994: 767–815) and Weiland (2000: 237–86).
3. Whereas the Supreme Court has defended state and local regulations on pesticide use, it has struck down tort claims for injuries caused by pesticides that hinge on the supposed inadequacy of EPA labels. Compare *Wisconsin Public Intervenor v. Mortier* 501 US 597 (1991) (upholding local use permits for pesticides) with *Papas* v. *Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991) (rejecting damage claims based on failure to warn labels). Courts have taken a more expansive view of FIFRA preemption of state tort claims since *Cipollone* v. *Liggett Group, Inc.,* 505 US 504 (1992) (finding some tort claims preempted by section 5b of the Public Health Cigarette Smoking Act of 1969) because the preemption clauses in these two acts are almost identical. See Carrier (1996: 509–611).
4. On the role of the ECJ in environmental enforcement, see Kelemen (2000: 157).

5. See for example, Directive 2001/18 (which replaces 90/220) dealing with the deliberate release of genetically modified organisms and the recently enacted Regulations 1829/2003 and 1830/2003 on the approval of GM foods and crops.
6. National Conference of State Legislatures, 'Biotechnology Statutes Chart', available at http://www.ncsl.org/ programs/esnr/biotchlg.htm (accessed April 24, 2004); Pew Initiative on Food and Biotechnology, 'State Legislative Activity', available at http://pewagbiotech.org/ resources/factsheets/ (accessed April 24, 2004).
7. *Chemical Specialties Manufacturers Association, Inc.* v. *Allenby*, 958 F.2d 941, 944 (9th Cir. 1992). The D.C. Circuit drew a similar conclusion in *Ferebee* v. *Chevron Chem. Co.*, 736 F.2d 1529, at 1541 (D.C. Cir. 1984). See Carrier, 'Federal Preemption of Common Law Tort Awards', pp. 601–2.
8. *Federal Environmental Pesticide Control Act*, Senate Report 92–270, 92d Congress, 2d Session (1972), p. 9 cited in *Ferebee*, 736 F.2d at 1541.
9. These are Austria (3), France (2), Germany, Luxembourg, Greece, and United Kingdom. In addition, one member state, Italy, invoked the safeguard clause of Regulation 2309/93 governing the marketing of a GM food. See European Commission (2004).
10. Case C-6/99 [2000] ECR I-1651. The case was brought under the preliminary ruling procedure in Article 234 (ex Article 177), which gives the ECJ jurisdiction in interpreting the Treaty and permits member state high courts to defer judgment on matters that pertain to EU law until the Court of Justice has issued a preliminary ruling on the subject.
11. The seven countries were Luxembourg (3), Belgium (3), France (2), Portugal (2), United Kingdom, Greece, and Spain. Author search of CELEX Database using 'genetically modified' search term.
12. 'Member States Split over Imports of Monsanto's NK603 Transgenic Maize,' *European Report*, Number 2845 (February 21, 2004).
13. 'Member States Reject Ciba-Geigy's Genetically-Modified Maize', *European Report*, Number 2144 (June 29, 1996).
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15. Directive 90/220/EEC, Article 16. 'Austria Seeks Euro-Wide Ban on Transgenic Maize', *European Report*, Number 2211 (March 28, 1997).
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18. European Commission, 'Commission Authorises Import of Canned GM-Sweet Corn under New Strict Labeling Conditions', Press Release IP/04/663, May 19, 2004.
19. Pew Initiative on Food and Biotechnology, 'State Legislative Activity'.

20. Gaskell, Allum and Stares 2003 Using a split sample, half of the respondents were asked whether they trust 'government regulators' and half were asked whether they trust 'the Food and Drug Administration'.
21. For a more detailed discussion of the Coordinated Framework and its long-term consequences for biotechnology policy, see Sheingate, 2006.
22. Just how robust this reputation can be was illustrated by the short-lived concern over mad cow disease following the discovery of the first US case in December 2003. Although the event exposed serious shortcomings in the USDA inspection system, consumer faith in the safety of the meat supply was largely unshaken.

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15

Immigration Policy

Martin A. Schain[1]

In this chapter, I examine the development of immigration policy in Europe and the United States and the role of federalism in this development. I focus on how the immigration issue was politicized in each case, and the importance of the federal system (or federal governance) for the way that the issue was shaped. I argue that the way that power is dispersed in federal structures—not simply the fact of dispersion—gives considerable weight to territorial interests. Although the United States is clearly a federal system, while the EU is a developing system of governance, federalism has been a key aspect in shaping immigration policy in both cases. The federal influence over policymaking has been important for understanding the ways that policy has been initiated, developed, and administered. On the other hand, differences in the federal structures in Europe and the United States can also help us to understand differences in policy. Since the federal government first turned its attention toward immigration policy, the American federal structure has developed strong powers of initiative within a nationally oriented executive. In the EU, the power of the Commission to develop policy initiatives is considerable, but executive power remains in the more member-state–oriented Council of Ministers.

The story of federal immigration policy in the United States begins 155 years ago, well after the United States became a country of immigration, and is intimately linked to efforts to develop policies of immigration exclusion. The story of EU immigration policy begins far more recently, but is also linked to efforts to develop and enforce immigration exclusion within the EU. In each case, different aspects of federalism shaped the dynamics through which these policies developed.

15.1 Immigration in the United States and Europe

Since the end of World War II, Europe has become a 'country' of immigration. This pattern began with the reluctant importation of immigrant labor during the great economic expansion in the 1950s, but continued even after the official suspension or termination of immigration of the 1970s (earlier in the UK). Although official policies indicated an objective of 'zero' immigration, immigrants continued to enter the countries of the EU both for family unification and for work. During the past few years, as countries in the EU have begun to recognize a need for immigrant labor once again, policies—and more extensive discussions of policy—have become more flexible with regard to labor. Still, policies remain generally restrictive, even as levels of immigration have crept up substantially in some countries.

Nevertheless, between 1 and 1.5 million immigrants enter the countries of the EU each year. Although there is considerable variation by country, in terms of the numbers of immigrants, the proportion of the population that these represent, and the growth and stability of immigrant populations, there are few countries among the Euro-15 that have not been touched by immigration during the past quarter century. Indeed, the greatest proportional growth in immigration has been in those European countries that have been traditional countries of emigration.

The countries in the Europe with the highest proportion of immigrants (aside from Switzerland and Luxembourg) are Germany and Austria. Overall, in 2002, the stock of immigrants was higher in the United States than Europe (only Switzerland and Luxembourg exceed the United States), but the rate of immigration was higher in Europe than the United States (3.8/1000 in EU; 3.5/1000 in US). The trend in immigrant flows is up for the UK and France, but clearly down for Germany and for the EU-15 as a whole. The strongest upward trends, however, are in Italy, Spain, the Czech Republic, and Poland. The rates of inflow of foreign population into Italy and Spain are now double those of France (see Table 15.1).

In recent years, about 650,000 immigrants per year have been entering Germany, 250,000 per year have entered the UK, and 140,000 have immigrated into France. They have done so for a variety of reasons. Most come either to join their families (family unification) or to work, but cross-country variations are considerable. In 2001, half the immigrants into the UK were labor migrants and 25 percent family reunifiers; while the same year in France, half came to join their families and only 18 percent for labor; compared with the United States, 80 percent came under family

Table 15.1. Immigration inflows to Europe and the United States (in thousands)

Country	1992	per thousand population	2001	per thousand population
UK	175	3.0	373.3	6.2
France	116.6	2.0	141	2.4
Germany	1,208	14.9	685	8.3
USA	974	3.8	1,064	3.8
EU-15	1,727.6	4.7	1,465.7	3.9

Source: OECD, *Trends in International Migration, Annual Report 2003* (Paris: OECD Publications, 2003), pp. 305–10.

unification and only 10 percent for work (according, of course, to figures for legal immigration).

The United States—also a country of immigration—has, by contrast, had a more open immigration policy since 1965. During the same period that Europe was closing its immigration gates, the United States was reversing a forty-year-old policy of immigration restriction. Although there have certainly been outbursts of identity politics—most notably in the mid-1990s—immigration policy has remained relatively open through good economic times and bad since 1965, and each year almost a million legal immigrants enter the United States.

Thus, although there are clear differences between Europe and the United States in terms of the kinds of immigrants that have been arriving, both are 'countries' of immigration, and have been since the end of World War II. The most important difference between Europe and the United States is not the presence of immigrant communities, but the development of immigration policy.

15.2 The development of immigration policy in the United States

For almost 100 years, the federal government of the United States played almost no role in controlling immigration. Insofar as it was controlled at all, it was minimally regulated by the individual states through their use of police powers, subject to review of the courts. The Alien and Sedition Acts of 1798 asserted the right of the United States to deport undesirable individuals (a right sometimes contested by European countries), but the federal government maintained no agency to control, regulate, or even monitor the flow of immigrants into the country (except for the bureau of the census, beginning in 1820).

Initiatives for the regulation of immigration came more frequently from states to which immigrants tended to arrive. New York, Massachusetts, Pennsylvania, and Maryland, for example, legislated restrictions on the entry of immigrants (head taxes and bonding were popular). Early legislation was directed against 'undesirables' (paupers and criminals are the most frequently cited) rather than national groups. Indeed, state and federal courts routinely struck down state legislation that was applied in a discriminatory fashion against particular nationality groups, establishing judicial standard for immigrant rights (Senate Documents 1911: 115).

However, the most important assertion of national judicial power came on March 20, 1876, when the United States Supreme Court ruled that immigration could no longer be controlled by the states through ordinary police power, but instead came under the formal jurisdiction of the federal government to regulate commerce (including 'human commerce') (*Henderson et al*. v. *Mayor of New York et al*. and *Commissioners of Immigration* v. *North German Lloyd*, 92 US 259 (1875); *Chy Lung* v. *Freeman*, 92 US 275 (1875)). Nevertheless, federal power to regulate immigration was limited to the provisions of legislation passed in 1875, which voided contracts for the importation of prostitutes and excluded convicted criminals from entry into the United States. For the first time, provision was made for federal inspection of ships carrying immigrants, and for federal deportation of undesirable aliens.

The impact of these decisions was first felt in California, where for over twenty years, there had been initiatives to exclude Chinese immigrants. Beginning in 1862, first the Republicans and then the Democrats in California tried initially to discourage, and then drive out the Chinese immigrants who had settled there. After the Democrats gained control over the state government in 1867, these measures multiplied both at the local and state levels. However, when first the lower courts, and then the Supreme Court, asserted federal jurisdiction in this area, groups seeking Chinese exclusion was forced to switch venues to the federal level. (Ah Fong, Fed. Cas. No. 102, 3 Sawy., 144, Senate Documents, 1911, 151)

In July 1876, the United States Congress established a Joint Special Committee to Investigate Chinese Immigration. Its report in 1877 served to mobilize a broader coalition of support for the Chinese Exclusion Act, which finally passed five years later. Although the legislation passed with strong support (a 2:1 margin in both houses), Chinese exclusion first emerged as a Western regional issue, where Democrats and Republicans focused on the Chinese as a way to mobilize voters. On the state level, the issue was both a labor market question (Chinese working for lower wages)

and an identity question (racial differences). As the proponents of exclusion sought to build a broad coalition at the federal level, among representatives of states in which there were few if any Chinese laborers, the issue became increasingly racialized (Fisher and Fisher 2001). A decade later, New England Republicans—who had deeply opposed Chinese exclusion—would take the lead in opposing the new wave of immigration from Southern and Eastern Europe, using many of the same arguments that had been used against the Chinese.

New institutional arrangements, put in place from the 1890s, both reflected and accelerated this reaction, but they also increased the ability of the federal government to act in this area. The key innovation was the establishment by both houses of the Congress of standing committees to consider immigration legislation. Both committees quickly became the key organizers of the debate on restrictive legislation, especially when the Republicans were in the majority. The committee leadership—dominated by New England Republicans—was increasingly allied with and influenced by the New England–based Immigration Restriction League. On the other hand, to build a legislative majority for restriction in a federal system, it was necessary to go well beyond the interests of the Northeastern restrictionists, and attract broad regional support.[2]

Soon after the establishment of the congressional committees, Congress acted to consolidate control over immigration. For the first time, under the Immigration Act of 1891, the federal government assumed effective control over the entry of immigrants into American ports (and built a new facility on federally owned Ellis Island in New York harbor). Moreover, the pace of immigration legislation was accelerated. During the twenty-five years between the end of the Civil War and 1882, three general, but relatively inconsequential, pieces of legislation were passed. After the establishment of the Congressional committees in 1889, hardly a year passed without consideration of major legislation on immigration at the national level.

The congressional committees also set the stage for a massive research and education effort, when, through provisions of the Immigration Act of 1907, they established the United States Immigration Commission, charged with undertaking a full investigation of the problem of immigration in the United States and making legislative recommendations to Congress. After four years, the commission produced forty-two volumes of data, documents, and studies, on the basis of which it adopted a moderately restrictionist position. The report also inevitably strengthened the case for additional restrictive legislation and, on the eve of World War I, set the agenda for great changes in immigration policy.

During the same period that congressional committees were established, the Federal Bureaucracy that dealt with immigration was also expanded. The Immigration Act of 1891 restructured the office of the Commissioner of Immigration (established in 1865) into a more powerful Superintendent of Immigration within the Treasury department. By 1903, the (now) Commissioner General of Immigration had considerable authority for policing immigration not only within the United States, but abroad as well.

The movement of the bureaucracy from Treasury to Labor and Commerce in 1904, and then to the new Department of Labor in 1913 was an indication of the link between restriction and the interests of organized labor. Immigration questions (particularly the administration of deportation) dominated the administrative concerns of the Department of Labor. By the 1930s, 80 percent of the budget of the department was taken up by the Bureau of Immigration and Naturalization (the name was changed in 1906) (Tichenor 2002: 121). Thus, by the decade before World War I, a network of national institutions had been put in place that both generated and more effectively enforced restrictive legislation on immigration.

The restrictive quota legislation of 1924 was the outcome of a long process of transformation of immigration politics from domination by states to domination by the federal government. At the beginning of this process, a movement for restrictive legislation initiated at the state level (California and the West) was leveraged into the Chinese exclusion act. In the process, the movement served to expand the power of the federal authorities, and solidify this expansion in court decisions (Tichenor 2002: ch. 4). The end of the process in the 1920s was highly restrictive legislation that effectively cut off most immigration. Framed by openly racist and eugenicist assumptions about integration and incorporation, the Johnson–Reed Act was passed by an overwhelming vote in both the House and the Senate[3] (King 2000: ch. 7). Nevertheless, each step in this process was long and politically complex, shaped by the difficulties of building coalitions at the federal level.

Despite this, the system was called into question after World War II. In practical terms, it was undermined by special legislation that progressively undermined its core assumptions. One category of legislation responded to state interests by establishing a guest-worker program for farm workers from Latin America, beginning in 1942. A second category responded to national cold war needs by admitting political immigrants from a variety of countries governed by Communist regimes (including China). By 1965, only one in three immigrants was entering the United States under the national origins system established in 1924 (King 2000: 242).

Efforts to reform the system demonstrate the key role of the presidency in the American federal system that had developed in the twentieth century. Initiatives were first pursued during the Truman administration, continued under Eisenhower and Kennedy, and finally implemented under President Johnson. The Immigration Act of 1965, framed by both the Civil Rights Act of 1964 and the Voting Right Act of 1965, represented a victory for both the president and a broad coalition of political forces dominated by representatives of areas in which the children of the despised immigrants of the turn of the century were electorally important. The 1965 legislation was overwhelmingly approved in the Senate 76 to 18, with the opposition limited mainly to the South. Final approval in the House was equally overwhelming (378 to 95). Although the process was long and complicated, passage was ultimately assured by linkage to civil rights, and isolation of the regional opposition to both sets of reforms.

Increasingly, what held the reformers together was fundamental opposition to the racial and discriminatory basis of the quota system, and support for a new system that was more consistent with emerging values. Public opinion never favored legislation that would increase immigration, but it did increasingly favor proposals for civil rights legislation. It was the persistent linkage between the two by liberal Democrats that finally convinced President Johnson to place immigration reform high on his legislative agenda in 1964, and this priority was nailed down by the Democratic electoral sweep in November of that year.

The new legislation was meant to establish a system based on family unification and the need for labor, and it was widely presumed that immigration would come mostly from Europe.[4] The unanticipated results, however, became clear within a decade, as it became evident that the new 'new' immigration was predominantly Hispanic and Asian. Opposition to immigration had declined sharply during the postwar period, and indeed seemed to bottom-out in 1965. However, as the results of the act became clearer, opposition to immigration gradually increased (see Table 15.2).

California once again served as a harbinger of change in national policy. In 1994, the State of California passed a referendum, Proposition 187, which would limit the access of even the children of illegal immigrants to schools, hospitals, and welfare services. The movement in California once again led to restrictive legislation at the national level, and it appeared that the United States was at the beginning of a new cycle of immigration restriction.[5] Pete Wilson, the governor of California who led the effort to pass Proposition 187, was reelected and the initiative passed in a campaign that grew increasingly anti-immigrant as it wore on.

Table 15.2. Opposition to immigration in the United States

	1953 (%)	1965 (%)	1977 (%)	1986 (%)	1993 (%)	1995 (%)	1999 (July) (%)	2001 (Oct) (%)	2001 (%)	2002 (%)
Should immigration be decreased	39	33	42	49	65	65	44	41	58	49
Increased	13	7	7	7	6	7	10	14	8	12

Sources: Roper Poll (1953); Gallup Poll: 1965–2002.

During the same period, both Democratic senators from California introduced immigration control legislation in the US Senate. During the next two years, President Clinton toughened the patrols along the Mexican border, supported legislation that restricted the rights of legal aliens, and established the Commission on Immigration Reform, the Jordan Commission, which quickly recommended a reduction in annual immigration limits. Finally, Pat Buchanan became the most prominent political leader in favor of immigration restriction after his Republican primary victory in New Hampshire in 1996. Thus the California conflagration spread quickly to national politics.

Slightly more than a decade after Proposition 187, however, California has become an interesting case study in political feedback. It now seems clear that the impact of the Proposition 187 campaign and the federal legislation in California was to mobilize new immigrant voters around the Democratic Party, and alter the direction of territorial politics. Wilson lost his second race for governor, and Orange County, long a conservative Republican bastion, is now increasingly competitive, thanks to the incorporation of Latin American immigrants and their children into the electorate.[6]

At the national level, immigration is at an historic high, interest in restriction in Congress of legal immigration seems to have faded,[7] and public opinion, in contrast to most countries in Europe, has moved against restrictionism. Pat Buchanan played no significant role in the presidential election of 2000 (if we ignore the 'chad' fiasco in Florida), and the conservative president of the United States is generally favorable to immigration and immigrants—often in Spanish! Finally, the AFL-CIO, the national trade union organization, has announced that it will no longer oppose even illegal immigration, and would make a major effort to organize new immigrant workers.

From the end of the nineteenth century, when the federal government in the United States first began to assume authority over immigration into

the country, there had been a continuing tension between Congress and the presidency. While the political forces that favored immigration control and exclusion constructed broad coalitions in the congressional arena, the executive almost always opposed these efforts in favor of more open immigration policies based on international treaties. If regional considerations largely determined the early period, and tended to favor congress, national considerations largely determined the period after World War II, giving added weight to the presidency.

However, for the president, there were other considerations as well. The Roosevelt Revolution in the 1930s had bolstered the international perspective of the post with an electoral perspective (Andersen 1979). Immigrants were prospective voters, not yet firmly committed, rather than simply a challenge to identity—political actors themselves, rather than a means of mobilizing other actors. If the Democratic Party had benefited from this changing electorate more than the Republicans, this could change over time. From a presidential perspective, immigration created opportunities, in part because their marginal influence surpassed their actual numbers, as immigrant settlements tended to be concentrated in states that were crucial in presidential elections.

Existing studies show that Latinos (with the exception of Cubans) are strongly Democratic in orientation, and become more so with increasing education and tenure in the United States. As governor of Texas, President Bush had some success in attracting Latino voters, and the president seems to feel that not to make this effort would be to surrender the electoral future to the Democrats (Gimpel and Kaufman, 2001). Indeed, this gamble paid off to a degree in the 2004 presidential election, in which support for the president increased marginally among Latino voters.

15.3 The development of immigration policy in Europe

Until a decade ago, it would not have been appropriate to speak of a 'European' immigration policy, not least because the EU did not have a common external frontier. Prior to 1995, immigration and immigration control policies were firmly in the hands of the member-states. Since 1995, however, with the implementation of the Schengen accords—signed a decade earlier—an external frontier was established. Subsequently, the possibility arose for a greater harmonization of these policies.

At the national level, member-states had pursued roughly parallel policies since the end of World War II. Among the immigrant-receiving

countries, recruitment of immigrant labor was an important element of postwar recovery. The principal immigration countries began by recruiting labor from within Europe—Spain, Portugal, Ireland, and Italy. However, as European economies continued to expand rapidly in the 1960s, recruitment shifted to Third World countries, especially those with preexisting colonial or historic ties (North Africa, the Indian subcontinent, Turkey, and Indonesia).

As concerns grew among political elites about problems of integration, pressures for more restrictive policies began to grow, first in Britain in the early 1960s, and then on the continent. In the British case, there was a rising tendency among policymaking elites to frame the immigration issue in terms of identity and race, but they were certainly not alone. As in other parts of Europe, what most concerned policymakers, well before the initiation of restrictions, were racial tensions and the perceived problems of integrating nonwhite immigrant groups into larger British society. Although there was clear conflict within each political party, even before 1962, about the need for immigration restriction from New Commonwealth countries, the core of the dialog in each case turned on racial differences and race relations. In the British case, far more than in other parts of Europe, there had also been clear public reactions to immigrant presence in the form of riots and electoral shocks[8] (Money 1999: Chs. 4 & 5).

The Tories, who had previously argued that experience in the Commonwealth demonstrated the viability of race relations, argued in 1965 that they '. . . reject the multi-racial state not because we are superior to our Commonwealth partners but because we want to maintain the kind of Britain we know and love' (Foot 1965). Although the law passed in 1962 is generally regarded as the first move in Europe toward immigration exclusion, in fact it dealt with a redefinition of Commonwealth citizenship. By carefully separating Commonwealth from UK citizenship, the law initiated a process of moving New Commonwealth citizens into the category of aliens, for purposes of entering the UK. Labour first challenged the 1962 legislation because it carried racial overtones, and then linked their support for even tighter immigration restriction with the Race Relations Act of 1965 (Hansen 2000: 136–41). This framing of the immigration issue certainly reflected public opinion, but more importantly, it defined the way that the issue would be politicized.

The British case was thus complicated by the provisions of Commonwealth citizenship. The French case, however, was far more typical of the way that immigration policy changed in Europe. There were solid labor

market reasons for the suspension of immigration in 1974, but, as in Britain, the decision also reflected other fears that were apparent in patterns of public opinion. The first attempts by the French state to define a coherent policy addressing the new immigration took place after the crisis of 1968, and were summarized in a report written for the Economic and Social Council in 1969. The report recognized the continuing economic need for immigrant labor, but, for the first time, clearly differentiated European from non-European workers. Europeans were assimilable, and should be encouraged to become French citizens, while non-European immigrants constituted an 'inassimilable island' (Calvez 1969: 315; Viet 1998: 509).

Thus, from the beginning of the process of defining and implementing immigration policy, the idea of difference was asserted—a difference that was frequently posed in (ethnocultural) racialized terms. The new forms of racial differentiation expressed by the report to the French Economic and Social Council, or in the earlier parliamentary debate in Britain, had little to do with eugenics, or the biological inferiority of the new immigrants. Rather it was an expression of a perceived chasm between immigrant and French culture, what French philosopher Pierre-André Taguieff has called 'differential racism'(Taguieff 1988). During the 1970s, the French government struggled to develop a policy informed by these assumptions, but was relatively unsuccessful for most of the same reasons that other countries were unsuccessful—the continuing need for labor and that family unification was mandated by the courts.

By the 1980s, all European states had developed restrictive immigration policies, often with the stated objective of 'zero' immigration. Nevertheless, immigration did not cease: labor migration was more narrowly focused on high-skilled immigrants, though there was need for the unskilled as well, and a steady stream of family migration (Geddes 2003: 17).

By 1999, policies based on challenges to identity had begun to run up against emerging needs for increased immigration. In France, just after the split in the extreme-right National Front in 1999, former Prime Minister Alain Juppé proposed a more open immigration policy, which would take into consideration emerging labor and demographic needs,[9] a trial balloon that provoked a discussion that never resulted in any legislative proposals. Nevertheless, the issue has not disappeared, and has continued to be publicly discussed in government reports.[10] There have been similar policy debates in other countries, and in several there have been announced and unannounced shifts in policy.

In Britain, for example, a steady stream of immigrants entered the UK under the flexible work-permit program after 1981. Rather than respond

negatively to this trend, the Labour government after 1997 began to respond to the demands by employers for more skilled labor. Prior to the 2001 elections, the Education Department initiated 'fast-track' entry into the UK for people with skills in information technology, and relaxed rules for entry for nurses and teachers. In 2002, the government launched a broader program to recruit skilled workers through the Highly Skilled Migrant Program based on a Canadian-style point system. Individuals who accumulate sufficient points, by scoring well on such criteria as educational qualifications, work experience, and professional accomplishment are then free to look for a job, and enter the UK without a guarantee of employment (Geddes 2003: 43). Indeed, this approach has quietly shifted the initiative for labor migration from the state to employers.[11]

It is now clear from Home Office proposals released in anticipation of the 2005 election that the quiet shift in policy that took place around 2000 toward market-oriented labor migration would continue. Britain would continue to seek skilled workers, using the point system established in 2002, and would accept limited family reunification as well as 'genuine' refugees (Home Office 2005: 21–3). Thus, the growth factors in immigration would continue. In fact, the explicit recognition of this fact is a significant change from the former rhetoric of 'zero' immigration, without regard for labor market needs. The evolution of British policy has been quite different from the lack of explicit movement in France, but there has been change in other European countries as well.[12]

Harmonization of these initiatives at the European level—the mandate that was accepted at the EU summit in Tampere in 1999—is, however, limited by the fact that few EU countries have legislated immigration policy of any kind that would specify levels of permitted immigration. Therefore, although Europe appears to be edging toward a more open immigration policy, it is not a policy that can be easily harmonized or developed into European directives.

Like the United States at the end of the nineteenth century, the approach of the EU to the harmonization of immigration policy has focused on the efforts to enforce exclusion first initiated at the member-state level. The exclusionary orientation was first evident in the (non-Community) Schengen agreements in 1985, and the implementation agreement signed in 1990, which emphasized border controls and control of immigrants and asylum-seekers present on EU territory. Both measures were integrated into Titles IV and VI of the Amsterdam Treaty in 1997.

The statement issued at the Edinburgh Summit of 1992 emphasized the importance of removing the 'root causes' of migration, and called for a

comprehensive approach to move toward this objective, which would include conflict prevention in the third world, development aid and enhancement of trade. This approach was dominated by the fear first engendered by the 'asylum crisis', which started in the early 1990s and has continued since then. Indeed, public opinion appears to fear asylum-seekers far more than immigrants. The general view of immigration at the European level as a problem to be combated has endured in various ways through the decade of the 1990s, and has been reinforced by periodic surges in electoral strength of the extreme right in France, the Netherlands, and Austria. The Seville Council, just after the French elections of 2002, reiterated much of the rhetoric of Edinburgh a decade earlier (see below).

Thus, the most effective actions taken at the EU level have been strongly oriented toward intergovernmental cooperation for immigration control (visa, asylum, and border control). The Schengen Information System, now moving into its second stage, and the initiation of the European Border Agency for the coordination of the border police around external EU borders, are counted among the most notable achievements of Justice and Home Affairs during the past five years.

However, there has been little intensive intergovernmental cooperation among national officials dealing with other aspects of immigration. In an address summarizing the work of the Directorate since 1999, Justice and Home Affairs Director-General Jonathan Faull noted that there was no progress at all on the development of coordinated policies on economic immigration, and just the beginning of information sharing on problems of integration (Faull 2005).

Nevertheless, since the Tampere Summit of 1999, the European Commission has made the case for a more expansive European immigration policy. In Tampere, a five-year mandate was developed to harmonize policies around *common practices*. This was an important emphasis, since in all countries in Europe there is a considerable gap between policy statements and commitments, on the one hand, and practice on the other. However, Tampere also recognized two widely discussed needs in Europe for immigrant labor: labor market needs in such areas as technology, agriculture, construction, and services; and demographic needs posed by pressures on the welfare state. Through its reports and recommendations, the European Commission has emerged as an important agenda-setting force. (European Commission 2000; 2004)

This positive mandate of the Commission was reinforced at The Hague in 2004. While reiterating that decisions on the numbers of labor migrants

will remain the prerogative of the member-states, the Hague Program requested that the Commission present a policy plan on legal migration and admission procedures before the end of 2005 (the deadline has not been met).

It is now becoming clearer that an important challenge to the security framework that has been driving policymaking at the EU level is the growing need for immigrant labor in specific sectors of the economy, as well as the benefits of this kind of labor for financing the welfare state. Although it is difficult to raise this issue at the national level in many countries, because of the challenge of the extreme right,[13] it may be easier to address within the arena of the EU (European Commission 2000). If the protected arena of the Commission and Council makes it easier to make less popular decision, however, these decisions also create long-term problems for democratic legitimacy.

Nevertheless, at least for the moment, security concerns appear to have overwhelmed any tentative move in that direction (Working Group X 2002: 5).[14] The key indication of the weakness of EU policymaking on immigrant entry, however, is that no structure has been established that would provide policymakers with a framework for cooperation, no doubt because national policymakers are not seeking a more expansive policy within a European framework.

Thus, although European policymakers are clearly beginning to accept the implications of the impact of low-fertility rates on the labor market and on pension programs, it appears that they are determined to deal with these problems at the member-state rather than the EU level. While instruments of immigration control and exclusion, as well as instruments for regulating asylum, continue to be developed at the EU level, any plan for the admission of immigrants continue to be stalled in the Council.

The development of policies of immigration control in the United States and the EU appear, therefore, to be quite different. US policy has been centrally controlled for more than a hundred years. The central government has acted to restrict immigration, identifying the problem in identity terms, and marking an end to open immigration to the United States. It then acted to create a more open policy that has substantially opened up immigration since 1965. There relatively open policies have remained in place through good and bad economic times, even though public support for immigration remains weak.

By contrast, the 'central government' of the EU has taken only limited steps to develop harmonized policies of restriction and control. It has made some moves toward coordinating asylum and external border

controls, and developed a highly coordinated police and information system (SISII) in what appears to be an increasingly powerful Justice and Home Affairs machinery. If in the US states retain considerable power with regard to the treatment of immigrants, the member-states within the EU remain the central actors with regard to policies of entry as well as integration.

15.4 The importance of federal relations

In the arena of immigration policy, both the policies and the way they are developed appear to be quite different. Nevertheless, I would argue that federal relationships in each system have driven policy development in similar ways.

15.4.1 The evolution of dispersed power and territorial bias

Sbragia (this volume) refers to federalism as 'dispersed power', that benefits different actors in each system. The way power is dispersed also helps us to understand policy strategies and policy outcomes. However the dispersal of power, and the dynamics that flow from it, have evolved in each system because of the way political actors have exploited, used, and challenged institutions.

In the United States, the development of immigration policy was related to the development of two dimensions of federal relations: the expansion of the range of activities covered by *all levels* of government policymaking and the expansion of functions dealt with, at least in part, by the national government (Riker 1964: chs. 3 and 4). The real impulse for extended federal control over immigration came from two principal sources: first, the states themselves (that had been constrained by the courts) and second, a federal-level reaction against the new wave of immigration from Eastern and Southern Europe that began in the 1880s.

Immigration control first became a national function as a result of court decisions, which defined *where* the question had to be considered, but not *how*. How it was defined and considered was a result of the Senate initiative, undertaken by a small but determined group of senators, primarily from New England. Nevertheless, there was a fourteen-year gap between to court decisions in 1875–6 and the establishment, in 1890, of the Senate committee that actually created an arena that favored the initiation of immigration legislation.

Built into the American federal structure is a territorial bias that permits territorial units considerable defensive capacities over their interests at the state level, as well as a capacity to influence policy at the national level that gives disproportionate weight to the interests of smaller states. Throughout most of the twentieth century, this unequal capacity was exaggerated further by congressional seniority system that gave power to representatives and senators from one-party districts and one-party states.

However, the US case is also a good illustration of the importance of understanding the changing political basis of territorial politics. The most significant institutional difference between the beginning of the development of national immigration policy at the end of the nineteenth century and the more recent period is the change of the Senate from an appointed to an elected body. With senators indirectly elected until the passage of the 17th Amendment in 1913, the Senate provided a legislative arena—not unlike the Council of the EU—that was relatively protected from the consequences of electoral opinion. As Sbragia argues (this volume), after 1913, 'Senators . . . became federal officials tied to state-wide electoral constituencies rather than representatives tied to state legislatures. They do not represent the institutional self-interest of the state's authorities' (p28).

As an elected body, the Senate retained its bias in favor of smaller territorial units, but could not avoid the implications of its actions for reelection. In the case of immigration policy, states with proportionately large immigrant populations rapidly became states with large numbers of potential ethnic voters. In the nineteenth century, it was relatively easy to see these immigrant populations as objects of politics, and as problems. A century later their presence as potential voters could not be so easily ignored.[15]

As Sbragia has emphasized (this volume), in contrast with the United States, where national officials have profited from the dispersed system as it has evolved, in the EU, member-state leaders have maintained a key role. In effect, they have maintained this role either through the equivalent of the intergovernmental lobby (see below), or more directly through intergovernmental conferences and their role in the legislative process (p27). The Council, in turn, remains the rough equivalent of the pre-17th Amendment Senate in the United States. Moreover, as Adam Scheingate has noted (the volume), member-states sometimes retain the right of veto even in the administrative process.

Thus, in the development of immigration policy, national representatives have maintained strong control over the policy process, even as

policymaking has moved tentatively to the EU level. 'Problem-solving deficits', that have made it more difficult for any one country to control entry from third countries while dismantling internal borders within the EU, have encouraged this move toward the center, in much the same way that there was movement toward the center in the United States at the end of the nineteenth century (Scharpf 2004). The problem has been understood as the need to reinforce the external border, and strengthen the will of countries that had been less prone (or less inclined) to maintain restrictive rules. This is not markedly different from the development of restrictive policy at the end of the nineteenth century in the United States. With far weaker presidential leadership, appointed representatives of the states took the lead in generating restrictive legislation in a relatively protected arena.

15.4.2 Federal linkages

At the same time, as federalism has evolved in the United States, relationships among territorial units have become increasingly complex (see Lowi in this volume). Samuel Beer has argued that two kinds of vertical bureaucratic hierarchies have become a main feature of American federalism. In key areas of public policy, people in government service—the 'technocracy'—tend to initiate policy, and form alliances with their functional counterparts in state and local government. Their territorial check and counterpart has been the 'intergovernmental lobby' of governors, mayors, and other local officeholders—elected officials who exercise general territorial responsibilities in state and local governments. If the interests of the technocracy vary by the function of government for which they work, the intergovernmental lobby focuses on how policy costs and benefits are distributed among territorial units. From the perspective of federalism, this evolution was both centralizing, because it created a national network for local elected officials with territorial interests, and decentralizing, because it enhanced the ability of local officials to defend their local interests at and from the national level (Beer 1978: 17–19).

At the end of the nineteenth century, the influence appeared to flow predominantly up from the states. By the middle of the twentieth century, however, the power of the center over the periphery was more evident, in part because of the influence of a more powerful presidency in articulating national and functional over peripheral and territorial interests, but also because the technocracy also developed a national perspective. For the development of immigration policy, the enhanced national perspective of

the president and technocracy was a crucial element in explaining change after World War II. Moreover the influence of local territorial interests was defined and constrained by the influence of electorally important, locally based associations in favor of immigration reform.

However, the American case is a good demonstration of how constraints within territorial units may operate differently at different times, and can be turned into opportunities. One index that has sometimes been used to understand the salience of immigration issues in local arenas is the concentration of immigrant populations. Along with other measures, it has been hypothesized that the larger the proportion of immigrants, the greater the pressure for restrictive legislation. This was often true in the United States during the period before World War I, and in Europe during the more recent period. On the other hand, a large immigrant population can also create local pressures for a more open policy—as in the United States more recently—if immigrants are seen as potential political actors and voters.

Finally, in the American federal system, actions at one level are linked to actions at other levels. The different arenas of the federal system are now unavoidably linked. Thus, as we have seen, the State of California was able to deny welfare benefits to undocumented immigrants, after the passage of Proposition 187, but their ability to implement this legislation was severely constrained by the federal courts. Moreover, as in this case, political initiatives taken at the state level can act as a springboard for action at the national level; while initiatives at the national level that can sometimes be resisted at the state level (Beer 1978). In Europe, this linkage was part of the rationale for the development of Schengen. Schengen, it was hoped, would provide a mechanism of forcing some member-states (notably Italy and Spain) to tighten their border controls.

Within the EU, the arena of policy development was and remains relatively protected space, space chosen by ministries of the interior and justice to avoid many of the national constraints that had become evident by the 1980s. This narrowly structured intergovernmental lobby has dominated policymaking on immigration at the EU level since the 1980s. Therefore, the emphasis on exclusion and restriction—the 'securitization' of immigration policy at the EU level—is no accident, and directly reflects the preferences of the ministries that control the process and their ability to dominate institutional space.

Virginie Guiraudon, in a comprehensive study of the study of the development of this arena, presents a useful and important way of approaching policymaking at the EU level. She links national and EU politics by analyzing the movement of the immigration issue to the EU level as

initiated by key national ministries in search of an arena within which they could gain more autonomous action. She describes how justice and interior ministry civil servants gained monopoly control over the implementation of the Schengen accord between 1985 and 1990, primarily by defining priorities that linked immigration to combat against transnational crime.

During the 1980s, ministries of justice and interior were increasingly constrained by domestic forces from carrying out policies of immigration restriction. Court decisions prevented wholesale restriction of family unification, and made expulsions far more difficult to implement. They also faced conflicts with bureaucracies charged with the integration of immigrants already in the country. As Guiraudon explains:

> The incentive to seek new policy venues sheltered from national legal constraints and conflicting policy goals thus dates from the turn of the 1980s. . . . It thus accounts for the timing of transgovernmental cooperation on migration but also for its character: an emphasis on non-binding decisions or soft law and secretive and flexible arrangements. The idea is not to create an 'international regime', i.e. a constraining set of rules with monitoring mechanisms but rather to avoid domestic legal constraints and scrutiny (Guiraudon 2001: 7).

Although the establishment of the high-level working group on immigration (1998) resulted in pressures for a more substantial cross-pillar approach to immigration, which would effectively integrate the interests of foreign affairs, Guiraudon argues that the dominant influence is still that of justice and home affairs. As Herz has noted, working groups preparing the work of the Justice and Home Affairs Council are dominated by civil servants from national ministries of the interior, with participation of staff from foreign affairs ministries only at the full COREPER meetings. Perhaps more to the point, the working groups reflect the concerns of ministries of the interior, and 'officials concerned with regular immigration are as yet seldom involved in networks of dense intergovernmental cooperation' (Herz 2003, 13).

Proimmigrant NGOs that have battled for access to the decision-making framework of the EU have been forced to seek a different decision-making arena—the rights-oriented framework of 'social exclusion'. This framework may very well benefit migrants already in the EU, but will have little impact on immigration into the EU. Their strongest support at the EU level comes from within the equivalent of the technocracy (Geddes 2000). However, in the case of Europe this is a technocracy without significant executive leadership capacity.

Finally, the definition of the immigration issue within the states of the EU has assured that Union-level policymaking is controlled by ministries of interior and justice. For national level policymakers who are concerned with the day-to-day administration of real levels of immigration to suit anticipated labor-market needs, there is no structural framework at the EU level through which policy can be developed.

15.4.3 The importance of executive leadership

By the postwar period, the impetus for change in the United States had moved decisively to the executive branch, where restrictive quotas were seen as both an international problem, as well as a different kind of domestic problem. As the cold war continued, the existing policy placed severe restrictions on admitting refugees from the Communist world. In domestic politics, both Democratic and Republican presidents increasingly tended to link the immigration issue with civil rights, and to link both to the American image abroad and its competition with the Soviet Union. Indeed, it was the technocracy that linked the White House to local pro-immigration interests, as well as to national interest groups in favor of change (Tichenor 2002: 178–9).

Resistance to change in immigration legislation remained strong in Congress, but in practical terms, presidential influence undermined the system after 1945 through special legislation and executive orders that progressively circumvented the assumptions of the quota system. By the postwar period, only one in three immigrants entered the United States under the national origins system (King 2000: 242).

In this context, the active opposition to more expansionist immigration legislation tended to be the powerful 'conservative coalition' of Northern Republicans and Southern Democrats. Northern Republican conservatives opposed revision of existing legislation to maintain '. . . the nation's ''cultural and sociological balance'' at a time of grave peril to the American republic' (Tichenor 2002: 179). For Southern Democrats, however, immigration reform was more tightly tied to a territorial defense of segregation. Although both business and organized labor (after the unification of the AFL with the CIO in 1955) strongly supported immigration reform, the entrenched power of Southern Democrats in the leadership of key congressional committees prevented the consideration of revision of the restrictive legislation until after the 1964 presidential elections. The massive Democratic victory did not alter the control of the immigration subcommittees, but it quickly became clear that the ability of

subcommittee chairs to veto legislation supported by the president had significantly declined (Reimers 1985: 71–2; Tichenor 2002: 211–6).[16]

In the case of the EU, there is no equivalent to American executive leadership. The meetings of the European Council in Tempere in 1999 and The Hague in 2004 provided a basis for the Commission to develop proposals for policy harmonization on immigration. The only European perspective in this area, however, has been that of the Commission. If, in the American case, the technocracy has been a powerful ally of the president in developing a more open immigration policy, in the case of Europe the technocracy has had far more limited influence.

15.4.4 Complexity and time

On the other hand, the American case clearly demonstrates that, even with nationally oriented institutions that are far stronger and more developed than those in Europe, the very complexity of a federal system means that policy change takes a long time. In the United States, thirty years elapsed between the first serious initiatives to develop a comprehensive system of immigration control in 1891 and the passage of comprehensive legislation in 1921. Similarly, despite a growing political movement to reform the legislation of 1924, it took twenty years from the first presidential proposals to reform the quota system after World War II and the passage of the legislation in 1965.

The first initiatives at the EU level were taken only seven years ago, and there has been some success in developing institutions and cooperation for immigration control. Indeed, this reflects the early national initiatives in the United States that resulted in a coalition for exclusion. In the US, even with strong presidential leadership, it was difficult to build a coalition in favor of harmonized entry policy.

15.5 Conclusion: immigration policy and the dynamics of federalism

The United States and the EU represent good illustrations of the ways in which the dispersion of power in federal structures gives added weight to territorial interests and to veto politics. Each of the great policy changes in the United States took decades of coalition-building at the legislative level. The dispersion of power in both the American and

European systems makes rapid legislative change difficult to achieve at the federal level.

Moreover, legislative change in the EU is firmly under the control of national representatives. The progress in legislating and developing programs for border control, asylum, and illegal entry has been considerable, while there has been almost no progress in harmonizing even minimum standards for immigration. Of course, ministers of justice and home affairs are far more interested in entry control than economic immigration. There is, however a larger structural reason for the progress in one area, but not the other. Policy specialization in the Council means that, at the EU level the momentum of these programs is not easily challenged.

Although legislative specialization during the earlier period by Congressional immigration committees meant that they dominated the legislative agenda on this issue, this did not mean that they were able to secure legislative majorities without considerable coalition-building. In the 1960s, the immigration subcommittees of the judiciary committees remained powerful arenas of resistance to change, but they were embedded in a federal system in which the ability of the technocracy and the president to mobilize support had grown considerably.

Finally, the largest single difference between the American and European systems is the directly elected American president. The presidential constituency is biased toward states with large immigrant populations and populations with immigrant heritage. This is related to a second key difference. At least some of the political differences between the United States and Europe can be attributed to the different kind of political geography of immigration in the United States as compared to Europe. Immigrant voters and their children are more politically important in the United States than in Europe. They are particularly important in presidential elections, but can be important in congressional elections as well.

Concentrations of immigrant populations are limited to certain areas of the country, but from a national perspective, these areas are crucial in presidential elections. Moreover, though limited, these areas are also far more widespread than in Europe. More than one-third (35%) of the congressional districts (CDs) in 2000 had immigrant populations of 10 percent or more, and, although they tended to be concentrated in relatively few states, they are spread among twenty-two states. This distribution of CDs with a high proportion of immigrants is far greater than in France or Britain (about twice as great), and provides a reasonable measure of the potential electoral gains. While these gains can be particularly important for the Democrats, since two-thirds of these CDs have Democratic

Table 15.3. Election districts with immigrant populations of 10% or more in Britain, France, and the United States (1998–2001)

	Central core*	Outside	Total	Percentage of electoral districts
Britain	30	14	44	9%
France	66	27	93	17%
USA	69	82	151	35%

*London and West Midlands; Paris and suburbs; New York and California.

representation, the challenge is also quite real for the Republicans who represent the other third. With this number of CDs at stake, neither party can afford to ignore the electoral potential of immigrant populations. (see Table 15.3).

Europe, on the other hand, has no elected EU executive. Even if it did, the 'immigrant vote' is relatively unimportant on the member-state level, and would therefore not be of much consequence on the EU level. Thus, compared to France and Britain, the electoral stakes are far more important in the United States. While the mobilization of immigrant citizens and ethnic voters has become central to American party competition at the national level, it has been marginal and episodic in France and Britain (Feldblum 1999: 43; Studlar and Welch 1987; Rath and Saggar 1987: 147–9, 210–3).[17]

Notes

1. My thanks to Anand Menon for his careful reading of this chapter.
2. The Republican leadership through most of the first decade of the Senate committee's existence was from New England: Chandler of New Hampshire, Hale of Main, and then Lodge of Massachusetts. However, members of the committee also included senators from the West, the mid-West, and the South.
3. The vote was 323 to 71 in the House and 62 to 6 in the Senate: Ch. 7.
4. The principles established by the 1965 legislation had been anticipated by some of the gradual changes in immigration legislation after World War II. For example, the 1952 Immigration and Nationality Act, while reaffirming the quota system, established preferences for skilled workers and relatives of US citizens and permanent resident aliens.
5. The federal legislation in 1996 limited some welfare state benefits to legal immigrants. However, in 1997, the now forgotten US Commission on Immigration Reform (the Jordan Commission) recommended that legal immigration be

cut by a third; and finally, public opinion seemed to be moving sharply toward support for at least limited restriction.

6. Two of the six congressional districts that are all or in part in Orange Country, CA are solidly Democratic, with 60% or more of the vote in 2000 and 2002.
7. There is however considerable opposition to undocumented immigrants now estimated to number 11 Million (3.8 percent of the population). See the *New York Times*, December 24, 2005.
8. By implication, Money's analysis also makes the case that policy change is related to identity fears rather than economic issues.
9. See, for example, the failed trial balloon floated by Alain Juppé in October 1999: *Le Monde*, October 1, 1999.
10. For example, a widely publicized report of the French Economic and Social Council, supported by MEDEF—the French employers association—recommended that France '. . . open our frontiers to controlled immigration', and estimated a need for an increase of ten thousand foreigners per year. See *Le Monde*, November 8, 2003
11. 'Why the British Government's Plan for Controlling Immigration is a Bad Idea', *The Economist*, February 10, 2005.
12. In Germany, for example, the SPD/Green Government persevered for three years, and finally passed legislation (in a compromise with the CDU opposition) in June 2004 that would formally open the country to legal immigration of highly skilled workers from outside of the EU, for the first time since the 1970s. The legislation is a follow-up of a five-year green-card program that was initiated in 2000 to attract highly skilled information technology specialists. Permits were granted for up to five years, without possibility of permanent residency or naturalization.
13. Thus the failure of Juppé's 1999 initiative-see note 9.
14. As Dietman Herz points out, the report of the Working Group of the European Convention that dealt with immigration emphasized the need for immigration policy to remain under the control of member states.
15. Jeannette Money presents a strong argument that 'immigrant pressure' creates a strong temptation to develop anti-immigrant positions as a way of gaining party advantage in competitive constituencies. It can be argued that this conclusion is not inevitable, and that advantage can be gained by more open policies where immigrants are seen as political actors.
16. With tremendous energy, President Johnson applied pressure to the Southern Chair of the Senate Immigration subcommittee, James Eastland. Eastland agreed to hand over control of the subcommittee temporarily to Senator Ted Kennedy, which then enabled him to vote, also voted against the immigration proposal. In the House, the leadership agreed to expand the membership of the subcommittee, to prevent the Chair, Michael Feighan of Ohio, from bottling up the legislation. Feighan, reflecting on a tough 1964 primary fight in a district with a significant immigrant population, insisted in 1965 that he had

supported reform for some time. See Tichenor (2002: 211–16) and Reimets (1985: 71–72).

17. *Le Monde*, December 3, 2003 documents disappointment with the left among immigrant voters, and attempts by the right to attract their support. For the British case, there are studies that document the success of a small number of nonwhite ethnic candidates (overwhelmingly Labour) in British local elections in the 1980s, as well as a small number of alliances between ethnic organizations and local authorities '. . . a handful of authorities'.

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