

Democracy and Federalism in the European Union and the United States

Exploring post-national governance

Edited by Sergio Fabbrini

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Democracy and Federalism in the European Union and the United States

The European Union – a supranational system with its own institutional characteristics and autonomy – has a structure and functional logic that are more similar to those of the United States than to those of European nation-states. Yet, by and large, the European Union and the United States tend to be analysed more as potential geopolitical and economic rivals or allies than compared as institutional peers.

By bringing together some of the most influential political scientists and historians to compare the European and American experiences of federalism, this book explores the future development, and seeks a better understanding, of a post-national European Union democracy. The book consists of four parts:

- how the European Union has developed and the implications of the process of European federalization;
- the features of American federalism, tracing the intellectual debate that led to the approval of the American federal constitution in 1787;
- the relations between state, market and social rights in the European Union and the United States;
- the future of the European Union.

Robert A. Dahl concludes the volume, exploring the difficulties of democracy on an international scale. He looks at the prospects for deliberately created democratic institutions and the problems of size, legitimacy and identity.

This unique volume will be of interest to students and scholars studying European politics, American politics, federalism and comparative politics.

Sergio Fabbrini is Professor of Political Science and Director of the PhD Programme in International Studies at the University of Trento, Italy.

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Preface

Although there are a great many books dealing with democracy in the European Union (EU), there are relatively few that adopt a comparative perspective. There are even fewer that compare the democracy in the EU with that in America. When the EU is compared, the comparison privileges the EU member states rather than other countries. Yet, if the EU is recognized no longer as an intergovernmental international organization but as a supranational system with its own institutional characteristics and autonomy, then comparison with a political system such as that in the United States (US) becomes essential. The EU has an institutional structure and a functional logic which are more similar to those of the US than to those of the European nation-states. Moreover, both emerged from the aggregation of distinct member states, both manage huge territories with large populations and both possess highly complex economies. In both cases, liberal democracy is the dominant political culture for the political élite and ordinary citizens. This is not to say that the EU and the US are the same thing. In fact, their differences, be they historical, social, economic, political or cultural, are as important as their similarities. Nonetheless, their decision-making mechanisms share many common features. Despite these important institutional parallels, the EU and the US tend to be analysed more as potential geopolitical and economic rivals or allies than as institutional peers. This book aims to fill the gap in the literature by highlighting the institutional structures and decision-making procedures favoured by these two polities and enquiring whether the nature and logic of the system of democratic government established in the EU can be better understood in the light of the US experience.

The book is divided into four parts. The chapters in Part I describe and analyse the supranational nature of the EU; that is, the federalist ideas that help shape its supranational development (Mark Gilbert), the Community institutions and primarily the European Court of Justice [ECJ] which supported its process of institutionalization as a supranational polity (Alec Stone Sweet), and the implications for democracy of the emergence of a supranational EU polity (James A. Caporaso). The chapters in Part II show what the EU can learn from the experience of American federalism; that is, from the theoretical reconstruction of the American debate on the ideas of

state and nation (Edoardo Tortarolo), from the way through which federal America structured the representation of electorates and territories (Alberta M. Sbragia), and from the dilemma that has constrained American federalism – namely the difficulty to locate accountability in the system (Bruce E. Cain). However, although necessary, the comparison with federalism is not sufficient to capture the entire EU institutional dynamics. The chapters in Part III extend the comparative perspective, showing how the EU has much more in common with the US than with the single EU member states in terms of market- and state-building (Sergio Fabbrini) and social rights and the welfare state (Vincent Della Sala). Moreover, the enlargement to the new ten Southern, Central and Eastern European states (as Donald Sassoon argues) will magnify this difference between the national and supranational road to democracy and capitalism. Finally, Part IV is devoted to discussing the future of the EU, identifying the problems of a post-national democracy (Alberta M. Sbragia) and the constitutional fate of its development (Yves Mény). If the building of a constitutionalized post-national democracy in Europe appears to be a formidable task, it is even more so to advance towards an international democracy. As Robert A. Dahl reminds us at the end of the book, an international democracy continues to be a fascinating as well as an implausible project.

The book project emerged from a conference in October 2001 on the general theme of the comparison between supranational Europe and federal America promoted by the University of Trento and by the American Mission in Italy. Numerous scholars, both American and European, participated in the conference. Since then, some of these scholars, especially those who have contributed to this volume, continued to discuss the topic, developing a transatlantic comparison by using aspects, phases and institutions drawn from the historical experience of the US to conceptualize the formation and the features of a supranational EU polity. As the reader will see, they have done so in different ways and have reached different conclusions. This book is as pluralist as the two political systems that have inspired it. Nevertheless, I hope it provides an original way of thinking about the experience of constructing a post-national democracy in Europe. It is no accident that a volume of this kind should have originated in a conference sponsored by the University of Trento, which is both geographically and culturally at the heart of Europe. I cannot but thank the university's academic authorities for having backed the project that has led to the publication of this book. I would also like to thank Marco Brunazzo, Vincent Della Sala, Alessia Donà, Mark Gilbert and Lynn Mastellotto who, in various ways, provided assistance during the editorial process.

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Introduction

**Why compare the EU
and the US?**

1 Is the EU exceptional?

The EU and the US in comparative perspective

Sergio Fabbrini

Introduction

The debate on the institutional nature and functional logic of the European Union (EU) is a growth industry. While there may be a consensus in defining the EU as a *supranational polity* pursuing a project of *post-national democracy*, there are still differences of opinion on how to interpret the latter. For historical reasons (the two world wars fought on the continent) and for contemporary structural reasons (the process of globalization), Europe has moved away from the nation-state and in the direction of a larger supranational organization. In the supranational EU, ‘the collectivity of members as a singularity, in addition to the central institutional apparatus of the EU, has become party to the interstate strategic interaction’ (Ruggie 1998: 195). National and community institutions combine rather than exclude. But the understanding of how they combine is still debatable. The EU has the features of a multi-level system of governance – that is, a system territorially organized around a plurality of centres of authority. Although the distribution of resources and powers among them continues to be uncertain, each can mobilize veto positions in order to preserve or to promote their own interests and views. However, the progress towards supranational or vertical federalization of the EU does not capture entirely the structure and the logic which took shape within the EU. In fact, vertical federalization has intermingled with a horizontal separation of powers between the Community institutions which has made the organization of the EU analytically distinctive from that of a pure federal system.

Because there is no European equivalent of a political system organized around a multiple separation of powers (with the exception of Switzerland – but on that more later), it was inevitable that many observers would conclude that the EU was and is an exceptional system. I will try to challenge the idea of a European uniqueness, showing that it does not stand the test of comparison. The EU is unique *vis-à-vis* the European nation-states, but not in comparison with another continental federal experience like the American one. In fact, the United States (US) is based on both a vertical and a horizontal separation of powers (Fabbrini 1999a). Moreover, the US has seen the first historical

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attempt to create a democratic (or ‘republican’) order out of a double and contradictory source of legitimacy: individual citizens and corporate (territorial) units (or states). The attempt was the expression of an explicit constitutional choice: the choice to create a *compound republic*. But the American case is rarely considered for a comparison with the EU (Fabbrini 1999b), probably because EU studies are shaped by a form of Eurocentrism.

The chapter will proceed as follows. First, I will contest the theory of a EU uniqueness. Second, I will discuss the institutional structure of the EU (also in the light of the constitutional treaty elaborated in Brussels between 2002 and 2003 and thus approved by the European Council held in the same city on 17–18 June 2004)¹ to show its character of multiple separations. Third, I will compare the EU with other federal systems, arguing the usefulness of the comparison, but also its limitations. Fourth, I will compare the EU with the US to detect their similarities. Fifth, I will compare the US and the single European nation-state constructions in order to show that the EU has more to learn from the former than the latter experiences. Finally, I will go back to the EU, asking whether it will be able to resist the new challenges of change and transformation. My answer will rely again on the American experience. This experience, in fact, shows that such regimes are more persistent than traditionally thought, although dramatic challenges may pressure them in a direction that contrasts with their functional logic.

Is the EU exceptional?

The institutional nature and functional logic of the EU has brought some European observers to discuss its uniqueness.² The EU appears so different from its member states that it seems inevitable to consider it as an exceptional system. As Helen Wallace (2000: 8) remarked, ‘it has been commonplace for commentators on the EU to stress its distinctive features, and indeed often to argue that they result in a unique kind of politics.’ This uniqueness is generally justified on the following basis. The EU is a system of *governance* rather than of *government*; that is, it expresses the end of the traditional distinction between state and society which marked ‘political modernity’ (especially European). Governance appears to be incompatible with government, exactly because the latter – contrary to the former – implies a pattern of decision-making processes developing within formal institutions, involving publicly recognized actors and structured around vertical relations of power and influence. This is not the case with the EU. In this sense the EU embodies the post-statist condition of contemporary politics.

Governance may have different meanings (Pierre 2000), but in the EU context it has to be interpreted as patterns of decision-making based upon informal networks of public and private actors and aimed at generating decisions through extensive consultation, diffusion of information, contingent integration of individuals and groups, promoters of specific knowledge, and a horizontal circulation of influence. One might say that a governance pattern

of decision-making is characterized by an informal political process, a fluctuating constellation of actors and horizontal relations among them. Because of its historical origin and development, the EU has tended to be a polity in permanent transformation; rather, it is the relations between its member states, the Community institutions and the plurality of private actors representing interests, sections and ideas of national and transnational economy and society that have been in permanent transformation. A system of overlapping jurisdictions, variable policy boundaries and segmented decision-making processes gradually evolved. Based upon an uncertain legitimacy, void of any formal sovereignty and lacking the party tools of political aggregation, the Community institutions had to operate in a floating environment. Nevertheless, decisions were taken, regulations and directives were promulgated, recalls were made public – decisions, thus, regularly implemented in the EU member states.

The argument about EU governance has an empirically uncontroversial basis. However, the dichotomy between governance and government is as clear theoretically as it is ambiguous empirically. Modern democracies have never relied only on formal institutions and publicly recognized actors to meet their decision-making needs or necessities. In addition, the traditional distinction between state and society has never been insurmountable. Private individuals and groups as well as public officials have frequently crossed the boundary, privatizing the state or politically colonizing society and the economy (Streeck and Schmitter 1985). Yet, it is also true that contemporary processes of globalization and Europeanization have contributed noticeably to an alteration of the traditional patterns and boundaries. It is true that this process has reached its highest mark at the EU level, where many decisions are the outcome of diffused processes of political interaction organized around mobile networks more than fixed structures. Nevertheless, these networks are comprised of informal and formal institutions as well as of private and public actors. Public institutions and public authority were not superseded, but integrated, by private ones. More than the substitution of an old pattern with a new one, the EU is characterized by their coexistence. As Sbragia (2000: 236) remarked, ‘the European Union governs in the sense of steering because it is structurally designed to keep certain substantive questions off the table while insisting that others be kept on the table.’

The governance pattern has emerged because of the peculiar governmental structure of the EU. It is one where there is no government *as a single institution*; rather, the decisions are taken through the contribution of a plurality of institutions and actors sharing decision-making power. Thus, if one wants to challenge the exceptionalist’s argument, it is not only appropriate but necessary to identify the institutional structure (as a combination of the vertical and horizontal relations of its institutions) which accompanies the governance network of the EU. The balance between governance and government might change in accordance with the policy decision involved. The coexistence of governance and government is (probably) inevitable in a polity

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which aggregates different nation-states, each of which is endowed with its own traditional sovereignty and which looks for supranational cooperation. In fact, in a comparative perspective, the institutional structure of the EU appears much less unique and exceptional than one might suppose. The institutional web of the EU governmental/governance system appears to be a species of a genus of democratic polities which are compound rather than unified – as is the case of the US.

In sum, it does not seem convincing to claim that the EU is a polity without any precedent, in the modalities of both its formation and its functioning, in the history of the democratic world. This is for empirical and analytical as well as methodological reasons. In the past, the outcome of the exceptionalist approaches has been the unfortunate parochialism of political analysis. Each and every political system is exceptional *per se*. However, this idiosyncratic approach cannot help us to understand the specific nature of each of them. Ideographic studies have produced a lot of information on specific countries, but not an effective comprehension of their functioning (Sartori 1990). In fact, we know a lot about the EU, but we understand much less about its nature and logic.

The institutional structure of the supranational EU

The EU is the most advanced experiment in building a supranational political authority to emerge from the twentieth century (Weiler and Wind 2003; Weiler 1999). The EU is more than a purely economic arrangement: it embodies an endeavour to construct a public authority with supranational features, if not to construct a ‘new form of state’ (Caporaso 1996). An increasing number of traditionally domestic policies (Wallace and Wallace 2000) are now influenced, conditioned, structured or defined at the EU level. At Maastricht in 1992, the EU was structured around three pillars: the first pillar concerned the growing number of policies connected to the formation and functioning of the common market; the second concerned the coordination of domestic security and foreign policies; and the third concerned cooperation in the fields of justice and home affairs. The three pillars were aggregated in the draft constitutional treaty elaborated by the constitutional convention between 2002 and 2003, a draft thus approved with some changes by the European Council held in Brussels in June 2004.

However, this aggregation will not cancel the double method of decision-making the EU has continued to adopt in its development: the Community (or federal) method and the intergovernmental (or confederal) method. One might say that *supranationalism* is the outcome of the combination of the two methods (and of the two sets of institutions which express them). The EU as supranational organization has been institutionalized via a complex system of interlocking governmental bodies (Stone Sweet *et al.* 2001) – complex, but nevertheless effective in supporting integration and in promoting member states’ consent. Its central institutions were and will continue to be the

European Council and the Council of Ministers, intergovernmental bodies representing the executives of the EU member states, responsible (the former) for delineating the aims of the EU and (the latter) for defining and approving (with the European Parliament) EU laws and rules. The constitutional treaty rationalizes and strengthens these institutions, but does not alter their nature. In the case of the former, by substituting the rotating chairmanship (every six months) of the European Council with a president of the EU, selected by the European Council members, representing the EU for two and a half years (a mandate which can be renewed for other two and a half years), it will become much more authoritative than in the past. In the case of the latter, by defining its structure better, instituting the Council of General Affairs and the Council of Foreign Affairs chaired by the minister of foreign affairs, it will evolve as a more effective institution. If some scholars (Burgess 2000: 262) wondered in the past about 'the uncertain character of the Council of Ministers', it seems plausible to assert that the constitutional treaty stresses that the intergovernmental nature of the EU is located here and in the European Council.

Nevertheless, these institutions were and will continue to be checked by more Community-oriented institutions, starting with the European Commission. Here as well, the constitutional treaty seems to rationalize the existing practice. In fact, the president of the Commission will continue to be appointed by the European Council and approved by the European Parliament. The president of the Commission, together with the president of the European Council, will have to choose the other commissioners (it is not important here to discuss their number and composition) and then submit their candidacy to the European Parliament for approval. The apparently innovative introduction in the draft is in the following clause: the European Council has to select the president of the Commission 'taking into account the elections to the European Parliament'. The point is that, as the European Parliament is elected with a PR system, it will not be at all easy to identify a clear outcome (of its elections). The choice of the president of the Commission will probably continue to have a consensual character, stressing the role of the European Council rather than the party composition of the European Parliament. The Commission will continue to monopolize the power of legislative initiative; that is, it will continue to be the institution which has to submit legislative proposals and to make sure they are properly executed once they have been approved (by the Council of Ministers and the Parliament).

Moreover, the European Parliament, which has been popularly elected since 1979, has increased its influence significantly with the Treaty of Maastricht of 1992 and of Amsterdam of 1997. This increased influence was fully recognized by the constitutional treaty. Although the Parliament is endowed with more limited legislative power than national parliaments, the constitutional treaty recognizes its power of co-decision with the Council of Ministers on most legislative issues. It also recognizes its power to confirm the

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choice of the European Council for the presidency of the Commission (and thus the choice of the members of the Commission negotiated by the latter with the leader of member-state governments of the European Council). But, again, this power cannot be confused with the traditional parliamentary power to form a government, although it is an attempt to deal with the democratic deficit of the EU. Last but not least, the European Court of Justice, which has since the very beginning acted as a fully Community-oriented institution, one which assessed, within the confines of the treaties, the coherence between EU and national laws, sees its role of 'guardian' of the legal structure of the EU recognized by the constitutional treaty.

At the same time, the constitutional treaty acknowledges fully the principle of subsidiarity which has come to structure territorial relations in the EU. Notwithstanding its conceptual ambiguity, the constitutionalization of this principle will formalize the multi-level nature of the EU or its quasi-federal character. From a territorial point of view, the EU is a more complex system than any existing federal system. Generally, a federal system is constitutionally organized around two levels of government (the federal centre and the federated units, states, *Länder* or provinces), whereas the EU is already structured around local, regional, national and supranational levels of government. In addition, various combinations of transnational coalitions of local and regional units have introduced a further level of decision-making. In sum, the EU is already a system where power is diffused, authorities overlap and the separation among institutions sharing decision-making power has been the guiding principle of its institutionalization. In order to function properly, this multiple separation of powers has been moderated by pragmatic devices of checks and balances. The president of the Commission is nominated by the European Council with the consent of Parliament, which has to approve the nomination. A growing number of EU laws and rules have to be co-decided by both the Council of Ministers and the Parliament. The Community directives have to be transposed in the national legal system by domestic parliaments. Each level of government has decision-making jurisdiction in some policy fields, but increasingly they have to cooperate to decide and implement the various policy measures related to the building of a common market. Thus, a system of checks and balances operates quite effectively. It is sometimes informal, but the pressure is to make it formal. For instance, the constitutional treaty has aggregated all the foreign affairs issues in the office of a powerful minister for foreign affairs, who will be nominated by the European Council on the basis of a qualified majority voting to lead the foreign and security policy of the Union. The minister will perform his or her role on the behalf of the Council of Ministers but, at the same time, will also have the role of one of the vice-presidents of the Commission, thus being subject to its rules and procedures.

In sum, the EU does not belong to the family of bodies set up to promote cooperation among states. Beginning as an international organization in the 1950s, on the basis of the dramatic experiences of the two world wars, the EU

has since gradually reduced its original intergovernmental configuration to acquire the features of a supranational organization (Hix 1994), as shown by the chapters in Part I of the book. Mény (2001: 30) wrote, ‘an international organization with limited powers [has been gradually transformed] into a Union . . . with missions and involvements that are almost unlimited.’ Thus, although the comparison of the EU with regional organizations such as NAFTA, Mercosur or ASEAN might give important insights, it is much more productive to compare it with domestic political systems.

Comparing the EU: the case for federalist systems

Once the EU was defined as a treaty federalism (Hueghlin 2000) or a multi-level system (Hooghe and Marks 2001), it followed that it could be compared with democratic federal systems (McKay 2001). This comparison has its virtues, helping to contradict the exceptionalism argument. However, if devoid of analytical specification, it runs the risk of transforming a part into the whole. Federalism is a way of organizing the territorial relations between the centre and the peripheral units, rather than a model of democracy per se (Lijphart 1999). Some scholars, such as Thomas Hueghlin (1995: 203), asserted that:

federalism and the nation state are contradictions in terms. The latter is an historical construct of centralized power monopolization, initiated by small groups of power-hungry men . . . The former is nothing less than its opposite, a form of decentralized political organization designed to prevent power-hungry men from assuming monopolized power.

Nevertheless federalism per se cannot capture the entire nature of a given political system. In fact, federalism and the nation-state are not contradictions in terms (we have many nation states which are effectively federal systems); we also have different models of democracy conjugated with a federal system (consociational in Switzerland and Belgium, majoritarian in Australia, competitive in Germany).

A federal political system or federalism is a genus to which different empirical species arguably belong (Watts 1998: 120). Although each species has to be connoted by some combination of institutions of *shared rule* and *self-rule*, this combination may vary significantly. The EU process of federalization asks for a reconsideration of the various federal species to verify whether their traditional distinctions resist the test of empirical analysis. This test concerns primarily the historical distinction between *federation* and *confederation*. Analytically, a federation has been defined as:

a compound polity combining constituent units and a general government, each possessing power delegated to it by the people through a constitution, each empowered to deal directly with the citizens in the

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exercise of a significant portion of its legislative, administrative, and taxing powers, and each directly elected by its citizens.

(Watts 1998: 121)

In a confederation, however:

the institutions of shared rule are dependent on the constituent governments, being composed of delegates from the constituent governments and therefore having only an indirect electoral and fiscal base. By contrast with federation, 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.

(ibid.)

Is this distinction still appropriate in light of the processes of federalization we are witnessing in Europe as elsewhere? It may be clear in theoretical terms, but empirical reality has made this distinction much more blurred. In fact, the two territorial systems weren't and aren't impermeable to a reciprocal influence, as shown by contemporary EU development and by the experience of previously developed federalized systems.

What appears to be distinctive about the EU territorial organization is exactly the coexistence of confederal and federal institutions and processes. If it is true, as Burgess noted (2000: 262) 'that, in establishing the European Economic Community (EEC) in 1957, the basic structure of the union resembled more an economic confederation than anything else', it is also true 'that these elements in practice coexisted with distinctly federal features' (ibid.). The main confederal elements of the EU are represented by the intergovernmental conferences of the European Council of heads of state and governments of the various member states, whereas the federal elements are the Commission, the Court of Justice and the European Parliament – not to mention the European Central Bank in its capacity to control the common European currency. Moreover, the adoption of qualified majority voting (QMV) in the Council of Ministers has further obscured the confederal origin of that institution. The prolonged though unstable coexistence of these dissimilar elements induces a reconsideration of the relationship between confederation and federation. Confederation does not appear to be, as Alexander Hamilton thought and wrote in no. 15 of *The Federalist*, a recipe for failure, or in any case a remnant of an institutional past.³ The two systems are not incompatible, in the sense that they may combine elements (institutions and practices) in an unexpected way.

All federal political systems include in their structure elements of a confederal type. Federal Germany, which has been the most cited case for comparison with the EU, has a *Bundesrat* which – like the Council of Ministers in the EU – represents the *Länder's* executive (Schmidt 1997). The adoption of confederal elements is evident in Canada, with the institutionalization of

the conference of the provincial prime ministers (Simeon 1995). Confederal elements also structured the development of American federalism, with the indirect election of the senators by state legislatures until the seventeenth amendment of 1913 or with the increasing role played by the lobbies of governors and state legislatures within the congressional law-making process since the 1970s. It seems more than plausible to compare the EU with established federal systems, regardless of the different combination all of them register of federal and confederal elements. However, the federalist perspective, with its nuances, captures only a part of the EU story because, contrary to the EU, established democratic federal systems have a separation of powers at the vertical level, *but not at the horizontal one*. This is true for quasi-federal democracies as well, such as democratic Spain and post-2001 Italy. With the exceptions of Switzerland and the US, Germany, Belgium, Canada and Australia are parliamentary systems. Power is separated at the territorial level, but it is fused at the governmental one. As it is fused in federal Austria, notwithstanding the popular election of the President of the Republic.

Switzerland has an institutional structure similar to the EU, with an executive as a collective body whose presidency has to rotate among its seven members (Blondel 1998). However, the limited geographic and demographic size of that country makes it an unlikely comparative reference for the EU. Size affects the complexity and density of social and institutional interactions (Dahl and Tufte 1973). The comparison between a polity of roughly 500 million inhabitants (as is the EU of twenty-five member states), imbedded in deeply rooted national identities and institutions, with political systems much smaller, and thus much less complex and dense, has its inevitable limits. Switzerland is a very small country, with limited social complexity, delimited internal transactions and zero geopolitical exposure. Thus, comparing the EU with the US appears to be much more promising (Nicolaidis and Howse 2001). Both the US and the EU have the features of a system with fragmented sovereignty, which was defined by James Madison in Philadelphia as 'compound republic' (Ostrom 1987), *where segmentation and separation of powers concerns both the horizontal and the vertical level of the system*. Moreover, both the US (at least for more than one century of its history) and the EU have performed as systems of recognized public authority without the support of a bureaucratic central state.

In conclusion, comparing the EU with the American federal system is a necessary exercise, as the chapters in Part II of the book show. However, although necessary, the comparison with federalism is not sufficient to capture the entire EU institutional dynamics. It seems evident that the process of supranational and subnational federalization has seriously challenged the internal cohesion and external autonomy of the EU member state, especially in its traditional West European version, represented by the French archetypal model. The process has etched both the *nation* and *state* sides of that model. As Kirsch (1995: 59) wrote:

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Western Europe is evolving in two opposite directions. On the one hand, the traditional nation states are losing at least part of their sovereignty and competency to the European Union. On the other hand, we are witnessing the renaissance of regional sentiment and loyalty. At a time when Western Europe strives to impose its new-found supranational identity on future history, it is rediscovering its own plurality, as infra-national identities from past history are reborn.

Comparing the EU: the case for compound democracy

Following the classical definition of Ostrom (1987), a compound republic is a polity constituted by ‘concurrent and overlapping units of government’ (ibid.: 106) or ‘a system of government with multiple centers of authority reflecting opposite and rival interests . . . accountable to enforceable rules of constitutional law’ (ibid.: 21) – multiplicity of institutional separations whose aim is finalized to promote and to guarantee the anti-hierarchical and anti-hegemonic character of the republic. In Philadelphia in 1787 the political theory of a compound republic was elaborated in order to reconcile a contradictory need: ‘to form a more perfect Union’ (as the preamble to the American Constitution of 1787 recites) without creating the institutional conditions for the formation and the ascendancy of a political majority (or, better, of a *majority faction*). As Dahl (1956: 16) reminds us, for the main architect of that theory (James Madison), there were ‘only two possible ways of controlling the effects of a majority faction. First, the existence of the same passion or interest in a majority at the same time must be prevented . . . Second, even though a majority faction exists, its members must be made incapable of acting together effectually.’ Although the US displays significant specific differences *vis à vis* the EU, the comparison with the US (and the political theory which created it) might be fruitful for an understanding of the EU. As Ostrom (1987: 9) remarked, for Europeans

to find [the American] theory useful for thinking about problems does *not* mean that Europe should copy the American model. That would show intellectual poverty – of doing no more than imitating the American example. The task, rather, is to use conceptions and the associated theoretical apparatus as intellectual tools to think through problems and make an independent assessment of appropriate ways for addressing the problem of contemporary Europe.

Thus, the US compound democracy is a system consciously designed to generate governmental decisions without a government. It has been the first system of governance where decisions have been taken without referring to a majority aggregated around the executive and its parliamentary majority. A compound democracy is structurally different from any existing model of democracy, not only majoritarian or competitive but also consensual or

consociational (Lijphart 1999). These models of democracy may be distinguished by their different ways or modalities of government formation: through bipolar or two-party electoral competition (in the first case) or through post-electoral multi-party negotiation (in the second). But in both models the formation of a governmental majority is the natural outcome of the political process. This was not the purpose of the system elaborated in Philadelphia in 1787. Power was separated not only vertically, but also horizontally, in order to hinder the formation or the identification of a political majority. Madison wrote in no. 51 of *The Federalist*: 'In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place' (Beard 1964: 228).

This is why the Senate, the House of Representatives and the president have different sources of electoral legitimacy (state legitimacy in the first case, because the senators, while indirectly elected by the state legislatures until 1913, are now directly elected by the voters in electoral districts equivalent to the states; local legitimacy in the second case, because the representatives are directly elected by the voters in smaller electoral districts within the states; and national legitimacy in the third case, since the president is indirectly elected by *ad hoc* 'great electors' of the electoral college, whose total number is equivalent to the members of the Senate and the House of Representatives) their mandates have different time frames (six years in the first case, two in the second and four in the third), and their operation is independent from the political confidence of the other institutions. Although separated, these institutions have to cooperate. In fact, as Neustadt stated, 'The limits on command suggest the structure of our [American] government. The Constitutional Convention of 1787 is supposed to have created a government of separated powers. It did nothing of the sort. Rather, it created a government of separated institutions *sharing* power' (1990: 29; italics in the original). They share power through a complex system of checks and balances through which each institution has a voice (or, better, a veto) in the operation of the others. The president may veto a congressional bill (in whose case the legislature may vote again in favour, but this time with a qualified majority of two-thirds of the members of the two chambers), while the Senate has a power of 'advice and consent' on presidential nominations (of the members of his administration or the judges of the Supreme Court), as well as on the approval of international treaties. Thus, although separated, they have to accommodate the interests of their different constituencies in order to generate a 'governmental decision'.

As regards the vertical dimension, power in the US system is distributed among multiple territorial levels, although, formally, only federal and state authorities are recognized as the sources of public authority (Elazar 1987a). Policy competences are divided among these different authorities, but only the powers of the federal centre are defined in the US Constitution, the remaining competences being assigned to the states. Thus, the states may exert any of the powers that are not explicitly allocated to the federal level.

This system has been termed ‘competitive federalism’ or ‘dual federalism’ (Dye 1990) because state and federal authorities can act autonomously in the policy area of their competence; moreover, they can do so with the support of autonomous and separated administrative, judicial, legislative and executive institutions. The system of concurrent governments enables individuals to take advantage of the level of government most appropriate to each specific policy issue. The Constitution has assigned to the Senate the role of representing territorial interests at the federal level, while the House of Representatives has the function of ‘giving voice’ to single electors. This bicameralism is also reflected in the EU, as we have seen, with the European Parliament as the popular institution and the Council of Ministers as the institution representing the territorial interests of the member states. However, while the executives of the EU member states are represented in the Council of Ministers, as in the German *Bundesrat*, in the contemporary US Senate state-wide voters are represented. Additionally, while in the Council of Ministers each member state has a weighted vote, in the US Senate all states have two senators, each of which votes individually.

Discounting the numerous specific differences, the EU has remarkable similarities with the institutional context and the functional logic of the US. Basically, in both cases, decisions have to be taken without relying on a single institution (the government) authorized to have the monopoly of them. This sort of institutional convergence between the EU and the US is all the more surprising if one considers that America and Europe (in the sense of single European countries) for long followed alternative paths to democratic nation-state-building (Fabbrini 2003a). In fact, the American experience of democratic nation-state-building is the most diverse from the experience of the single European countries and the more similar for deriving some indications for our understanding of the EU (Fabbrini 2003b).

State, nation and democracy in Europe and America

In Europe, modern nation-states are to be considered the outcome of the long drawn-out transformation of the feudal structure inherited from the disintegration of the Roman empire. The state-building process happened in different ways because it was influenced by the different nature of the centre-periphery structures proper of the countries concerned, which produced different incentive structures for the central élites who wanted to maximize their own power. The state-building process is concerned with the neutralization of free-riding and defection options by those peripheral actors (individuals, groups, territorial communities) hurt by the strategies of centralization (Spruyt 1994). The exit options were much more difficult to circumscribe, whereas the territory was organized around a network of economically independent trading cities. As Rokkan remarked (1999), the territorial sovereign state first developed in the areas at the periphery of the old Roman empire (France, Britain and Spain). In the core of the Roman

empire the dense network of independent cities created alternative institutional organizations of power arrangements (the city-leagues in Germany and Holland and the city-states in the Italian centre-north) to the territorial state.

If the original pressure for territorial and governmental centralization *in the form of the state* came from within the territory itself, its consolidation was helped by the subsequent development of a competitive interstate system (Tilly 1990). The territorial centralized state won over other institutional alternatives (city-state and city-league) because of its superior capacity to pool and to mobilize societal, fiscal and (above all) military resources. Once the new state had won, then the new rulers needed to look for a new cultural legitimacy of their own power. The *nation*, as a community of belonging to a stock of shared experiences and behavioural attitudes, was the outcome of this process. It goes without saying that one has to distinguish between earlier and later state-building in Western Europe (Tilly 1975). In fact, later state-building (Germany in particular) followed exactly the opposite path to that of the earlier countries. Here, the state was created in order to give representation to an already defined nation, and not, as in the earlier cases, to give shape to it. Between these two types of nation-state-building we had other experiences which escaped from the superimposition of state and nation (such as the consociational states of Switzerland, the Netherlands and Belgium; see Daalder 1995). With these caveats, it seems plausible to assert that the experience of the earlier European nation-states indicates the priority of the state and the system of states in the formation of European nations.

The situation in the US was significantly different. Here, the élites pursuing the strategy of territorial sovereignty had to operate on the basis of different cultural and economic premises. On the cultural side, in the US there was neither the overlapping of the secular and religious realms (which helped the process of state-building in protestant Europe) nor the competition between the secular and religious authorities (which characterized and constrained the process of state-building in Catholic Europe). On the economic side, the US was more similar to the European trading belt than to those areas which fostered the earlier process of state-building. America's differentiated network of trading cities, with growing areas of land distributed to a free peasantry, operating within traditional distinct state boundaries, proved unfavourable to any attempt towards political centralization. At least until 1865, the US was never able to produce a condition of no-exit (for individuals, groups and territorial areas), because neither religious or language barriers nor economic or territorial constraints were operating. In the same time, the continuous enlargement of the polity challenged any attempt to neutralize the exit options.

The federal state and the federated states have continued to be in competition throughout American history, notwithstanding the Civil War. As Elazar (1987b: xvi) remarked, 'the federalism of the Constitution was made crystal clear, just as the division and sharing of powers was left ambiguous.' Congressional government of the nineteenth century was federal government

through states' representatives, rather than European-style parliamentary government. Congress was at the same time the legislature of the nation and the patron of the states' interests. It played this double role through the internal working of the House of Representatives, largely dominated by state party leaders, and through the Senate, whose members were selected by state legislatures. Through this interlacing of partisan and institutional factors, the federal jurisdiction promoted by Congress was kept within limits, thus overlapping with the states' jurisdictions promoted by state legislatures. This overlapping of jurisdictions was necessary to guarantee the territorial corporate pact at the basis of the federal experiment. Otherwise, how can the Constitution's ambiguities about the states' right to secede be explained? This is why sectional conflict was, and continues to be, one of the recurrent sources of political conflict in the country (Bensel 1987).

Although the 1787 Constitution strengthened the capacity of central rulers to foster the territorial sovereignty of the new republic, it constrained their exercise of sovereignty to a degree unthinkable in Europe, through the vertical and horizontal separation of institutions sharing the same governmental powers. Moreover, the affirmation (with the celebrated Supreme Court sentence of 1803) of a power of judicial review of legislative acts, at the various levels of the judicial system, made that separation unassailable. The US is perhaps a paradigmatic case of a nation developed, at least until the end of the nineteenth century, without the support of a central state. Nevertheless, for that long period, there has been a unified legal order, but not the Weberian distinction between state and society registered in Europe. As in the EU, the judiciary was crucial in promoting the legal order, and the political parties were central to defining the legislative content. But especially important was 'the meta-legal theory which . . . shaped the way courts, governments, and the voting public understood and construed the law of their Constitution' (Beer 1995: 227). It was the Constitution, and not the existence of a supporting institutionalized centre, which first legitimized the new republic and then made possible its development.

The US differed from the European countries also in terms of its process of democratization. In the European experience here utilized as the archetype, the chain of political development starts with the state, passes through the nation and ends up with democracy (Smith 1995). In Europe, democracy is the outcome of the previous identification and mobilization of the nation-state. Thus, in Europe, democracy was obliged to grow within the conditions imposed by those who already controlled the state and by those who presided over the concept of national identity. In the US, the sequence was quite different. Not only did the (federal or central) state arrive after the nation, but the process of nation-building and democratization had a synchronism unknown to the European experience. In the US, the national revolution did not pass through the conflict between centre and periphery or church and state, but through a struggle against an external power (Lipset 1979). Not having to overcome an internal divide, the US could become a nation

without the lead or the imposition of a centre (Greenfeld 1992). The written constitution of 1787 crystallized an already existent national identity, giving to it, however, a republican basis. The making of the constitution, it has been argued by Preuss (1996) and others, is the founding act of the nation. Through (and sometimes forcing) the constitution, electoral democracy could develop in the nineteenth century, thus deepening the democratic shape of the national identity.

Nation and democracy, in America, thanks to the constitutional act, reinforced each other long before the consolidation of a federal state. In the nineteenth century, the institutionalization of the channels of participation, representation and opposition was realized largely in the absence of a central state. Until the growth of presidential government in the 1930s, the US did not have national parties. But also after the Second World War, congressional and presidential parties continued to be coalitions of state, county and local political organizations (Epstein 1986). Since the *locus* of power was in the Congress and in the states for a large part of the nineteenth century, it was there that the parties concentrated their political energy. The industrial revolution of the second half of the century pitted the commercial interests of the north-east against the land interests of the south, more than those of capital versus labour. There was also the latter form of conflict, but it did not take the European form of socialist and anti-socialist parties.

To use Hirschman's analytical tools (1970), in the US the social and economic conflict did not produce the European class parties *not least because* the exit option continued to be available for a long period to those individuals and groups who had suffered most from the industrialization process, but *also because* democracy arrived before not only the state, but a modern capitalist economy as well. Individual (male) workers were integrated in the political system before they could develop a collective conscience as members of the same class, thanks to a set of political and civil rights to which they had been entitled since the first decades of the nineteenth century. In any case, the ethnic divisions traversing the social classes further hindered the formation of a permanent cross-state social identity. The American way of integrating ethnic, cultural and territorial diversities relied on the 'hurly burly' of pressure politics and congressional sectionalism at the centre, and party mobilization in the states. In this way, the US could maintain its decentralized and governmentally separated nature. The US grew, to use Bell's (1991) definition, as a civil society democracy rather than as a state democracy. In sum, American political development challenges the view (Grimm 1997) that democracy requires a nation and a state to prosper.

Internal changes and geopolitical transformations

Between the end of nineteenth century and the Second World War, the US, pressured first by a tumultuous internal industrialization and then by a growing international exposure, started to alter its traditional institutional

patterns. It needed a viable federal state to regulate the economy and (above all) to promote and preserve its geopolitical interests. Politics became nationalized. The nationalization of American democracy implied a transfer of competences and resources from the states to the federal centre. At the same time, it also generated formidable incentives for the growth, within the federal centre, of the authority of the president in the decision-making process. The growth of influence of the federal institutions triggered a popular discussion on their democratic deficit. Public opinion and social and political movements asked for their democratization, which took place, but within the constraints of the separation of powers governmental system.

From the direct election of the senators to the diffusion of primaries for the selection of presidential candidates, from the popular election of the members of the presidential electoral college to the reform of the congressional committee system in order to reduce the influence of the southern congressmen (or 'barons'), twentieth-century America witnessed formidable popular pressure for the democratization of its federal institutions. The outcome was a more centralized system at the vertical level and presidential government at the horizontal level. But none of these reforms and processes altered the basic constitutional structure of the country. In fact, contrary to some expectations, the states continued to retain relevant powers in many fields of public policy.⁴ Some even argued (Beer 1993) that, with the 1980s and 1990s, compact theory awoke after a long sleep: America witnessed the start of a period of 'new federalism' (largely supported by the Supreme Court), especially with the transfer of social-policy responsibilities to the states. At the same time, Congress showed itself to be a formidable institution in constraining the increased presidential power (Polsby 2004, 1997). The resurgence of congressional power was largely supported by the 'institutionalization' of divided government in the 1980s and 1990s (with the two parties in control of different governmental institutions). A divided government era apparently interrupted, with the formation of a unified neo-conservative majority both in the presidency (2000) and in Congress (2002).

The US was pressured, especially in the second part of the twentieth century, to move in the direction of a more statist democracy (or, in any case, a less civil society democracy). Cold War imperatives had a crucial role in this transformation. They not only accelerated the centralization of foreign and military powers in the presidency (and in the offices of the 'personal president', such as the White House Office and the Executive Office of the President; Lowi 1985), but also created an opinion in favour of that centralization. This confirmed the approach of Tilly, who prized the role of (threat of) war as the necessary variable in the building of more centralized national decision-making structures. This happened in Europe, but not in the US, exactly because the isolationism in the nineteenth century protected it from war threats (although it might be said that America was protected more by the British navy than by its isolationism).⁵ Thus internal complexity and external exposure pressured the US to increase its statehood. But this

statehood developed within the fragmented and separated nature of the American system. The growing pressure for coherent and accountable federal action ended up in producing a 'new political disorder' (Dahl 1994). The tendency of a multi-separated system as incentive to political disaggregation and to confuse governmental responsibility was thus heightened in the late twentieth century. This disorder did not produce a legitimacy crisis because the institutional structure of the American compound republic had plenty of time to consolidate. The US survived and grew, thanks to the constitutional nature of its political regime (Beer 1995: 242). However, given the irresolvable contradictions of the US constitutional system, Dahl (2002) provocatively asked whether its constitution is properly democratic.

This experience is of great interest to Europeans. In the EU, nation, state and democracy do not overlap *by necessity*. Few feel the allure of a European nation as a primordial community of belonging, or claim a European state as a Weberian institutional structure, or expect the birth of a European demos (Gilbert 2003). Like the US, the EU is characterized by a diffusion of decision-making power (Coultrap 1999) because of its systemic need to guarantee the anti-hierarchical and anti-hegemonic nature of its regime. Thus, like the US, it has multiple modalities of representation, a powerful and judicial review-oriented judiciary and independent regulatory agencies (Majone 1996), and is based on subsystems of policy-making. In the EU, too, political parties are coalitions of member-state and local organizations, and the hurly burly of functional pressures appears to be more effective than electoral mobilization. In the EU, as in the US, sectional cleavage is proving to be a more mobilizing factor of political competition than transnational class or ideological cleavages (Bartolini 1998). Moreover, the integration process of post-Second World War Europe was made possible by a sort of European isolationism – an isolationism protected by US military forces within NATO, and not by the British navy, as in the American experience of the nineteenth century. Rigidly delimited by the wall of the Cold War, Western European countries could gradually build their system of multiple separations without facing serious external stresses on its working. The liberal democratic culture, constitutionally rooted at the member-state level, contributed to the peaceful solution of the tensions that emerged within the Community system. In sum, as the chapters in Part III of the book show, in terms of market- and state-building and of social rights and the welfare state, the EU has much more in common with the US than it does with the single EU member states. The enlargement to include the ten new Southern, Central and Eastern European states (as Donald Sassoon argues) will magnify this difference between the national and supranational road to democracy and capitalism.

However, with the end of the Cold War and the dramatic transformations of the global system after 11 September 2001, the preservation of European isolationism appears much less viable than before. The challenges of the economic transformation and social disparities of the EU will open new sources of instability. It is true that the EU compound republic was more

stable than supposed; nevertheless this stability may be considered an effect of a set of very fortunate circumstances. How the EU will react to these dramatic external transformations is an open question, because its institutions do not appear to be as consolidated as the American institutions were when they faced similar challenges. Part IV of the book is devoted to a discussion of the future of the EU, identifying the problems of a post-national democracy and the constitutional fate of its development. To be sure, if the building of a constitutionalized post-national democracy in Europe appears to be a formidable task, it is even more daunting to advance towards an international democracy. An international democracy continues to be both a fascinating and an implausible project as Robert Dahl reminds us.

Conclusion

The comparison of Europe with America furnishes important indications for our analysis. The development of the EU has made that comparison, if possible, more stringent. Although the complexity of the EU's development is much greater than that of the US, the latter's development does show the opportunities and constraints of a compound republic in the conditions of a continental-size democracy. Protected by the constitution and its judicial updating (Ackerman 1991), the US compound republic could find changing institutional solutions. However, the irreducible constraints of its constitutional system made those solutions uncertain (because cyclical, in the sense that decentralization followed centralization, congressional power challenged presidential primacy) and ineffective (to identify 'who is responsible for what', given that decision-making power is diffused). In the new global climate that emerged from the terrorist attack of 11 September 2001, the EU is called to play an interventionist role in the world arena (and especially in those international conflicts closer to it that threaten its internal security). The same enlargement is pressuring the EU to fashion its decision-making structures and procedures in a more coherent and efficient way, without jeopardizing its composite nature. If the American experience suggests that similar external and internal processes have tended to challenge the composite nature of a compound republic which, nevertheless, survived thanks to a rooted constitutional structure, how will similar challenges be dealt with in the EU case? Is the constitutional treaty approved in Brussels in June 2004 an appropriate solution both for preserving the compound EU nature and for generating a more effective and accountable decision-making process?

In conclusion, how much of the American experience is available for Europe? In 1835, Alexis de Tocqueville (1969: 18) wrote in the introduction of his *De la démocratie en Amérique*: 'I did not study America just to satisfy curiosity, however legitimate; I sought there lessons from which we might profit. Anyone who supposes that I intend to write a panegyric is strangely mistaken. . . for I am one of those who think that there is hardly ever absolute right in any laws.' In 1894, James Bryce (1909: 608), in his equally famous

The American Commonwealth, observed: ‘America has in some respects anticipated European nations. . . . She carries behind her, to adopt a famous simile of Dante’s, a light which helps those who come after her more than it always does herself.’ It is difficult to find a better approach for investigating the questions raised in this book.

Notes

- 1 Although the formal title of the document is ‘Treaty establishing a constitution for Europe’, this and other chapters will refer to a ‘constitutional treaty’ in order to highlight its ambiguous nature (of being a constitution but also a treaty among states).
- 2 On this, see the very interesting debate between Jim Caporaso, Gary Marks, Andrew Moravcsik and Mark Pollack hosted by *ECSA Review* (vol. 10, no. 3, 1997, pp. 1–5), titled ‘Does the European Union Represent an n of 1?’ (also at <http://www.ecsa.org/N1debate.htm>).
- 3 He wrote: ‘The great and radical vice in the construction of the existing Confederation is in the principle of legislation for state or governments . . . as contradistinguished from the individuals of whom they consist.’ Hamilton’s opinion has been so widely shared that *The Federalist* published in the American classics series, edited by Charles A. Beard (1964), omitted the articles (numbers 15–22) on the defects of the Article of Confederation. Beard (*ibid.*: 90) comments: ‘Inasmuch as the Articles of Confederation were discarded by the adoption of the Constitution, [this part of *The Federalist*] is now mainly of historic interest.’
- 4 Ostrom (1987: 27), for example, writes: ‘I construe the nationalization of American government in the twentieth century as a basic challenge to the political theory of a compound republic.’
- 5 It goes without saying that the US, in the isolationistic period, was involved in several wars, starting with the war against the native Americans. But, in any case, none of those wars had the institutional implications of the European wars.

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Part I

**The EU from federalist
projects to a supranational
polity**

2 European federalism

Past resilience, present problems

Mark Gilbert

Introduction

The idea of a 'United States of Europe' has gripped the imagination of scholars, intellectuals and practising politicians for well over a hundred years. Even in Britain, there is a flourishing federalist tradition that departs from the work of such Victorian historians as Edward Acton (Lang 2002) through to the 'progressive' intellectuals of the 1920s and 1930s and the many intellectuals, both socialist and liberal, associated with 'Federal Union' (Mayne and Pinder 1990). Before and during the Second World War, British writers such as H. N. Brailsford, Kingsley Martin and G. D. H. Cole argued in favour of a socialist European federation as a way of mobilizing a democratic dynamic against the Nazis (Gilbert 1990). In 1940, the constitutional scholar Ivor Jennings wrote a pamphlet called *A Federation for Western Europe*: the elegance and brevity of the draft constitution included as an appendix to this book might have been a useful model for the somewhat more verbose delegates in the Laeken Convention (Jennings 1940). Jennings's brief volume was one of dozens of pamphlets, reports and books published by the British federalist movement over the next decades. The most influential academic journal of European integration, the *Journal of Common Market Studies*, is an offshoot of this activity in favour of federalism: many of the contributors to its earliest editions (for instance, François Duchêne, Stanley Henig, Uwe Kitzinger, John Lambert, Richard Mayne, John Pinder and Roy Pryce) were convinced federalists with a long history of engagement in the life of Federal Union and its associated policy think-tank, the Federal Trust. There has never been a shortage in Britain of intellectuals who have been willing to assert (or hope) that 'by 2050, surely . . . the nation state will everywhere have vanished' (Thomas 1997: 59).

The British tradition of federalist argumentation and scholarship is just the tip of a very large iceberg. In the post-war years, scholars such as Mario Albertini, Henri Brugmans, Jean-Baptiste Duroselle, Pascal Fontaine, Pierre Gerbet, Walter Lipgens, Dusan Sidjanski and their numerous disciples have formed the collective perception of how Europe has been built and what its construction means in world-historical terms.¹ The historiography of

European integration, the pioneering revisionist work of Alan Milward and Andrew Moravcsik notwithstanding, is dominated by scholars with a deep-rooted normative commitment to European federalism and, in some cases, a historicist conviction that Europe is *evolving* towards a higher form of supranational statehood.

European federalism, moreover, is also one of the few concepts (parliamentary democracy and state-provided social welfare are perhaps the only others) that have bridged the lay–Catholic divide. Europe’s founding fathers – one thinks of Konrad Adenauer, Alcide de Gasperi and Robert Schuman – were all devout Catholics; Catholic intellectuals such as Christopher Dawson, Jacques Maritain and Don Luigi Sturzo all saw European integration as a way of restoring spiritual values to post-totalitarian Europe. Even today, Catholic newspapers and thinkers are in the forefront of the struggle for European unity. Eminent churchmen – Milan’s Cardinal Carlo Maria Martini, who for many years seemed *papabile*, is a particular case in point – have sought to identify the European project with Christian doctrine and urge Europe’s leaders to build ‘a Europe of the spirit’ (quoted in Prodi 2000: 46). The heated debate over whether the draft ‘Constitution’ produced by the Laeken Convention should have a reference to Europe’s ‘Christian roots’ is testimony to the central role the process of European integration possesses in contemporary Catholic social thought.

Among practising politicians, the belief that national sovereignty should be superseded is less heartfelt than among intellectuals. Yet from the 1948 Congress of Europe onwards, many key statesmen have written or spoken in favour of pooling or delegating national prerogatives to pan-European institutions: the preference for ‘more Europe’ has been constant and explicit. It was Giscard d’Estaing who wrote, ‘Our country considers it essential that the nations of western Europe, which are much alike in their way of life, civilization, and political institutions, should unite in a world where superpowers are emerging and where other groups of states are already banding together’, but it might easily have been Willi Brandt, Jean-Luc Dehaene, Amintore Fanfani, Edward Heath, Helmut Kohl, Ruud Lubbers or Helmut Schmidt (Giscard d’Estaing 1977: 139–40). Truly, it would appear that, for many European leaders, ‘l’idéal européen est inscrit dans mes gènes et dans ma formation’ (Moscovici 2002).

While it is also true that European leaders have often used the rhetoric of European unity to pursue national interests under a supranational guise, the continuity of rhetoric is striking. Schuman’s widely quoted phrase ‘le morcellement d’Europe est devenu un absurde anachronisme’ has been used again and again, in subtly different formulations, by one European statesman after another (Schuman 1963: 19). As Romano Prodi argued upon becoming president of the Commission, the political unification of Europe remains an ‘extraordinary intuition that has lost none of its vitality’ and that may be used as ‘an inspiration in our daily political activities’ (Prodi 2000: 107).

Why federalist ideas have endured

The longevity of federalist ideas is, when one comes to think about it, a fact that needs explaining. Federalist ideas are *not* the outcome of Europe's actual experience of integration, but convictions developed abstractly before and immediately after 1945, in response to the terrible political and moral crisis provoked by the Nazis, that have been maintained for the most part intact during the political developments of the last fifty years.

This longevity is all the more striking when one considers that the European Union remains very far from being a federal state. Although the treaties of Maastricht and Amsterdam generated some academic support for the idea that the EU was an embryo federation, most scholars continue to give short shrift to such views. As a rare exception to this rule, the 'constructivist' scholar Rey Koslowski has lamented, 'all too often the narrative of European integration has been cast in terms of federal failure' (Koslowski 1999: 567). In Koslowski's view, the process of European integration, despite the lack of 'federal intent' on the part of Europe's makers, has genuinely produced institutions that 'can be understood in federal terms.' The European Union, specifically, has a central bank, citizenship for its peoples, and a framework for cooperation in the fields of foreign and defence policy, and has adopted the principle of subsidiarity. The rulings of the European Court of Justice (ECJ) have established the supremacy of European over national law and the European Parliament has become a legislative chamber with the power to make law in most of the policy areas decided at European level. The EU, in other words, may not have replicated the 'classical taxonomies of federal theory', but it is 'federal in all but name' (*ibid.*: 577).

The counter-argument to such positions has been put by such scholars as Andrew Moravcsik, who has convincingly asserted that one needs to distinguish between 'rhetoric and reality' in the debate over the degree to which the European Union has become a federal polity (Moravcsik 2001), and Joseph Weiler, who believes that the EU is 'an exceptionally weak federation. So weak, indeed, that the difference in degree between it and national federations amounts to a difference in kind' (Weiler 2001: 186). If one focuses on the policy areas that are outside (or largely outside) the EU's competence, we see that it does not concern itself with the provision of social welfare, has only a minor role in education and cultural policy, is not a decisive force in the provision of public infrastructure, and does not make non-economic civil law. Most decisions about *spending*, in other words, continue to be made in the national capitals.

This is unsurprising because the EU has almost no tax powers. It has a capped budget that amounts to a mere 1.27 per cent of the gross product of the member states (the governments of such federations as the US, Canada and Germany spend a quarter or more of GDP). In cash terms, the EU spends less than 5 per cent of the \$2.5 trillion spent every year by the US federal

government. Most of the EU's money in any case goes on programmes (above all the Common Agricultural Policy (CAP) and the structural-cohesion funds, which together account for about 80 per cent of the EU's total spending) that are reviewed regularly by the member states. Any proposal for an additional EU-wide tax on income or consumption would certainly be rejected by the overwhelming majority of member states and would arouse popular resentment against the EU.

The EU, moreover, does not for the most part enforce the laws it makes. Contrary to the myth-making of the Euro-sceptic press in Britain, it has a very small permanent bureaucracy and a limited budget, and has to rely upon the public administrations of the member states for the implementation of law made at Union level. The negative perception of EU law among European public opinion is very often due to the overzealous (or outright stupid) way in which member states interpret and enforce EU directives (Sbragia 2003: 121).

Most important of all, the EU lacks a central role in the provision of internal or external security. A polity that has no police force, no army and no authentic common foreign policy can hardly be said to constitute a federal state; indeed, as Moravcsik argues, 'it is barely recognizable as a state at all' (Moravcsik 2001: 164). The EU's chief functions, agriculture and regional aid aside, are ensuring that internal and external trade are carried on smoothly, that unfair national competition practices are identified and eliminated, and that the monetary policy of the Euro-zone's member states and the broad macroeconomic policies of the member states respect agreed general guidelines. Even in these areas, the stringent qualified majority voting requirements that bind all those decisions of the Council of Ministers that do not require unanimity mean that nothing can be done without the broad consent of the member states' governments. As Moravcsik emphasizes, no contemporary federal nation-state places procedural restraints of remotely similar rigour on decision-making (Moravcsik 2002). In the light of Europe's leaders' persistent public commitment to 'more Europe' over the past decades, it is in some ways surprising that more has not been achieved – and that the failure to make greater progress in an authentically federal direction has not led to the ideal of European federalism being tarnished.

It is also interesting that European federalism has not been outflanked by more overtly internationalist schemes for supranational government. 'Globalization' is an academic cliché, but also an indisputable fact. World trade and capital investment have expanded enormously since the 1950s; the world's financial markets are able to swamp the efforts of governments or central banks to defend national currencies (or even supranational currencies such as the Euro); an increasing number of issues such as AIDS, world poverty, migration, climate change, human rights and terrorism cry out for coordinated action on an international scale. One of the reasons Margaret Thatcher's 1988 Bruges speech became so notorious was that she implied that the EC was an 'inward-looking' organization that could not cope with global issues (Thatcher 1996). Yet the huge changes that have taken place in the

world economy since the 1980s have unquestionably acted to accelerate the pace of European integration (Calleo 2001).

Federalism has remained a plausible outcome for Europe's leaders not because they have a profound spirit of allegiance to the European ideal but because the actual experience of European integration has been of striking utility for Europe's nations. It has been beneficial in three main ways.

The first of these is anything but an original insight, but it must be stated. The eventual elimination of independent national sovereignty in Europe is seen as a way of ensuring that political upheaval and war do not return to the continent. As John Gillingham commented recently: 'European integration is an epiphenomenon of a larger process of change that grew out of the founder generation's deep and abiding commitment to surmount the horrors of the first half of the twentieth century' (Gillingham 2003: 73). It is not an accident that the two most Euro-sceptical countries within the EU – Britain and Denmark – are, neutral Ireland, Portugal and Sweden excepted, the ones that escaped with least material and human damage to their civilian populations during the Second World War. François Mitterrand and Helmut Kohl acted so decisively after German reunification to give a political dimension to the process of monetary union at least in part because the prospect of a united Germany sitting astride Central Europe awoke memories both men would rather have stayed buried (Garton Ash 1994). However, the point is not so much that European leaders believe that Europe would immediately relapse into an anarchy of warring nation-states if the process of European integration were ever to grind to a halt, but that they regard European integration as a lesson they and their forebears have painfully learned from the events of the period between the two great European civil wars. If one reads the memoirs of the post-war statesmen who actually constructed present-day Europe, one comes across passages of this kind again and again:

Among the lessons that we drew from the events of the interwar years there was one that was more important than others. A great part of the chaos that marked the twenties, and even more the thirties, was attributable, we thought, to the absence of any international co-operation. *Each country sought to resolve its difficulties as if it were the only country in the world.*

(Marjolin 1989: 157; emphasis in original)

Europe's leaders have absorbed this lesson, and the resilience of European federalism owes much to that fact. For though recognition of interdependence does not necessarily mandate the construction of federal institutions, it is plain that the greater the degree of institutional integration, the fewer opportunities there can be for a major nation to act impetuously and unilaterally in pursuit of its short-term national interest. The much-bruited (and in many ways obviously exaggerated) claim that European integration has brought lasting peace is, at root, another way of saying that Europe's states

have renounced traditional *realpolitik* (though not, obviously, the pursuit of their national interests) (Gilbert 2003: 10–11).

It is for this reason that a shiver goes down the spines of Europe's policy-makers whenever one or another of the 'big countries' pursues its own narrowly defined national interests with little regard for the implications of its actions on its partners. The 'empty chair' crisis (1965–6), the British budget crisis (1979–84) and the German recognition of Croatia and Slovenia (December 1991) were until recently the three most striking episodes in which member states acted unilaterally to pursue what they saw, rightly or wrongly, as an overriding national interest. As this chapter was being written, however, the EU was being rocked by two acts of national self-aggrandisement: the refusal of the French and German governments, at a time of slow economic growth, to adhere to the rules of the Stability and Growth Pact (rules that Germany, in particular, had insisted upon including in the 1997 Treaty of Amsterdam), and the obstinate refusal of the Spanish and Polish governments to approve the draft Constitution put forward by the Laeken Convention on the grounds that it revises the favourable voting rights conceded to these nations in the Treaty of Nice. For the EU to be suffering from one act of national unilateralism might be carelessness; the occurrence of two simultaneous crises perhaps hints that some dangerous old habits are reasserting themselves.

The second reason for the longevity of the federal ideal is that 'more Europe' has brought concrete economic and political benefits. After 1945, the construction of economic and political integration in Europe was seen as a means of diminishing the appeal of communism for the European masses. As Alan Milward has argued, the post-war 'saints' who founded the European project were acutely aware of the need to establish a 'joint economic and spiritual renewal of European capitalism' as a bulwark against the Soviet threat (Milward 2000: 341). European integration, far from being an idealistic crusade to overcome the principle of nationality, was, in the minds of the most able of the post-war leaders, part of an attempt to consolidate the distributive form of capitalism being established in Western Europe as an ideological and practical alternative to communism. As Altiero Spinelli – surely the most ardent of European integration's high priests – argued in a particularly explicit article published in 1950, 'only when it is faced by a united federal Europe of some two hundred million people will the USSR be brought to a halt' (Spinelli 2000: 140).

Since the 1970s, European integration has been employed to protect Europe against the wayward economic power of the United States. The European Coal and Steel Community (ECSC) and the European Economic Community (EEC) were themselves, of course, customs unions designed to shield Europe's economies from the blast of US competition at a crucial moment in their development. But it is American exchange-rate and commercial policy that has been most directly influential upon the process of European integration. As David P. Calleo has suggested, 'America's aggressive

commercial diplomacy has provided a powerful inducement for Europeans to consolidate and intensify their own economic bloc' (Calleo 2001: 224). There is a very strong argument indeed for suggesting that the original EC was substantially the product of the gold-backed dollar, which, by keeping the dollar at an artificially high rate, facilitated the Six's development; that the EU is the consequence of the roller-coaster dollar that has dominated the world political economy since the United States loosened its fiscal policy in the early 1970s; and that the future political character of the EU will very largely depend upon whether the Euro establishes itself as a competitor to the American currency as a means of payment in world trade. But at least Europeans, or those of them within the common currency, are now much more insulated from the asymmetries dollar weakness or strength inflicted on the various European currencies (and, hence, on the real economies) from August 1971 onwards. Europe now theoretically has the luxury of becoming 'liberal internally, but relatively autarkic externally' (ibid.: 248).

The creation of the Euro in short has established the EU, at any rate potentially, as what Calleo calls a 'neo-mercantilist bloc', able to contract with the US on terms of equality. However, this economic clout cannot be used in the absence of unified political leadership. The pressure for more effective European government, for institutions able to conduct macroeconomic policy with, and if necessary against, the Americans, has been a hugely influential factor upon the recent reform process within the EU and will exert still more pressure in the future.

European integration has also twice served as a way of reintegrating Germany back into the democratic mainstream. German rearmament in the 1950s required the fig leaves of first the European Defence Community (EDC) and then, after the failure of France to ratify the EDC Treaty, the Western European Union (WEU) before Germany's neighbours would allow her to participate in the defence of the West. In the 1980s, monetary union was driven by French resentment at the loss of economic sovereignty inherent in the European Monetary System. The debacle of the first Mitterrand presidency's attempt to reflate the French economy in isolation, which led in March 1983 to what Bernard Connolly has provocatively but accurately called a 'kind of monetary 1940', brought home the extent of French subordination to the Bundesbank, but French leaders were reluctant to allow decisions over French interest rates (and hence economic output) to be decided in perpetuity at Frankfurt by inflation-obsessed German central bankers (Connolly 1995: 30). Monetary union offered a way out of this impasse (Moravcsik 1998: 412–14). Moreover, in 1989–90, the prospect of German reunification was a critical factor in the decision to establish an Intergovernmental Conference (IGC) on political union. France (but also Britain and Poland) was deeply alarmed by the prospect of a newly united Germany on her doorstep. The Treaty of Maastricht, indeed, from one point of view, can be seen as being a calculated act of statesmanship designed to nip the geopolitical uncertainties inspired by German unification neatly in the bud (Baun 1995).

In short, European integration has proved its geopolitical utility to the political élite of the member states. Europe's institutions, they think, must be maintained and strengthened for *reasons of state*. Without the construction of Europe, the individual member states would have been more exposed to communist competition in the immediate post-war era, much more at the mercy of the whims of American foreign economic policy and more subject to the potential hegemonic power of the largest member state, Germany. As Jacques Delors argued as long ago as the late 1980s, 'building Europe, in the current state of world forces, amounts to reasserting our capacity to act autonomously. In building Europe, we shall discover the degree of liberty necessary for us to have "a certain idea of France"' (Delors 1988: 60).

The third reason for the longevity of the idea of European federalism is that it has been an integral part of the belief systems of the three most influential political identities in post-war democratic Europe: Christian democracy, democratic socialism and progressive liberalism (Moravcsik 1991). The political movements associated with these identities have dominated politics in most European democracies. European integration is not a project that has ever succeeded with either the nationalist right (Gaullists, neo-fascists, some British and Scandinavian conservatives) or the Marxist left (French communists, Italian communists until the 1980s, the left wing of the Labour Party in Britain). The EC's most turbulent moments (the Gaullist interlude in France, the early 1980s when Thatcher was in power in London and the Mitterrand–Mauroy–Marchais government ruled in Paris) have always come when the 'sensible centre' lost its grip on the key states of the Community. So long as these formations continue to dominate the politics of the main member states – and it is perhaps worth remembering that European politics has seen a revival of both left-wing and right-wing extremism since the early 1990s and that public disenchantment with conventional politicians is unusually high – it is a safe bet that 'ever closer union' will remain on the political agenda.

This is not least because these centrist political identities have also shared a commitment to the establishment of higher standards of welfare across the continent. European integration has been intimately bound up with this wider ideological goal. The notion that Europe's supranational institutions should make the achievement of social and economic justice a priority was central to the thinking of the principal European leaders of the immediate post-war period (Milward 2000: ch. 6, *passim*). This principle was subsequently written into both the ECSC and EEC treaties, was the driving force behind the CAP which, whatever it has since become, was originally intended to ameliorate the problem of low rural incomes, and was eventually turned into something more than a statement of intent by the implementation of the Delors I and II regional aid packages and by the EU's guarantee of high levels of social protection in the Maastricht Treaty (Wise and Gibb 1993). The revival of neo-liberal economic doctrines within Europe itself and the challenge of globalization (with its shifting of industrial production to low-cost nations with low or non-existent levels of worker and environmental protection) have

underlined that this welfarist commitment may become a serious competitive handicap for Europe. But this notion is intolerable for politicians and thinkers brought up in the neo-communitarian traditions of Christian and social democracy. Not coincidentally, these developments have prompted key intellectuals and politicians to press for increased powers for the European Union as a way of protecting European values from the nefarious workings of market forces. Jürgen Habermas, for instance, has argued repeatedly for the institution of a strong federal European state that would halt the ‘race to the bottom’ promoted by globalization and project itself as a model of distributive social justice (Habermas 1999, 2001).

The reason in other words why federalist ideas have endured – why European élites have believed that the construction of a federal state in Europe is both possible and desirable – is to be found, ultimately, in the utility of the European integration that has actually taken place. European integration has allowed Europe’s nation-states to supersede the traditional methods of *realpolitik* and to domesticate Germany, and promises to help insulate its economies from dollar-driven economic turmoil or the pressures of globalization. It has also proved a valuable integument in several fractious political systems (one thinks of Italy, for instance, or Belgium, or Ireland, or post-Franco Spain) and has been a crucial part of the post-war project of constructing a more just society. For all the sub-Hegelian theorizing that has accompanied the process of constructing Europe, Europe’s leaders have subscribed to the ideal of European political unity because in matter-of-fact ways the experience of European integration has been a valuable one.

How European federalism has changed

European federalism has also changed in a way that makes it more palatable to national leaders. Contrary to the teleological picture of Europe’s supranational institutions gradually obtaining ascendancy over the member states, the institutional history of European integration has in fact been characterized by an iron determination on the part of the main member states to keep executive power within the Community in their own hands. Every attempt to shift executive authority away from the member states (empowering other institutions such as the Parliament or Commission to make them, rather than the member states, the source of key decisions) has met with implacable resistance and has ultimately been quashed. Europe may or may not be becoming a polity whose policy competences meet Moravcsik’s criteria for being an authentic federal state, but, whatever her ultimate political responsibilities, her ‘president’ is, and seemingly will remain, the collective judgement of her assembled national leaders. The European movement and academe remain filled with ‘supranationalist federalists’, supporters of the establishment of an independent president of Europe, elected by the direct vote of the Union’s citizens or by a vote of the European Parliament and directly responsible to the Parliament, but such views have persistently failed

to make headway. The national leaders have been willing to transfer important policy choices to Brussels, but they have not transferred their own power of decision to a supranational institution too.

This is a development that might surprise a time traveller from the post-war years. The heyday of the belief that Europe's nation-states could be somehow superseded was the 1940s and 1950s. Outside of Britain, there was widespread public agreement that Europe required an American-style single market able to provide economies of scale, the development of advanced policies of social protection, and centralized political institutions, including a parliament, to administer the continent-wide economy thus created and to promote economic growth and human rights. The conclusion of the May 1948 Congress of Europe at The Hague, which was attended by almost all post-war Europe's democratic élite, was precisely this (Sharp 1949). However, between 1945 and 1954, it proved impossible to go beyond the limited 'sectoral' integration of the ECSC, even though the Europeans' American paymasters were pressing hard for it and almost all the most representative leaders of Western Europe's new democracies had publicly committed themselves to achieving it.

Hopes for a European federal institution were embodied in the March 1953 proposal for a European Political Community (EPC) that featured a bicameral parliament and an indirectly elected president who would have had the power to choose his own cabinet and to promulgate laws. However, the EPC blueprint was immediately revised by the foreign ministers of the member states once it had been presented to them, and was abandoned definitively after the failure of the French National Assembly, in a debate that was characterized by stunning levels of national chauvinism, to ratify the European Defence Community treaty in August 1954 (Aron 1957; Brugmans 1970: 180–203). Less dramatically, the High Authority of the ECSC gradually found itself relying more and more on the approval of the ECSC Council of Ministers as its political decisions became more sensitive and involved laying off workers and enforcing free-trade rules. By the time the Rome treaties were signed, the Council of Ministers had become the *de facto* executive of the ECSC. The EEC treaty, of course, affirmed this shift towards the centrality of intergovernmental decision-making.

The two great 'constitutional' clashes of the Gaullist years – the debate over the Fouchet plan (1961–2) and the 'empty chair' crisis (1965–6) – were both bound up with the broader debate over whether the Community should confer a central role upon collective decision-making by governments, or should instead imply a gradual and substantial transfer of power to the Community's supranational institutions, notably the Commission and the Assembly. Without entering into the detail of these two very important crises for the Community, two points have to be made. First, de Gaulle proved during the 'empty chair' crisis that the Community could not be governed against the will of its chief member states (Haas 1968: xxiii). Second, he was more far-sighted than his many contemporary critics in understanding that Europe, if it was to develop community-wide policies in the most politically sensitive fields, would

have to allow the national leaders to take collective decisions. The centrepiece of the Fouchet plan was the creation of a 'European Council' of heads of state and government with responsibility for foreign and defence policy (and, eventually, general economic policy as well). De Gaulle's plan was blocked by the Belgians and the Dutch, who feared French domination (Silj 1967: especially ch. 3). But it is worth pointing out here that de Gaulle was ultimately proved right. The scheme for a European Council of national leaders was subsequently institutionalized in the 1970s, and the Council swiftly became the EU's core strategic decision-making body.

Since the European Council was created, at the Paris summit in December 1974, no serious attempt to dethrone the centrality of the national governments' sovereign role within the Community has ever been made. The most significant attempt to put 'supranational federalist' ideas of institutional reform back on the agenda came in the early and mid-1980s when the European Parliament responded to the perceived crisis in the Community by proposing a draft 'Treaty on European Union' in February 1984 (for text, see *Bulletin of the European Communities* 2–84). The Parliament's proposals, which envisaged an explicitly bicameral parliamentary institutional model and a substantial increase in the Community's broad legislative powers, but no formal executive role for Europe's national leaders, were simply ignored during the IGC that drafted the Single European Act (SEA). Of all the EC's institutions, the Parliament was the one that emerged with *fewest* new powers after the 1985 IGC. A significant faction of the Parliament wanted to reject the SEA; in the event, the Parliament's angry majority passed a motion saying that the SEA was 'very far from constituting the genuine reform of the Community that its people need' (*ibid.* 1–86: 10).

The Maastricht Treaty (1992) confirmed the trend towards 'more Europe' in the policy sphere and 'more collective decision-making' in the EU's government. While Dyson and Featherstone are right in saying that a vital element in the Maastricht negotiation was that Andreotti, Delors, Kohl and Mitterrand regarded themselves as 'Europeans of the heart' who were convinced that 'it was necessary to make concessions to sustain momentum towards European political union and to make it irreversible' (Dyson and Featherstone 1999: 749), the Maastricht Treaty cannot be seen as a victory for supranationalist federalists. In institutional terms, Maastricht embodied the European Council as the strategic executive of the Union and gave the Parliament wide new powers of co-decision in order to provide a veneer of democratic legitimacy for the member states' collective actions (de facto judicial review, of course, had long existed). Maastricht was at bottom an inspired constitutional compromise between the Gaullist and the supranationalist federalist visions of Europe's future. The 1997 Treaty of Amsterdam merely added fine detail to the monument constructed at Maastricht (Moravcsik and Nicolaidis 1997), as did, in even more convoluted fashion, the 2001 Treaty of Nice. Nor is this surprising. Going beyond the Maastricht compromise between the two central visions of Europe's organization will not be easy.

Indeed, this has been the lesson of the process of constitutional reform begun in May 2000 by Joschka Fischer's speech at Von Humboldt University in Berlin (Fischer 2000). After the German foreign minister appealed to Europe to advance to a federal Europe (or else face the risk of a breakaway by a German-led 'inner core' of nations), an active debate involving all of Europe's most prominent political leaders led to a consensus forming of the need both to transform the EU's institutions and to extend the scope of its activities still further.² However, while Fischer's preference was, on balance, for supranational institutionalism, the outcome of this debate was the formulation that Europe should be a 'federation of nation-states'. The constitutional treaty signed in Brussels in June 2004, while it has strengthened the Parliament, created a European foreign minister and greatly added to the ECJ's power of judicial review by incorporating the Charter on Fundamental Rights, nevertheless also represents a clear *reinforcement* of the member states' executive role (IGC 2004). Even in a Europe of twenty-five member states, the national governments are not going to relinquish their right to decide the direction of policy.

In concrete terms, the proposed Constitution has clarified that foreign and defence policy are to be decided by the Council by unanimity; has otherwise retained unanimous voting on 'over 50 legal bases' (European Commission 2003: 20); and has established a 'European Council Chair', with a potential five-year mandate, who may usurp the president of the Commission as the public face of the Union. This is not least because the European Council will continue to propose the president of the Commission and is unlikely to nominate a Delors figure able by sheer personality to impose a personal agenda on the Union. Moreover, in a very interesting development, the Constitution's appended protocols, with an eye to the debate over the 'democratic deficit', give national parliaments the right to intervene in the legislative process of the Union by sending 'reasoned opinions' to the Commission if they consider that a particular legislative initiative contradicts the principle of subsidiarity.

The draft Constitution furthermore retains the Council of Ministers, rather than creating a Senate, and proposes a 'double majority' voting system in the Council of Ministers that requires the assent of 55 per cent of the twenty-five member states and of states representing 65 per cent of the expanded Union's population. This new system may well shore up France and Germany's *de facto* veto over the Union's policies.

As Joschka Fischer pointedly said in his speech marking the fortieth anniversary of de Gaulle and Adenauer's Elysée Treaty, 'Franco-German cooperation has been the driving force at the heart of European development and will, in my firm opinion, remain so in the EU of twenty-five' (Fischer 2003). At the same time, it is a system that will allow new blocking coalitions to emerge. For this reason, it is now widely suggested that a 'core group' of countries, led by France and Germany, will press ahead to establish a federal union within the wider Union. From the point of view of this essay, however, the crucial point to note is that, though this would-be core group disagrees

with countries such as Britain, Denmark, Ireland and Sweden over *what* decisions the European Union should take, and with Poland and Spain over how much influence individual countries should have over the taking of decisions, *none* of them disagrees that the strategic decisions should be taken by the member states. The great change in European federalism over the last twenty years has been the broad acceptance of the Fouchet plan's core premise that the European project is one whose progress depends upon the collective political will of the national governments.

Conclusion

It may well be that an 'inner union' is the only way that Europe can enhance political and economic integration to authentic federative levels while retaining collective decision-making. How can a Union in which all twenty-five national leaders, including the leaders of such minnows as Estonia, Luxembourg, Malta and Slovenia, have an outright veto on key questions ever punch its weight in world politics?

An intriguing question remains, however. Will the electorates of the nations composing the 'inner union' go along with their leaders' schemes for federal union? Since 1992, Denmark (twice), Ireland and Sweden have all used referendums to vote down important EU initiatives. France came close to vetoing Maastricht in September 1992 and only voted *oui* because the electorate was persuaded that rejection of the treaty would leave Germany unconstrained by 'any set of European rules in its role as a military, economic, financial and monetary power in the centre of the continent' (Marsh 1995: 149). Austria's government threatened to hold a referendum during the Haider affair in 2000, well knowing that it could count upon the electorate to vote no to Europe rather than accept interference from Brussels in the composition of the Austrian government.

These voter rebellions, like the deep resentment in Britain of the EU's encroachments on traditional parliamentary sovereignty, were conscious rejections of the perceived excessive transfer of sovereign responsibilities to Brussels, not mere emotional outbursts. Since Maastricht, Europe's leaders have constantly sought to improve the EU's standing with public opinion, but they have been slow to grasp the unpalatable fact that, at any rate for some European countries, the acceptable limit of Europeanization has been reached and surpassed.³ The question is whether the contagion will spread from Britain and the Nordic countries to the more traditionally Europhile countries of the original six. The elections to the European Parliament in 1999 seemed to reveal widespread disaffection within the 'inner core' too. Traditionally Europhile nations such as the Netherlands (under 30 per cent turnout) and Germany (45 per cent) registered a lacklustre level of commitment. Half the French voted, but a million of them cast a blank ballot paper as a sign of disaffection with both Europe and France's corrupt political class (Gilbert 2003: 248). The 2004 elections to the Parliament, which saw record

numbers of Eurosceptics elected and a further fall in the turnout, confirmed this trend. The December 2003 Eurobarometer opinion poll carried out on behalf of the Commission also recorded severe falls, especially in the six founder nations of the ECSC-EEC, in the numbers of citizens believing membership of the European Union to be a good thing.⁴ This disaffection with Europe in the Union's heartland cannot simply be attributed to voter impatience at the failure to build Europe.

How Europe's leaders will respond to this complex situation, in which every choice appears to bring with it a host of negative outcomes, is beyond the predictive skills of scholars. What is clear, however, is that the coming decade in European Union politics will place exceptional demands upon its leaders. A situation like the present, in which the political constraints on action appear overwhelming, is one tailor-made for creative leadership. As Richard J. Samuels has argued in an important recent book, 'leadership is that constrained place where imagination, resources and opportunity converge' (Samuels 2003: 6). One can imagine that Europe's leaders will act as what Samuels calls *bricoleurs*, and will dredge through the tradition of European integration to find a 'useable past' that will justify some radical departure in policy (ibid.: 7). One can easily imagine, for instance, that the leaders of France and Germany will resurrect the examples of the Schuman plan and monetary union to suggest that Europe has always advanced as the result of the Franco-German willingness to make a 'leap in the dark' and proceed to full political union, dragging several countries behind them.

On the other hand, one can equally imagine an American president taking advantage of this uncertain moment in the EU's history to relaunch the notion of an Atlantic free trade area. Certainly, there is no shortage of neo-conservative intellectuals arguing for such a policy on behalf of the American government (Gilbert 2004). Such a project, if accompanied with appropriate Kennedyesque rhetoric, might exercise a powerful attraction upon Britain, Ireland, Spain, the Poles, the Balts, perhaps even Italy, Portugal and the Netherlands, and greatly weaken the chances for further significant integration in Europe. As Samuels argues, 'we live not in a world of predestination, but in a world of possibilities' (Samuels 2003: 361), in which the scope statesmen have for creative action is much larger than social scientists have been prone to admit. If the current impasse in the progress of European unification does at least cause scholars to rethink the teleological assumptions some of them possess about the inevitability of European unity, it will have served a useful purpose. European federalism is an idea that has proved a rich source of inspiration for Europe's leaders in the past, and may well help Europe's current generation of leaders to find a way forward through the difficult challenges of the coming decade. But it is equally possible that public opinion will be marshalled against further European integration and persuaded that European federalism is a superseded world-view of doubtful relevance to contemporary conditions. We should perhaps see European federalism less as the inevitable end-state of a historical process and more as

a political preference whose completion will depend largely upon the skill and strength of both its proponents and its opponents.

Notes

- 1 The key volumes by these authors are Albertini (1973), Brugmans (1970), Duroselle (1990), Fontaine (1981), Gerbet (1999), Lippens (1982) and Sidjanski (1992).
- 2 To name but a few, see Jacques Chirac's speech to the European Parliament, 6 March 2002; the four speeches made in the US by Jacques Delors between 26 March and 4 April 2001, especially the second, 'Where is the European Union Heading?', and Delors' earlier speech, 'Réunifier l'Europe: notre mission historique', presented at the Aspen Institute on 14 November 1999; Lionel Jospin, 'The Future of an Enlarged Europe', Paris 28 May 2001; Johannes Rau, 'Unity in Diversity: What Political Form for Europe?', Berlin, 16 November 2001; and Giuliano Amato's 22nd Jean Monnet lecture to the European University Institute, 'From Nice to Europe', 20 November 2000.
- 3 Moravcsik (2002: 20) argues that the voter rebellions against the EU are to be attributed to the fact that the EU deals with issues that most voters do not understand or care about. The issues that matter to voters (health care, tax, pensions and social security, education, law and order) are all outside the EU's purview, while the ones the EU does deal with (trade policy, monetary policy, agriculture) are incomprehensible except to experts. Accordingly, referendums on Europe 'encourage impoverished and institutionally unstructured deliberation, which in turn encourages unstable plebiscitary politics in which individuals have no incentive to reconcile their concrete interests with their immediate choices.' There is some force to this, but it is not obvious that the Danish referendum in 1992 or the Swedish referendum on Euro membership in 2003 were conducted in the way Moravcsik describes. Even in Britain, if one looks beneath the hysterical flag-waving of the tabloids, a surprisingly sophisticated level of analysis and debate has been reached.
- 4 Only 48 per cent of those polled believed membership to be a good thing, down 6 per cent since spring 2003. The falls recorded in traditionally Europhile countries such as the Netherlands (down 11 per cent to 62 per cent), Germany (down 13 per cent to just 46 per cent) and Belgium (down 11 per cent to 56 per cent) were striking. Support in France is down to just 42 per cent, hardly more than some traditionally Euro-sceptic countries. Significant doubts about the utility of the Euro were also recorded in both Italy and Germany (*Eurobarometer*, no. 60, December 2003, pp. 8–9).

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3 The constitutionalization of the EU

Steps towards a supranational polity

Alec Stone Sweet

Introduction

With the Treaty of Rome, European states designed a set of policy domains related to trade and the regulation of markets, a complex of governmental organizations, and a binding set of substantive and procedural rules to help them achieve the construction of a European Economic Community. Although the treaty traced the broad outlines of this new Community, it was the purposeful activities of representatives of national governments, of officials operating in the EC's organizations, such as the Commission, and of leaders of transnational interest groups that subsequently produced the extraordinarily dense web of political and social networks that now functions to generate and sustain supranational governance. But it was the European Court of Justice (ECJ), the judicial organ of the European Union (EU),¹ that fashioned a judicially enforceable constitution out of international treaty law, transforming the EU in the process (Weiler 1991). The constitutionalization of the Treaty of Rome not only provoked the gradual emergence of a quasi-federal legal system. It fundamentally altered, within a very wide zone in Western Europe, how individuals, groups and firms pursue their interests, how judges resolve disputes, and how policy is made at both the national and supranational levels. This chapter examines how the EU legal system has been constructed and operates, focusing on the impact of constitutionalization on European integration and governance.²

The Treaty of Rome and European integration

With the 1957 Treaty of Rome, six European states established a political system to facilitate market and political integration. Integration originally referred to the process through which a common market would be achieved and regulated by EU law and institutions of government. Today the European common market consists of: (1) a zone of free movement, wherein restrictions on the movement of labour, goods, services and capital within the area have been abolished; (2) a collective external customs policy, whereby goods imported from outside the area are subject to uniform treatment; (3) an EU-wide regulatory system, whereby common legislation and other public policies

are made by the EU's governing bodies; and (4) a common currency and monetary policies. As integration has deepened in existing areas, and spread to new domains, the word *integration* has come to mean the overall process through which a European economy, society and polity are being constructed. The EU is now made up of twenty-five states, following enlargement in May 2004 to ten new Eastern, Central and Southern European states.

Although a constitutional treaty was agreed in June 2004, we do not know yet whether it will be approved by the twenty-five member states. In the meantime, the EU is made by its treaties. The treaties comprise the EU's constitution. Like all written constitutions, these texts distribute governing authority among functionally differentiated institutions and establish procedures to produce legislation. The EU, however, does not fit easily into traditional typologies of comparative or international politics. It blends, in complex and fluid ways, elements of governance found in international law and organization with elements akin to national constitutional law and federalism. Simplifying, institutionalized forms of interstate cooperation, or 'regimes' (Krasner 1983), are commonly understood in *intergovernmental* terms. Representing sovereign states, national governments establish and maintain these regimes in order to create social benefits and to solve collective problems. Intergovernmental analyses of the EU focus on the crucial position of the member state, a position bolstered by the presumption in international law that a state cannot be bound without its consent (Moravcsik 1991). The EU system, however, can also be understood in *supranational* terms. The focus here is on how the regime's own institutions, such as the Commission and the ECJ, work to structure intergovernmental bargaining, as well as to generate political outcomes on their own and through their interactions with private actors. As integration has proceeded, the supranational mode of governance has steadily expanded and the importance of intergovernmentalism has been reduced (Sandholtz and Stone Sweet 1998; Stone Sweet *et al.* 2001). One purpose of this chapter is to show how the ECJ and the EU legal system have steadily expanded the supranational aspects of the EU, while reducing the intergovernmental ones.

The EU is governed principally by four institutions: the Commission, the Council of Ministers, the European Parliament, and the ECJ. The ECJ is a constitutional court based roughly on the European model of constitutional review (Stone Sweet 2000). It resolves legal disputes that arise between the various EU organs, between EU institutions and the member states, and between the member states themselves. That is, the Parliament can bring a dispute that it has with the Council to the ECJ, member states can sue each other, and the Commission can take member states to the ECJ for non-compliance with EU law. The ECJ also provides authoritative interpretations of European law to national judges, by way of a preliminary reference procedure that resembles German, Italian and Spanish 'concrete review'. The fifteen members of the ECJ, which sits in Luxembourg, are appointed by the member states and serve six-year, renewable terms.³

The evolution of integration must be understood in light of permutations in the Community's decision-making processes. Simplifying, the original understanding of these processes distinguished between amendments to the treaty and regulations and directives – called secondary legislation – made pursuant to the treaty. Amendments would be governed, as in traditional international law, by the rule of unanimity, that is, every member state would possess a veto. Secondary legislation, including most legislation concerned with the construction of the common market, would be proposed by the Commission, and then amended and adopted by a qualified majority (about two-thirds) of the weighted votes of the Council. Unanimity is an inter-governmental mode of governance, whereas qualified majority voting tends towards supranationality, since a member state can be bound by a policy it has not voted for.

The Treaty of Rome fixed a timetable for the completion of the common market, establishing two types of integration process. The first is commonly referred to as *negative integration*: the obligation of all member states to remove barriers to free movement within EU territory. States were obliged by the treaty progressively to reduce and ultimately to eliminate (by the end of 1969) all import tariffs and quotas, for example. The second type is called *positive integration*: the creation of new rules to regulate problems common to all member states. The two processes were meant to go hand in hand. Successful negative integration would erase whole classes of national laws and regulations, leaving important 'holes', which positive integration would then fill with EU laws. The kaleidoscope of disparate national laws that functioned to hinder trade in 1958 – such as taxes, duties, and rules governing health, licensing and environmental protection standards – would be replaced by uniform, or 'harmonized', Euro-rules by the end of the 1960s. Most harmonization, according to the treaty, would proceed, beginning in 1966, by qualified majority voting.

This is not what occurred. Just as the deadline approached, France's president, Charles de Gaulle, provoked a constitutional crisis. De Gaulle distrusted the supranational elements of the EU, including the Commission and qualified majority voting. The crisis was resolved by the 'Luxembourg Compromise' of January 1966, an intergovernmental understanding among the member states. The compromise permits a member state, after asserting that 'very important interests are at stake', to demand that legislation be approved by unanimity rather than by qualified majority voting. In other words, each member state, on the grounds of national interest, could veto EU legislation. The veto strengthened the intergovernmental element of the EU – the Council and the member-states – but, despite perceptions of stagnation and 'Eurosclerosis', integration nonetheless steadily proceeded in the 1970s (see Fligstein and Stone Sweet 2001).

Qualified majority voting was reinstated as the dominant legislative process for achieving the common market by the 1986 Single European Act (SEA), and extended to other areas by the 1992 Treaty on European Union (TEU).

Since the early 1980s, the EU has developed a powerful momentum of its own evidenced by, among other things, institutional reform bolstering the position of the Parliament, the development of juridical notions of European citizenship and rights, the emergence of a formal treaty basis for foreign policies and new modes of political cooperation in policing and border control, and the move to a European central bank and a common currency.

The constitutionalization of the treaty system

The ‘constitutionalization of the treaty system’ refers to the process by which the Treaty of Rome has evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EU territory. Today, legal scholars and judges conceptualize the treaty as a constitution, and this is the orthodox position (e.g., Lenaerts 1990; Mancini 1991; Weiler 1981, 1991). In its decisions, the ECJ has, since the 1960s, implicitly treated its terms of reference as a constitutional text and, today, explicitly refers to the treaties as a ‘constitutional charter’ or ‘the constitution of the Community’ (Fernandez Esteban 1994).

The ECJ is the supreme interpreter of EU law. Its tasks are to enforce compliance with that law, and to ensure that it is applied in a uniform manner across the EU. With constitutionalization, these two tasks have become one and the same. Although the outcome was not intended, the vast bulk of the ECJ’s caseload is generated by preliminary references sent by national judges responding to claims made by litigants before them. This procedure is governed by art. 234 of the Treaty of Rome. According to art. 234, whenever an EU legal norm is material to the settlement of a dispute being heard in a national court, the presiding judge may – and final courts of appeal must – ask the ECJ for a correct interpretation of that law. This interpretation, called a preliminary ruling, is then applied by the national judge to settle the case. The procedure is designed to enable national courts to understand the nature and content of EU law, and to apply it correctly and uniformly throughout EU territory.

The constitutionalization process has been driven – almost entirely – by the relationship between private litigants, national judges and the ECJ, interacting within the framework provided by art. 234. Simplifying, there have been two waves of constitutionalization. In the 1962–79 period, the ECJ secured the core, constitutional principles of supremacy and direct effect. It made these moves despite the declared opposition of some of the member states (see Stein 1981). The *doctrine of supremacy* (*Costa*, ECJ 1964) lays down the rule that, in any conflict between an EU legal norm and national rule or practice, the EU norm must always be given primacy. Indeed, according to the ECJ, every legal rule coming within the purview of the Rome Treaty, from the moment of its entry into force, ‘renders automatically inapplicable any conflicting provision of . . . national law’ (*Simmenthal II*, ECJ 1978). The

doctrine of direct effect holds that, under certain conditions, EU rules confer on individuals rights that public authorities must respect, and which must be protected by national courts. During this period, the ECJ found that certain treaty provisions (*Van Gend en Loos*, ECJ 1963) and a class of secondary legislation called directives (*Van Duyn*, ECJ 1974a) were directly effective, and it strengthened the direct applicability of another class of secondary legislation, called regulations. Both doctrines have been controversial, since the Rome Treaty does not contain a supremacy clause and does not provide for the direct effect of directives or treaty provisions.

In the second wave of constitutionalization, the ECJ supplied national courts with enhanced means of guaranteeing the effectiveness of EU law. In the 1980s, the *doctrine of indirect effect* was established, according to which national judges must always interpret national rules as if they were in conformity with EU law (*Von Colson*, ECJ 1984). In *Marleasing* (ECJ 1990), the ECJ announced that, when a directive has either not been transposed or has been transposed incorrectly into national law, national judges are obliged to interpret this law in conformity with that directive. Put differently, the doctrine empowers national judges to rewrite national law in order to render EU law applicable, in the absence of implementing measures. Once national law has been properly (re)constructed, the EU law (in the guise of the national rule) can be applied in legal disputes between private legal persons (i.e., non-governmental entities). Thus, indirect effect substantially reduces the problem that the ECJ's doctrine of direct effect covers disputes only between a private person and a governmental entity, but not between two private persons. Finally, beginning with *Francovich* (ECJ 1991a), the ECJ has developed the *doctrine of state liability*. According to this doctrine, a national court can hold a member state liable for damages incurred by individuals due to a member state's failure properly to transpose a directive. The national court may then require member states to compensate such individuals for their losses.

Once accepted by the national courts, these doctrines served to connect national and supranational legal systems; they established a decentralized enforcement mechanism for EU law; and they radically expanded the capacities of the supranational mode of governance and reduced the power of governments to control the integration process. The doctrine of direct effect empowers individuals and companies to sue member-state governments or other public authorities either for not conforming to obligations contained in the treaties or regulations, or for not properly transposing provisions of directives into national law. The doctrine of supremacy prohibits public authorities from relying on national law to justify their failure to comply with EU law, and obliges national judges to resolve conflicts between national and EU law in favour of the latter. In sum, in its constitutional jurisprudence the ECJ sought to enlist national judges in a partnership to make EU law more effective. If national judges chose not to refer cases, the legal system would have been stillborn, and the effectiveness of EU law could not have been secured – although it needs to be said that, for various reasons and at different

points in time, some national courts resisted the supremacy doctrine. I now turn to the impact of constitutionalization on integration and policy.

The dynamics of legal integration

The ECJ and negative integration

As defined above, *negative integration* refers to the process through which national barriers to transborder economic activity are removed. The ECJ, activated by art. 234 references, sustained this project during the post-Luxembourg Compromise period, systematically removing national rules and administrative practices that hindered labour mobility and trade, beginning in 1970s. One such line of decisions, on the free movement of goods, turned out to be crucial to the politics that culminated in the Single European Act of 1986 (SEA). As noted above, the SEA and the TEU repudiated the Luxembourg Compromise, reinstating and extending qualified majority voting as the dominant legislative process for regulating the common market and for other purposes.

From free movement of goods to the SEA

Ex-arts. 30-36 (now 28-31) of the Rome Treaty constitute the normative context for free movement. Ex-art. 30 (now 28) prohibited the member states, after 31 December 1969, from maintaining ‘quantitative restrictions [quotas] on imports’ as well as ‘all measures having equivalent effect’; ex-art. 33 empowered the Commission to adopt, on its own, secondary legislation to clarify and enforce ex-art. 30; and ex-art. 36 (now 30) permitted exceptions to the ex-art. 30 prohibition: on the grounds of public morality, public policy, public security, health, and cultural heritage. These provisions can be interpreted variously. What exactly are ‘effects’ that are equivalent to quotas, and what types of national measures produce them? What national measures, otherwise prohibited by ex-art. 30, could not be justified with reference to an ex-art. 36 exception? For that matter, what exactly is a ‘public policy’ exception? Pursuant to ex-art. 33, the Commission sought to resolve questions such as these in a 1970 directive. The directive established a ‘discrimination test’: national rules that treat national goods differently from imported goods are considered to be measures prohibited under ex-art. 30. Almost immediately, however, the ECJ’s jurisprudence rendered the Council’s directive obsolete.

The leading decision is *Dassonville* (ECJ 1974b). In 1970, Mr Dassonville imported some Johnnie Walker Scotch Whisky into Belgium, after having purchased it from a French supplier. When Dassonville put the whisky on the market, he was prosecuted by the Belgian authorities for having violated customs rules. The rules prohibited the importation from an EU country (France) of spirits that originated in a third country (UK), unless French

customs rules were substantially similar to those in place in Belgium. Dassonville was also sued by a Belgian importer who possessed, under Belgian law, an exclusive right to market Johnnie Walker in the country. Dassonville argued that, under the treaty, goods that had entered France legally must be allowed to enter Belgium freely, and exclusive rights to import and market goods were not legally valid.

The case provided the ECJ with its first real opportunity to consider the meaning of free-movement provisions. Dismissing the objections of the UK and Belgium, both of which argued that such rules were not prohibited under ex-art. 30, it found for Dassonville, declaring the following:

All trading rules enacted by the Member States, which are capable of hindering, directly or indirectly, actually or potentially, intra-[EU] trade are to be considered as measures having an effect equivalent to quantitative restrictions.

Thus the ECJ replaced the Commission's discrimination test with a 'hindrance of trade' test. Any national measure that impacts negatively on trade, even indirectly or potentially, is prohibited. If put to a vote, this treaty interpretation – more expansively integrationist than any in circulation at the time – would not have been accepted by a majority, let alone all, of the member states.

The ruling posed a delicate policy problem for the ECJ. Ordering the wholesale removal of national regulations would strip away legal regimes serving otherwise legitimate public interests, such as the protection of public health, the environment and the consumer. The ECJ resolved the problem by declaring that member states could, within reason, continue to regulate the production and sale of goods in the public's interest, pending harmonization by EU legislation. It stressed that: (1) the burden of proof rests with the member state to prove it has acted reasonably; (2) such regulations – as with national measures justified under ex-art. 36 grounds – could not 'constitute a disguised restriction on trade between member states'; and (3) the ECJ and the national courts would review the legality of these exceptions to ex-art. 30 on a case-by-case basis.

The 'Dassonville principles' have animated the free-movement jurisprudence of the ECJ to this day.¹⁵ They enabled the EU legal system, activated by traders, to monitor member-state compliance with EU trade rules, but also to shape national law by progressively elaborating the permissible exceptions to ex-art. 30. More generally, virtually every important domain of negative integration is today governed by judicially constructed rules resembling, in their broad outline and logic, the Dassonville principles. That is, the ECJ works to remove barriers to the movement of persons, or to the provision of services, while requiring member states to justify such barriers on public interest grounds.

The purely judicial construction of a common market on a case-by-case

basis, although theoretically possible, would have been a slow and inefficient process. After Dassonville, however, the development of the law governing free movement exerted a profound impact on the evolution of the European political system. In 1979, the ECJ ruled, in *Cassis de Dijon* (ECJ 1979), that Germany could not prohibit the sale of a French liqueur merely because that liqueur did not conform to German standards. While this was seemingly a straightforward application of the Dassonville principles, the ECJ also declared that it could not divine:

[any] valid reason why, provided that they have been lawfully produced or marketed in one of the member states, alcoholic beverages should not be introduced into any other member states.

The Commission used the ruling to ‘relaunch’ Europe. It immediately issued a communiqué abstracting from the decision a general rule, today called the principle of *mutual recognition* of national standards. The ECJ had shown the Commission how member states might retain their own national rules, capable of being applied to the production and sale of domestic goods within the domestic market, while prohibiting them from applying these same rules to goods originating elsewhere in order to hinder trade.

After Dassonville and Cassis de Dijon, levels of free movement litigation rose sharply, rulings of non-compliance proliferated, and national regulatory frameworks were placed in the ‘shadow of the law’. At the same time, the Commission, in alliance with transnational business coalitions, worked to convert member-state governments to the idea that mutual recognition could constitute a general strategy for breaking intergovernmental deadlock. They were successful at doing so. The political science literature on the sources of the SEA has sufficiently demonstrated the extent to which governments were dragged along in this process (Alter and Meunier-Aitshalia 1994; Dehousse 1994; Sandholtz and Zysman 1989; but Moravcsik 1995 disagrees). Governments acted, of course, in the form of a treaty that codified pro-integration solutions to their own collective action problems. But these solutions had already emerged, out of the structured interactions between traders, the ECJ, and the Commission; and they were given urgency by globalization and the failure of ‘go it alone’ policies to sustain economic growth.

Constitutional rights and negative integration

In a development of enormous long-range importance, the ECJ has grafted its (post-*Wachauf*, ECJ 1989) rights jurisdiction onto its case law relative to the removal of barriers to exchange. Two cases, both decided in 1991, reveal the potential of this new rights discourse to structure, but also to legitimize, judicial control of national policies. In the *Commission v. the Netherlands* (ECJ 1991b), the ECJ annulled a Dutch law requiring a fixed percentage of all radio and television programmes broadcast in the Netherlands to be made by

a national production company. The Commission had attacked the law as contrary to the freedom to provide services established by ex-art. 59 of the Rome Treaty. The Dutch government justified the law as a permissible derogation from ex-art. 59, on the grounds that the rule was designed to further a 'general good' and a 'fundamental right' that it called 'cultural pluralism': the right of Dutch audiences to a Dutch point of view. The ECJ took the opportunity to state (echoing national constitutional courts) that pluralism, 'connected [to] freedom of expression, as protected by art. 10 of the European Convention on Human Rights', indeed constituted one of the 'fundamental rights guaranteed by the Community legal order'. It found no compelling link between the Dutch law and the protection of rights, however.

In the second case, *Grogan* (ECJ 1991c), the ECJ was asked to review Irish abortion law. Although abortion has never been legal in Ireland, its status was constitutionalized in a 1983 amendment to the constitution which declares that 'the State acknowledges the right to life of the unborn and . . . guarantees in its law to respect, to defend, and to vindicate that right.' In a 1988 decision, the Irish Supreme Court read the amendment to prohibit family planning clinics and medical health professionals from counselling women about alternatives to carrying their pregnancies to term. In protest, student organizations in several Irish universities produced and distributed information on obtaining abortions outside Ireland, particularly in the UK, whereupon they were prosecuted. The students claimed that EU law established fundamental rights to obtain information about the availability of abortion services in the Community, as well as to travel to obtain those services. Thus, two fundamental rights were potentially in conflict.

In its decision, the ECJ ruled that the provision of abortions did constitute a 'service' under EU law, and that fundamental rights guaranteed by the Community were at issue. Nonetheless, the students lost. The ECJ ruled that:

the link between the activity of the students' associations . . . and medical terminations of pregnancies in another member state is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of [ex-]art.59.

The ECJ thus sidestepped a political landmine, although it implied that foreign abortion clinics could not be prohibited from advertising their services directly in Ireland.

As these two cases demonstrate, the ECJ has positioned itself as the balancer of constitutional rights guaranteed under the EU's constitution against an asserted public interest expressed in member-state policy. Further, the Irish abortion case indicates that, as constitutionalization deepens, potentially any national legal controversy can be transformed into EU litigation, under the rubric of a conflict between EU rights and national rights.

The ECJ and positive integration

Whereas negative integration results in the removal of barriers to integration, positive integration results in the construction of EU legal regimes that replace national ones. In positive integration processes, governments would seem to have enhanced means of controlling policy outcomes: for most of the life of the EU, one or a minority of Council members could veto important EU legislation. If we restrict the empirical domain of positive integration to the process by which the Council of Ministers adopts secondary legislation, then governmental control of policy outcomes appears to be quite obvious. However, if we expand the empirical domain of positive integration to include judicial processes that have taken place both before and after the EU's legislative institutions adopt secondary legislation, then the Council's control of process and outcomes can only be an open empirical question. In fact, the legal system has pushed the positive integration project far further than the member-state governments would have gone on their own, given the existing rules governing intergovernmental decision-making.

In numerous policy domains, the ECJ has provoked, and even required, the Council of Ministers to legislate in new areas. In 1986, for example, the ECJ invalidated certain price-fixing policies of a national airline, widespread across the EU, ruling that such policies violated competition rules residing in the Rome Treaty. It then ordered the EU to liberalize the airline transport regime by legislation. Within weeks, the Commission initiated legal actions against the practices of several member states and, in 1987, the Council of Ministers approved a package of legislation inspired by the ECJ's jurisprudence (O'Reilly and Stone Sweet 1998). Dramatic moves to liberalize national telecommunication systems, and to reregulate the regime at the European level, were also provoked by ECJ rulings and the consequent strengthening of the Commission's position within EU policy processes (Sandholtz 1998). In these cases (see also Berlin 1992), judicial law-making and the threat of future judicial censure prompted the EU's legislative bodies to act.

Such examples reveal only part of the story. Because the ECJ interacts simultaneously with both national and supranational legislators, the full impact of its rulings can only be understood by paying attention to policy-making processes and outcomes at both levels at once. An important example is the elaboration of EU law governing the equal treatment of men and women in the workplace.

Conclusion

Once 'constitutionalized', the EU legal system has constituted and reinforced supranational modes of governance in the EU and reduced the impact of intergovernmentalism. Lacking the unanimity necessary to reverse the ECJ when it interprets the treaty, member-state governments have been forced to

adapt to the ECJ's case law, by ratifying its policy choices and by revising national law. Thus, the intergovernmental capacity to control judicial outcomes is limited, even when governments attempt this. Governments have ratified, rather than reversed, the ECJ's most important moves. They have done so implicitly, by not reversing the ECJ's case law on supremacy and direct effect, for example. But they have also done so explicitly, by giving formal treaty basis to some of its most innovative doctrines. Thus, in negotiations on the SEA, the member states followed the Commission's lead on mutual recognition, not least because the ECJ's free-movement case law made it clear that mutual recognition would have been likely to become formal law anyway. In 1977, after the ECJ had constructed a charter of rights and granted itself jurisdiction over that charter, the European Parliament, the Commission and the Council adopted a joint resolution approving the move. In the Treaty on European Union (chapter F),⁵ the member states simply echoed the ECJ: 'the Union shall respect fundamental rights as guaranteed by the European Convention on Human Rights . . . and as they result from the constitutional traditions common to the member states as general principles of Community law.' Nor is this statement simply symbolic. The case *Commission v. the Netherlands* (1991b) provides important evidence that member states have begun to defend themselves, in cases involving Community fundamental rights, in the language of fundamental rights. Thus, the member states have legitimized the ECJ's rights discourse by using it, reinforcing the centrality of the ECJ as constitutional balancer of rights against the general interest.

On the other hand, intergovernmental attempts to constrain the ECJ's impact have been few and weak. A declaration annexed to the SEA, stating that the 31 December 1992 deadline for completion of the internal market did not 'create an automatic legal effect', was the first formal attempt. The member states sought to ensure, in the event of failure to meet the deadline, that the ECJ was not to assume responsibility for filling in the gaps. The intergovernmental negotiations leading to the adoption of the Treaty on European Union yielded several such restrictions. Art. L of the treaty excludes from the jurisdiction of the ECJ foreign and security policy, and cooperation on justice and immigration, two 'pillars' of the new European Union. Even adopting a broad definition of measures designed to constrain the ECJ, what measures have been adopted have also been few and weak. They constitute efforts to constrain the potential impact of judicial law-making, an acknowledgment on the part of the member states of the ECJ's capacity to pre-empt the EU legislator and national parliaments.

Like other European constitutional courts, the ECJ has used its constitutional review powers to expand the relevance of constitutional law within policy-making processes, thereby altering the very nature of the polity. In the EU, the capacity of the member states to constrain the creative effects of the legal system is heavily conditioned by restrictive decision rules. The ECJ's constitutional jurisprudence (its interpretation of the treaty) can only be

overturned by revising the constitution, which requires the unanimous vote of the member states. Thus, the factor that undergirded strong intergovernmental elements of the EU for so long – the requirement of unanimity – also undermines the ability of the member-state governments to control the ECJ, and the policy outcomes its decisions generate, once it has rendered a judgement.

Notes

- 1 The 'European Union' is now commonly used as the name of the European polity. Unless otherwise noted, this chapter focuses on the European Community (EC), the system constituted by the 1958 Treaty of Rome and subsequent amendments to that treaty. The EC constitutes the first pillar of the EU, as it was decided in the Treaty on European Union (TEU) in 1992. The other two pillars concern foreign and security policy and cooperation, justice and immigration.
- 2 The chapter is based on Stone Sweet (2000: ch. 6) and Stone Sweet and Caporaso (1998).
- 3 According to the treaty, judges must be 'chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointments to the highest judicial offices in their respective countries' or who are law professors.
- 4 Albeit as modified by the *Keck* decision (ECJ 1993).
- 5 The Treaty of European Union also endorsed the ECJ's post-*Francovich* jurisprudence on state liability (art. 171), and on the certain powers of the Parliament (art. 173).

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4 The emergence of the EU supranational polity and its implications for democracy

James A. Caporaso

Introduction

The premise of this chapter is the recognition of profound changes in the Westphalian order of nation-states. After briefly describing these changes, I will turn to the possibilities for a post-Westphalian order based on the experience of regional integration in the European Union (EU) and the implications for democracy at the regional level.

The transition from the medieval system to the Westphalian order involved a consolidation of rule and territory.¹ In particular, it involved a progressive congruence among territory, authoritative rule, nationalism and citizenship. Authorities that competed with the state were extruded, non-state purveyors of violence were eliminated or pacified (Thomson 1994), internal authority was streamlined, and external recognition (international legal recognition) came to be progressively aligned with the effective exercise of domestic authority. While this congruence is far from perfect (e.g., extraterritoriality, more nations than states), it served as a tendency within the state system for hundreds of years. There is no logical reason why these four properties have to come together. States and nations are often disconnected. Citizenship rights can be defined by territorial membership, market participation, and even membership in humankind, as the most abstract concepts of human rights would have it. Authority can be exercised over people of similar religion regardless of territorial location just as it can be exercised over all those within a territory. What is distinctive about the Westphalian order is the degree to which it has brought together authority, territory, nationalism and citizenship rights.

While the Westphalian order is not crumbling, there are forces supplementing if not supplanting the nation-state. In Western Europe, there are challenges being posed in terms of international trade, international capital flows, technological changes, migration, terrorist networks and so on. While these changes are themselves partly endogenous to politics, in the sense that the single market resulted from a political decision, the economic and technological dimension has a logic of its own. One result is the growth of a transnational political system that seeks to regulate and channel these economic,

political and cultural forces. The growth of this political system finds its centre in the EU. As the EU becomes stronger and more effective, and spreads to more and more policy areas, it raises questions about the nature of rule at the international level. As Brussels becomes the site for decision-making and laws that govern the individual member states, it is natural to ask about the democratic or non-democratic nature of the EU.

The difficulty that arises stems from the fact that we do not know to which category of political system the EU belongs. Yet a provisional answer would seem necessary before even the most elementary analysis can proceed. It would certainly be a mistake to apply standard democratic theory to a traditional, state-to-state international organization. Almost all of democratic theory emerged and developed within the context of the city-state or the nation-state. Just as it would be questionable to apply democratic concepts to a private firm, marketplace or military organization, in the same way we should not uncritically transfer ideas about democracy from the domestic to the international context (Dahl 1999, and in this book).

A related complication arises because of conditions that are sometimes asserted as ‘prerequisites’ of democracy. A favoured prerequisite is a demos. For a democracy to exist, there must first be a people who in turn vest their sovereignty in government, authorizing the government to speak on the people’s behalf. I pursue these points below.

The rest of the chapter is organized in the following fashion. First, I will say something about the presumed organic link between ‘the state’,² its people or demos, and legitimacy. It seems necessary to clear the ground of this obstacle before going any further. If the EU cannot pass the ‘no demos’ hurdle, there is no point in proceeding. I argue that the ‘no demos’ thesis poses no insuperable obstacle, thus opening a space for the second task of the chapter. Second, admitting that we don’t have a good answer to the question ‘What is the EU?’, I offer two models of what is emerging in Europe and suggest criteria for thinking about democracy appropriate to them. The two models are drawn from Dehousse (1998) and Majone (1993, 1994). In doing the above, I provide a brief empirical description of the democratic and non-democratic aspects of the EU, insofar as they are relevant for the models suggested.

Overcoming a preliminary obstacle: the people (demos), statehood and democracy

There is a line of argument which if true, makes the democratization of Europe an impossible task. It goes as follows: democracy requires a state, a structure of authority. In turn, a state requires a people, a demos, defined in ethno-cultural terms as a ‘we group’. The progression is from a people (*Volk*) to state (thus *Staatsvolk*) to a democratic state. This sequence is so tightly coupled that it almost becomes a definitional matter. No people, no state. No state, no democracy. The argument underlying the ‘no demos, no state’ position has to do with the appropriate conditions under which authoritative

decisions can be made, binding on the populace as a whole. The people are the source of sovereignty, and the actions of governmental institutions must be grounded in the will of the people. The German Constitutional Court, in its decision on the compatibility of the Maastricht Treaty with German basic law, argued as much, and further stated that the conditions for a European Volk did not yet exist:

the principle of democracy, as enshrined in Article 20 of the Basic Law, requires that each and every execution of sovereign rights derive directly from 'the people of the state' (Staatsvolk), the framing of whose political will postulates the existence of a form of public opinion which can only be created through the free exchange of ideas and an ongoing process of interaction between social forces and interests. Today, such conditions exist only within the nation state where the people may express and have an influence on what concerns it on a relatively homogenous basis, spiritually, socially, and politically.

(Mancini n. d.: 7)

The 'no demos' thesis seems unduly constraining. First of all, it rests on a questionable historical basis, since in only a few instances did a homogenous people antedate and bring into existence a state. A much more typical pattern is for a state to come into existence and to construct a nation out of the raw materials that are in place. Thus the French were created out of numerous peoples from Brittany, Normandy, Languedoc, Burgundy, Provence and so on. The title of Eugen Weber's book *Peasants into Frenchmen* (1976) captures the centralizing project of state- and nation-building. In the same way, the process of building the Italian state after the formation of Italy in the late nineteenth century involved a centralizing effort to focus the attention and loyalties of people from the Piedmont, Tuscany, Apulia, Naples, Calabria and Sicily around Rome. Second, the 'no demos' thesis makes it logically impossible to think about democracy in cases where it would otherwise seem appropriate. Even if one concedes that there is no developed European identity in the primordial sense, Europeans are increasingly tied together in numerous ways: through an increasingly dense market for goods, services and productive factors; through elaborate institutions; and through the daily experience of living under a common system of laws. Unlike almost all other international organizations, the EU has evolved a system of law that applies directly to individuals and is recognized as 'higher law' within the universe of competing legal rules (Weiler 1991: 2407; Stone Sweet 1995). In short, European citizens are affected, in both economy and polity, by the actions of others. In this basic sense, the peoples of Europe, differentiated as they might be according to their national affections, are nevertheless drawn together at a more encompassing level by their mutual engagement in the European economic and political project.

The basic problem, as I see it, is that the 'no demos' thesis is usually

conflated with the absence of a unique and autonomous European *ethnie*, a European people tied together by perception of a common ethnic stock, language, shared history, customs and ideas. But this is only one meaning of *demos* – one that is constituted by primordial feelings. It is true that Europe lacks such a *demos*. But it is possible, even sensible, to define the *demos* in civic rather than ethnic terms. Such a civic definition of the people would emphasize their shared ideas, especially in areas such as social democracy, organization of the economy and polity, and exposure and participation in very similar constitutional republics, as well as their solidarity with respect to widely shared principles of human rights, political freedoms and habits about cooperative problem solving. Defined in this manner, Europe (especially the Europe of the EU) comes much closer to having a distinctive *demos*, and the most self-conscious vehicle for shaping this popular conception of what it means to be European is the EU itself. This is especially evident in the application of the accession criteria to candidate countries seeking membership.

What type of political system is the European Union?

There is no abstract, timeless model of democracy. Here I agree with Mény (1998: 8) that there is a certain arrogance to the demand that all newcomers to the democratic club fulfil all the old criteria of what it means to be democratic. Some conceptual anchor must be retained, just to be sure we are talking about the same concept, but this anchor may be at a very high level of generality (accountability, political competition, responsiveness to the people), and does not need to imply how these principles are made operational (e.g., legislative oversight, judicial review, standard setting). In a similar vein, Dahl (1994) sees three great democratic transformations: one in ancient Greek times, another centuries later with the rise of the national state (supplanting city-states and feudal kingdoms), and a third occurring today, with globalization and the emergence of transnational governance. Each transformation brought along with it new problems and possibilities for democratic governance. The key unanswered questions are what is the nature of the transnational governance system in Europe today and how can we think about it in democratic terms?

The problem identified by Puchala in 'Of Blind Men, Elephants, and International Integration' (1972) concerned the proper classification and understanding of the EU. Numerous answers have been given to the question 'What type of political system is the EU?' It has been called a regime, an intergovernmental organization, an emerging federal system, a confederation and a supranational state. To others, the EU is a journey to an unknown destination, an open-ended project that 'does not fit into any accepted category of governance' (Sbragia 1993: 24). We of course cannot decide 'what the EU is' through a priori means, nor is it possible to examine its DNA to ascertain its developmental blueprint. Still, it does not help to label the EU *sui generis*. We will not get far if we don't establish some working assumptions to guide our research. Following Dehousse and other scholars (Dehousse 1998;

Majone 1993, 1994), I will hypothesize two lines of development for the EU. One sees it as an emerging parliamentary system, the other as an international regulatory state. Each template implies somewhat different, though not mutually exclusive, ways of thinking about democracy in the EU.

The European Union as an emerging parliamentary democracy

The supranational level

One way of thinking about the development of democracy is to see it as part of a long historical process whereby power and authority are wrested from executives and vested in councils and legislatures (Mancini and Keeling 1994). According to this line of thought, the EU is emerging, however imperfectly, as a young parliamentary democracy. In its fullest form, the peoples of Europe would directly elect representatives to two houses of parliament, an upper house representing the territorial dimension (member states, currently organized as the Council of Ministers) and a lower house based on population (currently the European Parliament). The executive would be chosen out of the popular house and would constitute the government. The task of government would be to provide executive leadership based on popular support in Parliament. Popular participation (especially voting for representatives), representation and political parties acting to aggregate interests would be crucial components of the democratic process in this idealized model. The parliamentary model does not require a primordial 'people' but it does rest on the existence of a civic body to recognize, construct and debate the *res publica* of the Union.

How does the EU fit this model? Primary executive power (at least in terms of implementation) is vested in the Commission, which has the sole right of initiative but whose members are appointed by executives of the member states. The original European Assembly (officially known since the Single Act as the European Parliament [EP]) is composed of members chosen by national parliaments who are then sent to Brussels and Strasbourg. The powers of the EP were long considered quite limited, though the Single European Act, the Treaty on European Union and the Amsterdam Treaty strengthened and extended these powers. In many areas (those covered by the co-decision procedure), the EP acts as a co-legislator with the Council of Ministers. In other areas, legislative power rests firmly with the Council, a body that paradoxically is composed of national executives (Mancini and Keeling 1994: 175–6). The Commission is accountable to the EP in the sense that the EP can dismiss the Commission collectively. The European Court of Justice (ECJ) is composed of one member from each state, again appointed by the executive of each state, and serving a term of six years that may or may not be renewed. While the ECJ may actually serve as a democratic counterweight to the Council and other Community organs, in the sense that it provides for a separation of powers, it is not of course a popular institution. All in all, as

Mancini and Keeling (1994) argue, the institutional structure of the EU does not present a very democratic picture, especially from the vantage point of parliamentary democracy.

It is not surprising that the earliest charges of a democratic deficit in the EU centered on the weak role of the EP and national parliaments. Indeed, when Shirley Williams launched her attack on the nature of the EU's institutions, it was based on the expanding power of the Council of Ministers (national executives acting as a supranational legislature) along with the declining power of national parliaments and the weak role of the EP (Williams *ibid.*: 155) Williams concluded: 'the loss of accountability to national parliaments has not been compensated by increased accountability to the European Parliament' (*ibid.*: 155). National parliaments were judged to be weak because 'parliaments have little or no input into Commission proposals, certainly none formally' (*ibid.*: 158–9).

The strength of parliaments at the supranational and national levels is central to the question of how well the EU conforms to a parliamentary democracy. How accurate is the picture of weak accountability to parliaments given above? This question resolves itself into two parts, the first concerning the EP and the second concerning the role of the respective national parliaments.

The EP was not set up as a strong institution or one designed to engage public opinion and attract legitimacy. The visions of Europe of both de Gaulle and Monnet discouraged the construction of influential popular assemblies as part of the institutional design of the EEC, for different reasons. Members of the EP were not directly elected, something that did not change until 1979. Further, the EP was given the power only to consult in the legislative process, a power which itself was not always fully respected until the ECJ established it as a separation of powers principle in the *Roquette Frères* case (1979).³ Further, legislative power was concentrated (indeed monopolized) in the hands of national executives operating as a supranational legislature through the Council of Ministers. The same executives who appoint the ministers sitting on the Council also held the power to appoint members of the European judiciary (the ECJ) and executive (the Commission). Overall, it could not be denied that power was heavily concentrated in the executive branch when the EEC came into existence (Mancini and Keeling 1994).

One obvious way to strengthen the EP is to increase its legislative powers and responsibilities. The Single European Act (SEA) took the first steps by introducing a new procedure for the adoption of legislation, the 'cooperation procedure', tied particularly to the legislation needed to complete the internal market. While the early stages of this procedure resemble the traditional legislative procedure (Commission proposal, non-binding EP opinion, Council decision), in later stages the EP gains the right to propose amendments which may be adopted by the Council. In effect, if the Commission agrees with the EP amendments, it becomes easier for the Council to adopt those amendments (because adoption requires only a qualified majority agreement) than it

is to change or reject them (both of which require unanimity). The cooperation procedure, which extends to new areas in the 1992 Maastricht Treaty but which was largely abolished (in favour of co-decision) at Amsterdam, gives the EP substantial 'conditional agenda-setting power' (Tsebelis 1994) and enables it for the first time to exert meaningful legislative influence.

The 1992 Maastricht Treaty extends the cooperation procedures and, most importantly, creates a 'co-decision procedure' that bestows additional powers on the EP. What this procedure entails essentially is a limited form of joint legislative power with the Council of Ministers. This power is limited to areas such as the internal market, free movement of persons, rights of establishment, and education, culture and public health. In effect, if the EP and the Council of Ministers cannot agree on a policy, a conciliation committee is convened which tries to iron out their differences. At the end of the procedure, the EP can veto any policies that the Council might try to impose on it. Sceptics suggested that co-decision actually exacerbated the EU's democratic deficit because it replaced the EP's highly effective 'conditional agenda-setting power' under cooperation with an absolute veto that it would almost never wish to use (Tsebelis and Garrett 1997).

The Amsterdam Treaty further extends the role of the EP. Legislative co-decision has been introduced to eight new areas (Dehousse 1998: 7), including some very important ones such as social policy and public health. In addition, co-decision has been extended to numerous areas in which cooperation was previously operative, covering such important areas as free movement of workers, transport and environmental policies (*ibid.*).

Over a very short period of time, the EU has developed institutional structures that provide substantial powers to the EP. It has aligned the terms of the EP and the Commission and it has further integrated the Commission and the EP by giving the EP influence over the appointment of the Commission and the president. For those who would see the EU as an emerging parliamentary democracy with two houses, some support is found in the institutional developments of Maastricht and Amsterdam.

The national level

Strengthening the EP is not the only way to check executive power and democratize legislative institutions within the EU. Just as the EU relies on national administrative structures to implement legislation made in Brussels, so it can in principle rely on national parliaments to scrutinize and control transnational executive power. While this democratic route is indirect, national parliaments are grounded in the popular will. Representatives are directly elected and, in parliamentary systems, the executive is chosen out of the parliament. Arguably, it is a short step from the control of national executives to the control of ministers operating in Brussels.

It is important to recall that a major part of Shirley Williams's critique of the democratic deficit had to do with the impotence of national legislatures in terms of controlling decision-making in Brussels (the ascendancy of the Council of Ministers along with the decline of national parliaments). Perhaps not fortuitously, at precisely the same time that Williams was sounding the alarm, the role of national parliaments was being strengthened. This movement was led by Denmark but was not confined to it. Completion of the single market, along with the Treaty on European Union (TEU), galvanized the forces in favour of parliamentary influence. The SEA committed members to completion of the market by the end of 1992, a single market for goods and services, as well as productive factors. Institutional reforms went forward on several fronts, most importantly the extension of qualified majority voting (QMV). As long as the national veto was in place, member states could be secure in guarding their interests. The expansion of QMV was politically very important, since it placed member states in a position where they were increasingly vulnerable to being outvoted. With the signing of the TEU in 1992, the competence of the EU was extended in numerous areas. Significant powers were vested in the EU, especially the power to create a European central bank to manage a European currency. A three-pillar structure was set up and a timetable to institute European Monetary Union was agreed upon. As Martin argues, as the stakes increased (with the expanded agenda and QMV), national parliaments followed the Danish leadership by creating European parliamentary committees with more rigorous monitoring mechanisms to control European institutions (Martin 2000: 147, 153).

By the late 1980s and early 1990s, national parliaments became interested in controlling EU policy. Every member state set up a body specializing in EU affairs, keeping track of events in Brussels, as well as attempting to exert influence on ministers through demands for briefings, increasing transparency, and debriefings after meetings took place in Brussels. A number of states, among them Germany and France, enacted 'constitutional provisions for involving the national parliament in the EU decision-making process at the national level' (Martin 2000: 160).

While these observations do not add up to 'impact' of the national parliaments, they do reflect something about the intensity with which national parliaments have addressed themselves to the perceived democratic deficit in the EU. One argument made by those who defend the EU against charges of a democratic deficit is that the EU's activities are already carefully subject to parliamentary scrutiny and control but that the relevant controlling institutions are not part of the institutional apparatus of the EU. Instead, domestic institutions should be seen as performing the functions of control and oversight of their agents in Brussels. This rationale is often made by those adopting a principal-agent perspective. Ministers acting within the Council of Ministers are seen as extensions of the delegation-control chain that originates within the domestic context. The prime minister embodies executive power but acts on the basis of popular sovereignty. The people elect

representatives who then form a government with a prime minister as its head. The prime minister then appoints ministers to carry out his or her policies, i.e., the policies of the government. Nothing of a qualitative nature changes when these very same ministers 'go to Brussels' and engage in diplomacy and authoritative decision-making there. The location is different and the decision making rules are somewhat altered by the fact that one's negotiating partners are not members of an opposition party but instead heads of governments of other states. While this is not a trivial matter, from a principal-agent perspective the relationship between principal (the executive) and agent (minister) can be conceptualized in the same way. The chain of delegation may be longer, slippage may be greater, divergence of preferences between principals and agents may be more or less than under domestic conditions. But these are empirical relationships to be investigated rather than qualitatively different circumstances. The bulk of the evidence supports the view that the more important the decision-making area, and the greater the incentive for national parliaments to control their agents in Brussels, the more closely the national parliaments exercise oversight and control. In this sense, the principal-agent perspective undermines support for the democratic deficit view.

The European Union as a regulatory state and the American experience

The main theme of this chapter is that there is a close link between how we conceive the EU as a political system and how we think of democracy at the regional level. This overarching theme implies a logical link between the question of how we categorize the EU (a traditional international organization, an emerging super-state, etc.) and how we think about democracy. In the previous section, I examined some possibilities for the emergence of the EU as a parliamentary democracy. Consistent with the idea that parliamentary, executive and judicial institutions compete and cooperate within the EU context, I explored the changing power balances between parliamentary and executive structures at both the national and the European level. In this section, I shift the focus to the second model of the EU as a regulatory state and, in parallel fashion, I try to develop a set of standards appropriate to democratic governance for regulatory structures.

If we ask what is novel about the EU in comparison to nation-states and international organizations, the list of responses could be quite long. The EU is composed of previously existing nation-states yet it makes laws that take precedence over conflicting national laws. It relies on these states for resources as well as administrative capacity, not unlike other multi-level governance systems. The EU has not tried to imitate or supersede the administrative structures of extant member states, nor has it been successful in supplanting the overall existing functional capacity of these states, e.g., their primacy with regard to social welfare policy, fiscal policy, education and redistributive policies (see Caporaso 1996; Moravcsik 2002: 607). Thus, it is no accident that the EU's governance functions are quite limited in areas

where the nation-states are particularly strong. There is much less duplication of function and less struggle for common turf than one would expect. Instead, the dominant pattern is one of overall political specialization of labour.

What governs this overall division of labour between Brussels and national polities?

According to some analysts (Majone 1993, 1994, 1998, 1999), the main lines of development in the EU are shaped by a distinction between efficiency politics and redistributive politics. Because efficiency politics aim at improvements for all concerned, even if aided by secondary methods of compensation out of collective gains,⁴ decisions are more easily taken by majority votes. Here the Pareto principle is respected not by the procedure (states can be overruled) but by the nature of the task and expectation of collective gains. Redistributive policies, on the other hand, involve winners and losers from the start. Straight-line trade-offs are involved, and the choices about who pays and who benefits are not softened by an increasing pie. These decisions generally are made by unanimity. In a sense, then, the unanimity procedure is an institutional safeguard against uncompensated losses. States may deliberate in order to find areas of mutual gains, or bargain for side-payments in the event that a loss looms on the horizon, but, if neither venture succeeds, the veto can be utilized.

While there is not a perfect congruence between regulatory politics and efficiency (in the sense that regulation usually does impose costs that must be borne by someone), there is a broad overlap. The making of a transnational European market, with all that this implies in terms of regulations for labour, capital and markets for goods and services, is to a large extent an efficiency project. The aim is to ease the flow of goods, services, labour and capital across national borders so that consumers and producers can carry out economic exchanges that otherwise would have been frustrated. A worker in Denmark might not have found a job in the Netherlands due to differences in licensing and credentials. Thus, the EU may work towards the harmonization of credentials or mutual recognition of them. A potential investor in Portugal might not have found access to capital and technology sources in Germany because of national restrictions on capital markets. Or, to draw an example from social policy, workers from different countries might be discouraged from taking employment in other member states because of different social security schemes, or from the absence of provisions about how to aggregate years of work across different countries. So deregulation and re-regulation in order better to coordinate economic activities across borders can be used to enlarge the area of economic exchange. Again, the point is accepted that even market-making is not innocent in the sense that it involves some redistribution, but it is important to note that most of this redistribution is from less to more efficient. It also allows those who are excluded from the market to enter as viable economic actors (e.g., employment in a 'foreign' EU state rather than unemployment in one's home state). Those who support the idea of the EU as an emerging regulatory state should expect the main lines of institutional development to concentrate the EU's competences in areas where

efficiency concerns are prominent. This should be the case particularly in areas where QMV is allowed. In areas where losses are likely, potential losers are likely to be protected by heavy reliance on intergovernmental and unanimity procedures.

According to this analysis, the EU is not an embryonic state lying on a continuum ranging from a decentralized state system to a federal Europe. An embryo, infant or adolescent will naturally grow to adulthood barring exceptional circumstances. But the EU does not have such a developmental template, and it lacks one precisely because its institutional evolution is shaped by the durable facts of the existing member states. The EU is thus a complement to the member states, one that shapes its external, national and subnational capacities, but not a substitute for these states. It lacks not only a primordial nation but also Weber's centralized administrative staff, Tilly's domestic sinews of war, and the extractive powers of a Marshallian social welfare state. In the area of citizen rights, the normal Marshallian sequence of political rights, participation rights and social-economic rights appears to be reversed, with economic rights associated with market-making coming first and the jury still out on political and participation rights. Despite these limitations, the EU is universally recognized as a supranational institution of great importance. Why?

One answer to this paradox⁵ lies in conceiving the EU not as a fully-fledged Westphalian state but as an international regulatory state (Majone 1993; Caporaso 1996). A regulatory state is (in this case) essentially an international state (or polity if you prefer) specializing in the control and management of international externalities. Because this state does not engage substantially in the redistributive and stabilization⁶ functions of government, and because it relies on the administrative structures of member states to carry out policies, it can get by with a small revenue base. In this sense, the tax limit on the EU's expenditures is a misleading indicator of its real strength.

What motivates international regulatory policy? Market transactions create externalities that often cannot be managed by countries acting alone through national regulations. When national attempts fail, we can speak of national regulatory failure. The conditions under which this is likely to happen include lack of information, problems of credibility, and the existence of incentives for strategic use of regulations (Majone 1994). Information problems arise when regulators do not have adequate knowledge of the behaviour of those whom they are attempting to regulate, especially across borders. Credibility problems exist when, because of opportunism, there is the possibility that agreements among countries will not be enforced, or enforced in a lax manner. The incentives for strategic use of regulatory policy – from laws for brewing German beer, to making pasta only from durum wheat, to setting nationally convenient standards in health and safety – are numerous. If regulating faithfully in compliance with national standards and national regulatory bodies disadvantages home-country firms, an international regulatory body is called for.

If the EU is seen as a regulatory rather than a parliamentary state, this has implications for the assessment of democracy. The EU's mandate is more modest than the mandates of national governments and does not cut heavily into domestic turf that covers the full range of government policies (redistribution, stabilization, symbolic). In addition to regulatory problems, the regulatory state pursues a number of objectives related to the management of risk in areas such as consumer protection, health and safety, and workplace environments. Many of the areas covered are complex and do not lend themselves to *ex ante* legislation (Dehousse 1998: 14). Instead, a logic of delegation is implied in which specialized agencies are granted broad mandates to make and implement rules.

Delegation of course implies independence, so as to avoid political pressure and possibly capture by the very groups government agencies are trying to regulate. Here is where democratic concerns emerge. On the one hand, independence is necessary for agencies to be credible, whether the European Central Bank or a standard-setting agency in pharmaceuticals. If the Competition Directorate of the Commission were strongly politicized, so as to make policy outcomes the result of group pressures, cartel policy would not be socially optimal. On the other hand, removal of agencies' work from direct political control runs another type of risk, that agencies will become fiefs of their own not responsive to any principal, or develop a cosy relationship with those whom they are to regulate. 'Capture theory' has been a particularly important line of research in the United States, where the Interstate Commerce Commission (ICC), the Security and Exchange Commission (SEC) and Occupational Safety and Health Administration (OSHA) are constantly under pressure from the very actors they are supposed to regulate.

But what exactly is the new model? In the international regulatory state, the primary mode of governance is delegation to 'independent' agencies that make rules designed to achieve objectives consistent with the preferences of the median voter. Often associated with this mode of policy-making are terms such as 'government by information', 'open coordination', 'best practices' and 'deliberation to find consensus positions'. Such an approach is decidedly more consensual and non-coercive than traditional command and control politics and relies heavily on the faith that continued deliberation will discover points of agreement that are preferred by all to the status quo. Such a faith, whether justified or not, is certainly not extended to the second and third pillars, where intergovernmental procedures (little delegation, the veto) are dominant (Majone 1999). However, according to Majone, there are broad areas of public policy where 'regulation by information' is quite effective, indeed more so than direct regulation (1997: 262). For example, the European Environmental Agency (EEA), the European Agency for Evaluation of Medicinal Products and the Agency for Health and Safety at Work, while they do not have the strong rule-making and enforcement powers usually granted to US regulatory bodies (*ibid.*), nevertheless have made much of their capacity to form networks, collect information, and develop standards which can be used

to assess public policy goals. Relying on expertise and other techniques such as audits, the control of fraud and corruption, the works of the Committee of Independent Experts (Lequesne and Rivaud 2003) have become hallmarks of policy-making in the EU. The limitations of this mode of policy-making, and the negative side effects even where the primary goal of good government is met, are addressed below.

If delegation of discretionary authority to expert bodies to make rules is the mode of governance, then accountability is likely to be the key democratic problem. A dilemma is posed between the independence required to make policies credible and the accountability necessary to ensure democracy. Reconciling independence with accountability is a major task for regulation theorists, but the mechanisms on which they rely are somewhat different from the traditional methods of legislative and political oversight. Among the methods suggested in the EU are clear statutory objectives, judicial review, transparency, budgetary discipline and monitoring by interest groups (Majone 1994: 2). Providing clear standards is important but not enough by itself. The actual operation of specialized agencies is often opaque, even if objectives are spelled out. Thus, publication of documents and access to records are important mechanisms for controlling the activities of the regulatory state. In this regard, it is interesting that the Treaty of Amsterdam (1997) introduces a number of innovations. It establishes in clear terms the right of citizen access to documents of the EP, the Council and the Commission. Since much of the work of the Council and Commission is done in specialized committees (comitology), information related to activities of regulatory bodies becomes available in principle. Of course, rights of access are effective only if they work on the ground, and to my knowledge we have little beyond anecdotal information about day-to-day access. In any case, in the post-Amsterdam period, public access has become the rule, and secrecy and confidentiality are to be interpreted narrowly (Dehousse 1998: 19).

The American experience with regulation

One way to get leverage on questions related to the EU as a regulatory state is to draw on the experience of others. The case of the United States immediately suggests itself. What can be learned from the US experience with regulation?

On first look, the US and European experiences seem quite different. Regulation at the EU level came late, for the most part during the 1980s and 1990s, and it came as part of the transition from public to private ownership associated with the neo-liberal turn in Europe. Since public ownership provided its own structures of rules, regulation was thought to be superfluous (Majone 1999: 1). But if the Keynesian state relies on high levels of public ownership, the regulatory state relies on broad grants of discretionary authority to quasi-independent agencies and bodies. This historical experience stands in stark contrast to the US experience, where independent agencies

came into existence during the Progressive Era and later during the New Deal. During the Progressive Era (1880s and 1890s) at least part of the effort to create independent agencies (and the term independent is problematic, as Shapiro [1997] argues) stemmed from a desire to free government functions from the grasp of political parties. It had little to do with market failure, asymmetric information, problems of credibility and commitment and so on, factors so heavily emphasized by analysts today (see Majone 1993, 1994, 1999). Similarly, the New Deal of the 1930s was spurred by the impact of the big depression and decline in the faith of self-organizing markets. Nevertheless, the differences between the US and EU experiences does not undermine the case for comparison. There are four places where the regulatory experience of the US can shed light on the EU case.

The first point comes in the form of a question. In what sense are regulatory agencies (e.g., the European Environmental Agency, the Agency for Health and Safety at Work) independent? This is an important question because it is basically the presumed independence of agencies that poses a threat to democratic governance. If agents are granted broad discretion to make policies, and if they develop different preferences from the principals and have access to different information, their goals may diverge from the goals of the principals. However, if there is one thing that the American experience tells us it is that agency independence is not to be assumed. Indeed, the terms 'independent regulatory commission' is somewhat of a misnomer (see Shapiro [1997] for an overview). Agencies and commissions are not free of congressional control. Quite the contrary. As Shapiro puts it, both commissions and agencies live 'in a regime of statutory duties under which Congressional statutes not presidential policies control much of their behavior. Both are subject to judicial review' (Shapiro 1997: 276). As part of its control and oversight, Congress undertakes annual, intensive, budgetary review of almost all executive bodies. Thus, to summarize the first point, the US experience does not provide support for the view that administrative agencies are loose cannons posing a threat to democratic rule owing to the absence of broad political, legislative and judicial controls. In this sense, the US experience downplays the concerns about insulated regulatory bodies as a threat to democracy in the EU.

Second, there is an overall institutional balance in the US system that is not present in the EU. I am thinking in particular of the strong powers of the US Congress, but even more of the ways in which interest groups and party government add significant dimensions to the US political scene. Political parties are capable of mobilizing bias in the US in a way that finds no parallel in the EU. Parties have their pathologies, and these sometimes turn people off from politics. But parties also mobilize people, structure debates, encourage different points of view to come into contact with one another, not out of any commitment to deliberative democracy but purely as a result of the need to build coalitions (necessary to win elections after all). In the end, voters can 'throw the rascals out' and bring in new politicians with different priorities in

the regulatory field. European elections (for members of the EP) are recognized as 'second order elections' centring mostly on domestic issues with few instructions for the MEP headed for Strasbourg or Brussels.

The third point, relying on the US experience, has to do with the false promise of efficiency politics. If we divide public policies between those that improve the lot of all (pure public goods) and those that involve straight-line trade-offs (pure redistributive goods), the EU concentrates more heavily on the former than the latter. Because of the weak legitimacy of EU institutions, policies that *presume* to involve collective gains are more likely to be accepted. As a result, many of the rules made by the EU are enabling rather than restrictive. A rule establishing the right for a worker to look for employment in a different country creates a potential exchange where none existed previously. Similarly, an international social security law that permits aggregation of years of work across countries allows workers to collect benefits even when the minimal number of required years of work within each country is not satisfied. Such a regulation imposes few costs and provides benefits for those seeking work and for workers.

Many analysts of the EU see efficiency considerations behind the demand for regulations (Majone 1993; Gaitsos and Seabright 1989). Regulations respond to different forms of market failure and policy externalities. In addition to traditional market failures, national policy failures lie at the back of EU regulations. Individual countries simply cannot solve market failures if there are incentives to cheat, renege, free-ride, in short to use domestic policy strategically for national gain. This is precisely why a coordinated, multilateral approach has to be taken and policy-making authority delegated to region-wide bodies. It is only this which fosters credibility, so the efficiency story goes.

Starting from this assumption, it is easy to see how the EU, as well as its broad justification for public policy, can be organized around a technocratic conception of politics reminiscent (perhaps misleadingly) of Progressive Era tendencies in the US. 'Good government' enthusiasts like to say: 'there is no Republican or Democratic way to pave a road.' Just do it efficiently, up to standards and the like. Perhaps, but whether a road should be built at all is a question of considerable political significance, creating costs and benefits (many of them non-internalized by market transactions) for landowners, recreationists, developers, truckers and railway interests. A road is hardly innocent.

Nevertheless, I have no conceptual objection to the broad distinction between efficient policies and redistributive ones. It is not the concepts that trouble me but the unrealistic and misleading ways they are used to create the false impression that the EU, and its legitimacy, is secured because of its emphasis on a technocratic conception of decision-making which relies on the advice of neutered experts who have no political axe to grind.

There is little in the American experience to support this view of public policy-making. Shapiro (1997) reminds us that the first wave of the independent regulatory commissions were a product of the Progressive movement of

the 1880s and 1890s. But the Progressive movement's focus on 'good government' did not mean technocratic government. A deeply political conception of public policy survived. Progressives were anti-party or at least anti-single parties – not anti-government or anti-politics (Shapiro 1997: 278–9). The solution, therefore, was not government by information but policy-making by bodies with mixed representation from each political party. In this sense, efforts on the part of EU policy-makers to rely on the advice and information of experts seems out of touch with reality. Experts usually do have political points of view. If they don't, they are likely to get lost in the buzz and confusion of politics. Policy-makers can choose their own experts, ignore others whose viewpoints are uncongenial and so on. This is an old story in American politics. 'Experts on tap, not on top.'

Finally, the American experience with regulation does not support the frictionless view that, as externalities increase with interdependence, so does the demand for regulation, followed by regulations themselves. On the contrary, because of Olsonian collective action problems associated with the concentrated costs and diffuse benefits syndrome, regulatory politics often finds well-funded and well-organized élites set against potential diffuse beneficiaries (Wilson 1980). As a result, the mobilization of bias often favours those who are to be regulated. Thus, as Peter May (2000: 34) argues, pressure for policy-making often comes only after some dramatic episode such as a picture in the newspapers of a gaping hole in the ozone layer (well known by scientists before the photograph). The moral outrage surrounding publication of Upton Sinclair's book *The Jungle* (1906), which described the terrible state of the meat-packing industry, or the dramatic public awareness of the harm done by pesticides after the publication of Rachel Carson's *Silent Spring* (1962), may have provided the energy to motivate government regulation and standard-setting in these two areas. So, there is suggestive evidence that broad public awareness, even outrage, may be at the back of regulatory policy – not just a demand for regulation that tracks market failure.

The final point of comparison concerns regulations and legitimacy. Many have grappled with the problem of legitimacy in the EU. In a recent article, Heritier (2003) develops the notion of the EU as a 'composite democracy', one that relies on several strands for its legitimation, only one of which is heavily loaded in the direction of expertise and information. While such efforts are laudable, in that they attempt to develop complex, well-balanced theories of legitimacy, the American experience suggests that the regulatory component is unlikely to advance legitimacy in significant ways. For one thing, as Peter May (2000: 9) argues, regulations are relatively invisible tools of government. Despite the fact that elaborate procedures exist to open regulations up to the public, the issues are so complex and time-consuming as to escape public attention. Again, were it not for the more dramatic episodes of regulatory failure (savings and loans scandals, pesticides, worker deaths and injuries, the accident rates for sports utility vehicles), it is not clear how much the public would care if, for example, pollution levels are socially optimal.

We can ask bluntly whether the EU is in equilibrium with regard to its status as a regulatory state with weak legitimacy. On the one hand, regulations are complex and do not easily engage the attention of the average citizen. If this is so, if the average voter does not much care, there may be no special problem. This may argue for granting broad discretion to regulatory bodies on the hypothesis that autonomy is justified so long as the public interest is not strongly and negatively affected. At the same time, the EU would seem to be assigned to a position where it is permanently occupied with low politics issues. But can we tell cause from effect? Is legitimacy low because of low salience or is cooperation confined to low salience areas because of weak legitimacy?

Conclusion

As the EU develops, it becomes clearer that it contains elements of both parliamentary and regulatory templates. The struggle for democratic accountability will continue along the several paths suggested by parliamentary democracy and the regulatory state. The Amsterdam Treaty extends co-decision (a parliamentary mechanism) at the same time that it develops new transparency procedures. While both sets of controls may be judged weaker than desired, the movement is clearly in the direction of more rigorous accountability.

My central argument has been that assessment of democracy in the EU faces a dual problem in which progress in each area is co-dependent on progress in the other. Surely an understanding of democracy in the EU requires prior assessment of the nature of the European political system, its basic structural features, the sources of its authority and legitimacy, and the bases of the political division of labour between Europe and the member states. Early critiques of the democratic deficit in the EU suffered from an uncritical application of standards of democracy appropriate to an ideal Westphalian state, without accepting the distinctiveness of political institutions – some very non-Westphalian – that characterize Europe today.

Notes

- 1 This section is based on Caporaso and Jupille (2001).
- 2 Notice that I do not say ‘a state’ or ‘particular state forms’, but rather ‘the state’, to suggest the timeless and essentialist nature of this conception.
- 3 The case was *Roquette Frères v. Council* (1979, reported 1980), ECR 3333. The Council of Ministers adopted a regulation fixing production quotas for isoglucose without giving the EP adequate time to respond to its proposal. A dissatisfied French company, Roquette Frères, challenged the regulation before the ECJ, and used as one of its arguments the fact that the Council had failed to obtain an opinion of the EP (see Mancini and Keeling 1994: 178).
- 4 A good example might be the coupling of the Single European Market (generally seen as improving efficiency) with an increase in structural funds for the poorer regions of the EU. If poorer regions anticipated losses, or even if they felt vulnerable

through risk exposure, their concerns could be assuaged through compensatory policies funded out of the prospective collective gains.

- 5 There is a paradox in the sense that the EU has limited extractive capacity but well developed law-making and regulatory capabilities.
- 6 The stabilization functions of the EU have increased substantially with the establishment of European Monetary Union.

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Part II

Features and problems of the US federal polity

5 Nation and federalism in the American historical experience

A model for Europe?

Edoardo Tortarolo

Introduction

‘Nothing confers such honour on the reformer of a State, as do the new laws and institutions which he devises.’ This passage from the concluding chapter of Machiavelli’s *The Prince* is well known to all students of political thought and political historians, as well as all those directly and practically involved in politics. Machiavelli’s statement is both a reference point and a background element against which our thoughts on the future of Europe will most definitely be reflected. The project for a post-national democracy in Europe represents a caesura, a detachment, and probably a fracture (not too traumatic, we hope) with European political tradition, to the creation of which in fact Machiavelli himself contributed, through his theories on the post-universalist principality, founded on the clear distinction between the modern state and both the empire and the church, which had both tried, with difficulty, to coordinate the plurality of power centres in medieval Europe. Machiavelli certainly lies at the origin of a continental European political tradition that is deeply marked by both the cultural and the symbolic construction of the nation, with the involvement of large human masses, and by the centralization of the decision-making tools in the state institutions (Mann 1993; Reinhard 1999; Tilly 1990). If Europe intends to move towards a form of political unity ratified through the promulgation of a European constitution, ‘new laws’ and ‘new institutions’ are clearly required, and these will contain an element of hazard, of risk, although such margins of unfathomability will be compensated for by the strength and grandeur of the prospects that link them, as well as the economic and institutional advantages, on both the domestic and foreign political front, that a strong European unity can guarantee for the continent. For Machiavelli, this foundation of a new reality was the work of a single, vigorous and talented man, able to profit from the favourable combination of events to create a new reality.

In the conditions of representative democracy that are so typical of the post-1989 European states, this choice for the community of European citizens can consist only in the definition – in the free and public space of public opinion – of standards of behaviour shared by a qualified majority, if not by an

unthinkable unanimity, of the population. One element of this process of a common definition of institutions that are ‘well founded and with greatness within’ (Machiavelli) certainly involves historical considerations. The importance of the historical element for the identity of Europe is enormous. But this does not mean re-importing the principle of the *historia magistra vitae* into the culture of European public opinion. In fact, if we accept the notion of development, progress, the dynamics of civilization and the complexity of historical situations, we must also accept that history cannot be repeated. Historical analysis has the task of observing and examining the choices made by groups and communities in as much detail as possible, at the time when the ‘new laws and new institutions’ (Machiavelli) are being created, and also to compare behaviour and the consequences resulting from specific decisions. In sum, historical analysis is interested as much in finding common elements as in identifying the specificities that distinguish the various processes under consideration. In other words, the comparison does not aim exclusively at identifying a common framework subjected to different situations, apart from contingent variations, but must also highlight any moments of divergence. The importance of this perspective is clear. Current political thought is enriched only if it bears in mind situations in which the possible futures of the past were unveiled, in which practical alternatives were offered clearly, practically, and in an attractive and seriously persuasible manner by the players in the decision-making process.

A case of this type, of comparability well aware of the diversity of conditions, is certainly the decade starting with the promulgation of the Articles of Confederation in 1781 and leading through the preparation and up to the approval of the federal constitution between 1787 and 1790 (Anderson 1993; Siemers 2002). This decade, in showing how America weaved nation with federalism, reminds the European effort to overcome the nation-states. However, the temptation to be ‘inspired’ by the events of America in modelling the future of Europe appears to be a dead end. The legitimate admiration, to cite Machiavelli once more, in the face of the greatness of the creation of the American Constitution must not become blindness when faced with the radical differences between the United States of the 1780s and Europe at the beginning of the twenty-first century.

From the Articles of Confederation to the federal constitution

We must firstly remember the different meanings of the word *federal* in American history compared to the idea of federal and federalism in Italian or other European languages. In European languages, the term federalism in fact refers to a range of very different experiences. In French, *fédéralisme* was unquestionably linked to the battle against the centralist and activist conception of central power that was so typical of revolutionary Jacobinism in the 1790s: a deep misunderstanding that moved federalism closer to the deceitful contestation of national unity and indivisibility (Voyenne 1981;

Ozouf 1988). In German, the term *Föderalismus* is linked to the more common meaning of the political vocabulary of *Bund/Bündnis/Bundesstaat* (Koselleck 1974). In the German political vocabulary the long historical experience of federal-type bodies has multiplied the presence of federalist links, but has also anchored them to the history of German institutions. The federal state itself (*Bundesstaat*), which now organizes the German institutions, represents a specific answer to the National Socialist government that attempted to remove the particularist, autonomist traditions. In Italy the concept of federalism is linked to the historical defeat of a project for Italian unification in the nineteenth century: in Italian, federalism has a polemic and militant meaning, the decentralization of decision-making powers and competences of the central state to local authorities, which since the time of unity have had very few capacities for initiative or autonomous responsibility (Petraccone 1995).

There is a vast amount of literature on federal traditions. I believe, however, that it is possible to highlight the sense of unity, of bonding among the parties that is innate in the American notion of *federal*. For John Winthrop, at the puritanical origins of American political culture, ‘civil or federal liberty’ is the freedom to do good, within a body politic ordered by agreements and laws, in a republican universe of values that has no room for the division of contrasting interests (Winthrop 1972). In the 1780s, the federalists were an unstable coalition of supporters of the need to concentrate some of the competences held at that time, according to the regulations of the Articles of Confederation, by the single states, in a complex, articulate and well-balanced political body. And anti-federalists were, as we will see, those who wished to maintain the decision-making power at state level, closer to the direct needs of the people. One example is an anonymous polemicist from Pennsylvania, who in 1788 wrote: ‘Take the word Federalism directly or indirectly, and it amounts neither to more nor to less in its modern acceptance than a conspiracy of the well-born few against the sacred rights and privileges of their fellow citizens’ (Storing 1981a: 194). Elements of social polemics, the poor against the rich, but also the interests of agriculture against the interests of trade, moral polemics, the legitimacy of wealth well-earned through one’s own hard labour against the immorality of speculative wealth, mixed together not always and necessarily according to the lines of opposition between federalists and anti-federalists.

The battle between different concepts of freedom was clearly fundamental. From this point of view – it has been rightly noted – the contrast between federalists and anti-federalists was a paradoxical repeat of the battle between the American patriots and the English parliamentarians, with the anti-federalists on the side of the colonial patriots and the federalists playing the role of the English ministers. Was the federal constitution therefore the betrayal of the American Revolution, the final nail in the coffin of revolutionary hope? The reply to this question depends on how we reconstruct the means of drawing up and approving the constitution. This has in fact the most exceptional origins, as it was born from a convention called to propose

some amendments to the Articles of Confederation. The objective was technical-constitutional. In reality, however, it aimed to remedy the serious social, economic and financial crisis in which the young republic found itself following peace.

The post-war period did not seem to have readdressed the problems of the United States; on the contrary, scepticism over the possible success of the republic was widespread, particularly because the roots of the disorder and uneasiness seemed to lie in the state constitutions drawn up on the wave of independence from the English monarchy. There was a situation of great danger, known as 'a crisis in our public affairs'. Looking back, Madison spoke of a political situation among the states that was such 'as to alarm the most steadfast friends of Republicanism' (Wood 1969: 467). The delegates therefore met with the aim of radically renewing the constitutional system through a close-fought internal debate, away from the critical eye of public opinion, in a perspective that went far beyond formal commitment. This element of secrecy was important, I believe, for at least two reasons: the first is that the mediation among the different original projects took place in a relatively free space, open to experiments in constitutional engineering – mediation among projects that mirrored contrasting interests and worries; the end result of the convention in September 1787 reasonably mirrored the orientation of its participants, even though all fifty-five delegates had had to give up some of their own initial proposals. The second reason for the importance of the secrecy of these works is that it originally permitted a clear contrast between two camps, each emerging from the revolution (the flight of those loyal to the monarchy to England or Canada eliminated any possibility for an opposition 'to the system'; see Calhoun 1973) but linked to different images of the future of America, the national and the federation/confederation. The federalist victory of between 1788 and 1790 was – as it is well known – neither a landslide nor transparent, but it was definitive, so much so that not only has it remained in force until today but also all the constitutional changes in the form of amendments have been integrated into the text of the constitution itself. We may add that the lengthy discussion on the constitution involved not only those clearly on one or other side of the barrier, but also those who, like Thomas Jefferson, had mixed feelings on the project and who during the discussions made their position progressively more clear.

Among the many issues in the discussion – this time public, concerning the federal constitution leading up to the approval of the single states – particularly interesting for our consideration here, is the issue of the relationship among the single states that up to that time held total sovereignty within the confederal structure and the arising federal Congress and Senate. The American colonists who, up to the Olive Branch Petition in July 1775, had made serious efforts to reach an agreement with the monarchy believed in the British empire as an empire dominated by a monarchist prerogative, an empire in which the British parliament was not (or could not be) the one single legislative body but rather – under the monarchic prerogative – just one of the

assemblies representative of the empire, coordinated with all the others (Greene 1990; Gould 2000; Jefferson 1993). In the misunderstanding that was created among the colonists and the British parliament, the issue linked to the powers and duties of the king was central, and was clearly greatly overestimated by the colonists in the same way that they took for granted the far-reaching competences of the colonial assemblies in a framework of autonomy within the empire. The Articles of Confederation and the state constitutions reflected this attitude of priority attention to local interests expressed firstly in the colonial and then in the state assemblies. The Philadelphia Convention clearly wanted to distance itself from this attitude. The new federal constitution created a new two-layered legislative body, which would clearly have taken away some powers and areas of sovereignty from the state assemblies to concentrate them in an institution that was physically distant from the voters, necessarily opposing the behaviour of the state assemblies sooner or later, and in any case close enough to make itself, and its capability to interfere in local issues, when and if needed, felt. Two guiding principles of the American colonial culture were opposed to the proposals of the Philadelphia Convention: the first was the whig diffidence for any power that tended, when left to its own devices, to abuse its office, and the second was the dogma of the indivisibility of ultimate sovereignty.

The federalists and their critics

Without attempting to analyse the complex and sometimes dramatic situation in the United States in the 1780s, from the severe state debt to the strong pressure for expansion to the West, from the aristocratic-authoritarian temptations to the question of slavery, or the many and not always coherent issues linked to the discussion of the constitution, it is certain that the federalists gained superiority in their arguments – which was in the end to prove decisive – through two fundamental positions (Sheehan and McDowell 1998). The first was the ultimate point of anchorage of the system of freedom they wanted to build: not the states, but the people. Concretely, the use of the population as the only depositary of power, and therefore legitimately able to distribute sovereignty in a differentiated manner, could justify the creation of new institutions. The clearest expression of this principle was offered by Edmund Pendleton: ‘Who but the people can delegate powers? Who but the people have a right to form government?’ (Wood 1969: 534). Given that the Articles of Confederation, and many state constitutions, had not been explicitly approved by the electorate, a constitution ratified by a specifically elected convention would have received solemn blessing, and would, in the words of the poet Francis Hopkinson, have been the proof of ‘A whole people exercising its first and greatest power – performing an act of sovereignty, original, and unlimited’ (ibid.: 535). We would now say that, where national identity formation was concerned, the federalists dug their heels in. On the one hand a process of literary and symbolic construction of the American

identity had begun, from Thomas Jefferson's *Notes on the State of Virginia* to the Anglo-French-Bostonian Saint-John de Crèvecoeur's *Letters of an American Farmer* (Gerbi 1983); on the other hand the population was composed far less of English and ever more of a variety of nationalities. The black slaves and the German Moravian brothers were clearly not English, but neither were the Welsh, the Scots or the Irish, who began to count for a significant percentage of the population.

The second fundamental position expressed by the federalists concerning freedom was the great and delicate conquest of the revolution. Only a federal government could guarantee the whole population against the underlying worry of despotism, however this may have been interpreted, even by the anti-federalists. In his *The Federalist* no. 10, Madison offered an articulate defence of the representative republic as an institution able to remedy the inborn defects of direct democracy that were so typical of the smaller states and to stop the violent, fanatic and unreasonable factions from becoming a majority able to use the tools of the majority to oppress the minorities, who were possibly enlightened, possibly rational, but still incapable of gaining the majority. The greater variety in the political community, and the greater variety of interests it represents, the more each of these will be guaranteed in a large republic governed by a congress that must obligatorily filter specific interests from general ones. In the representative bodies foreseen in the new constitution, there was to be a clear distinction between pure democracy ('a society consisting of a small number of citizens, who assemble and administer the government in person') and a republic ('a government in which the scheme of representation takes place'; Hamilton *et al.* 2001: 58). A large republic would have magnified the merits of a representative system, and would have made possible the decision of 'representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice' (*ibid.*: 61). The debate in favour of a large-scale federal political unity was compulsory. As Madison wrote:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonourable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

(*ibid.*: 60)

In Madison's *The Federalist* no. 51 (Hamilton *et al.*: 334), the same principle was applied and verified in the case of the multiplicity of the seven religious faiths, and precisely this multiplicity guaranteed the pacific and free practice of critical reason, created transparent relations between the state and the church, and avoided religious despotism.

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.

(see Wood 1991)

For Alexander Hamilton, radical federalist, in *The Federalist* no. 35, the free professions were the most suitable for interpreting the long-lasting and common interests of the whole of society (and possibly were the only ones able to do so), since they were in a neutral position, whereas a certain amount of rivalry existed among the various industrial sectors. The 1787 constitution was clearly an attempt to recognize the limits of the post-revolutionary situation founded on the legislative assemblies inherited from the 'monarchist-prerogativist' conception, and expressed at the same time the will to update, in a clearly republican manner, the English model of co-penetration by the monarchy and the parliament as a basis of legislative power to create not a minor government but a strong guide for expansion on the continent – a guide equipped, as John Brewer wrote of eighteenth-century England, with the 'sinews of power' (Brewer 1989). The objections of the anti-federalists on this perspective were clearly expressed during the long debate that preceded ratification. Jefferson privately voiced his own doubts on the lack of a Bill of Rights, which would have left the American citizens with no guarantee of freedom of religion, speech and press, with no certainty of habeas corpus, and without protection from a permanent army and from monopolies, and he expressed his worry over the intrinsic monarchist threat that lay in the possibility for the president to be re-elected indefinitely (Sylvers 1987). Many made themselves heard in a populist-type opposition, in which social resentment was difficult to distinguish from the defence of local interests: William Findley did just that, arguing with James Wilson and accusing the federalists of high aristocracy (Storing 1981b: 95). Others, including Republicus, used arguments of contractualist tradition to accuse the Constitution of not protecting 'natural freedom' as:

power of self-government . . . under the direction of reason, the great, primary, and never ceasing law of nature. As long as any man does so he has a right to enjoy his person, life, and property, free from all molestation

whatsoever . . . An universal, and unerring observation of, and obedience to this law, is what we call rectitude, or moral virtue.

(Storing 1981c: 161)

Supporters and opponents of the constitution used a common vocabulary, which included clear references to the history of the English institutions and the battles between court and country, but also references to the European political debate, from Montesquieu to Mably, which federalists and anti-federalists alike cited to support their own positions. The transatlantic dimension to the events of the last two decades of the century in America is clear, although it does not always sufficiently consider much of the historiography on the matter (Jacob and Jacob 1984; Bonwick 1977; Durey 1997). The European context was very much involved, if only to differentiate from the errors of European history, as demonstrated in John Adams's *Defence of the Constitutions of Government of the United States of America*, published in 1787, in which a large portion is dedicated to the history of the Italian republics (Del Negro 1989). The American constitution was drawn up and finally adopted during a time in which attempts were being made to reform the institutions of the Old World in all manner of ways: the rationalization of the absolute monarchy in Austria and Russia using an administrative monarchy model; the updating of the institutions of the oligarchic republics in Venice and Geneva; the attempt to defend the republican confederation from the pro-monarchy party in the United Provinces, swinging unsuccessfully between absolutist provisions and the need to fall back upon the convocation of the States General in France (Venturi 1971, 1989, 1991).

It was precisely the explosion of the French Revolution in 1789 that tore the Europeans' attention from the American constitution: in contrast to what happened in 1776, the 1787 constitution did not run deep through European political thought (Martucci 1995). While well known by the leaders of the French Revolution, from Brissot to Condorcet, its principles were misunderstood: even those who declared a liking for the American model did not understand the division of competences between the states and the federal state, refused bicameralism, and did not see what form of compromise the constitution represented. They often associated federalism with the feudalism that kept alive not only parochialism and an outdated and unfair social structure, but also France's political weakness (Baker 1975; Reichardt 1973; de la Croix 1791–3; *Le Fédéraliste* 1792). To define the French attitude, and the more general European attitude towards the United States and its constitution, we need to remember the substantial non-comprehension of the constitutional document and its creation: the presidencies of Adams, Jefferson and Madison coincided with a far too turbulent period for Europe to be in a position to study closely what was happening (Popkin 1989). De Tocqueville's journey in the winter of 1831–2, his discovery of the new American democracy and individualism, his admiration and doubts, started a new phase of not always balanced or profound interpretation of American

politics, in which European political thought posed the question of the efficacy of the constitutional choice of 1787 (Hullington 2002).

The unresolved tension between the federal centre and the states

So how effective was the model supported by Madison, Hamilton, Jay and all those who often very unscrupulously forced the approval of the new constitution? How far did the constitution guarantee the correct interpretation and pursuit of the general and national interests above the local ones, represented by the state assemblies? To answer these questions fully today would mean rewriting the history of the United States, maybe from the point of view of the history of freedom, as was recently done by Eric Foner (1998), maybe, on the other hand, from the point of view of the history of 'sovereignty', as John Pocock would like (1975, 1996). We can, however, recall a few occasions in American history when the tension between federal bodies and state claims, between the vocation of the imperialist republic and the protection of the autonomy of local government, stood out much more clearly.

The 1787 constitution did nothing to clarify the relationship between the federal state and the single states, and in 1798, in a climate fraught with the Anglo-French conflict, with the resolutions of Kentucky and Virginia against the Alien and Sedition Act, and at the time of the French Revolution, Jefferson and Madison posed the question of the right of single states to compare federal laws with the constitutional authority. In concrete historical terms, this was the conflict between North and South for domination over the federal institutions and for the organization of American economic life: the problem was only really solved following the War of Secession, closing at least on a legal front the open and ever more controversial question of slavery. In 1803 the chief justice, John Marshall, established that at the Supreme Court it was the task of the judicial review to verify the congruency between the constitution and the creation of laws.

The moves towards a conception of republican imperialism were in any case very strong. Between 1801 and 1803 the United States purchased Louisiana from France in cash: this operation was not authorized under the constitution and was carried out with the opposition of the trading and non-agricultural north-eastern states of the republic (mainly New England). The paradox, so indicative of the transformation underway, was that the operation was led by Thomas Jefferson, who, despite acting to lessen the effects of the federalist government in the 1790s, in this case acted like a confirmed federalist. Following the 1812 war against England, which was waged to protect the interests of the agricultural and anti-federalist South and West, the 1798 Kentucky and Virginia doctrine could be found once again in the strongly federalist New England, with the political aim of stopping the excessive power of the South and rebalancing the federation and the fears of secession. But the Federalist Party lost prestige because of the suspicions of betrayal by the

federation in favour of England. The trend towards a federalist army under central power became stronger starting with the Monroe presidency, with growing competency for the federal state, starting with the creation of federal roads that accompanied the expansion of the federation westwards (the constitutional status of this federal intervention was unsure, despite the fact that development towards the West continued).

The tension between the federal government and state legislation was a constant theme of nineteenth-century history. A new peak in the conflict between the central and state powers revolved around the character of Calhoun (liberal advocate of slavery from South Carolina) and the nullification crisis established by him: Calhoun took up once more the problem of the rights of the states against the laws of the federation, in this case concerning the protection of tariffs under an 1828 law which was against the interests of the southern states (Calhoun 1992; Salvadori 1996). The solution required the threat of the use of the army. President Jackson stood up against Calhoun, making Congress confer on him full powers in the fight against the rebels of federal law. South Carolina was forced to back down.

Following events linked to the expansion of the republic towards Mexico, Texas and California, the problem of the relationship between federal sovereignty and the rights of the states came to a dramatic head with the promulgation of the Kansas–Nebraska law of 1854, forced upon Congress by the Illinois senator Stephen A. Douglas, who wanted the support of the southern states in his fight for the presidency. This law declared the right of the north-western states to introduce slavery if they wished, thus suggesting the idea that slavery could be extended across the whole federation. Attention was then centred on the problem of the relationship between federal competency and state law, the conflict between those for and against slavery, which became explicit with the election of Lincoln, elected by the North against the candidates from the South, and the process of secession started by South Carolina even before Lincoln took office on 4 March 1861. Lincoln attempted reconciliation, but denied the right to secession. The end of the war marked a victory for federal rights over those of the states, and the assumption of new tasks by the federal government (Temin 1991). Under the presidency of Andrew Johnson, the underlying theme of reconstruction, the integration of blacks into American life, sparked an interesting constellation of political factors. The post-war Congress accused Johnson of not showing enough muscle over the question of the rights of the black population in the conquered southern states to be reconciled. In this case, when an intervention from the federation was required on the racial question, Johnson in fact defended the autonomy of the southern states and argued with Congress, which passed the fourteenth amendment (November 1866) to guarantee ‘equal protection of the laws’ for anyone born or naturalized in the USA. At the initiative of Congress, the central federal power then imposed the active protection of blacks against the black codes of these states, which were prejudicial to the rights of citizenship (Foner 1988).

The dynamics between federal intervention and the peculiarities and privileges of the states came to the fore on other occasions as the evolving American political culture brought new issues to light. In the case of the right of women to vote, state legislation had a clear active role: women's suffrage came from state legislation, starting from the states of the West and then more decisively in New York in 1917 and Michigan in 1918. The amendments to the constitution had had no impact on this matter, as amendment no. 15 of 1870 had denied any restrictions on the basis of race or any previous condition of slavery, but it was only in 1920, with the nineteenth amendment, that any limitation or denial of the right to vote on the basis of sex was finally forbidden (Clinton 1984).

In the 1950s, on the other hand, federal initiative was decisive in the campaign for civil rights in the southern states (as in the case of *Brown vs. Board of Education*). And in 1973, with the *Roe vs. Wade* sentence, the Supreme Court denied the legitimacy of state legislation on the right to abortion.

Conclusion

Over the last few decades a new drive towards the ethnicization of American life and politics, towards the recognition of a multiple identity, but also towards a rather anxious – and unenlightened – religious enthusiasm has and continues to put the theoretical foundations on which the federal constitution was built in clear difficulty, at least as far as the interpretation given by Madison, Hamilton and Jay in 1787–8 is concerned. The glory and respect that Machiavelli spoke of, which the American federal constitution has earned since then, is an element of the past, the present and most certainly the future of Europe, but must not be considered a Machiavellian inhibitor for the will of the modern European to create 'new laws and new institutions', which are 'well founded and have greatness within'. The history of the building of the constitution clearly shows us the ambiguity of the American constitutional authority, able in some historical situations to favour the guiding hand of the federal government, particularly in times of economic or political-imperialist expansion, but also its capacity to understand the needs expressed in the laws issued by the state assemblies, as in the case of political rights for women, and to transform them into federal rules to be imposed on all states, even when some states fight against them and appeal for legislative autonomy and more generally for the right to strong self-determination, autonomy, and the preservation of their own cultural and social identity. In this, the American example shows most clearly the point at which, now (December 2003), the process of constitutional European union meets its greatest obstacle: the American solution, adopted by the Philadelphia Convention in 1787, offers one of many possibilities, but certainly not one of the most likely ones.

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6 Territory, electorates and markets in the US

The construction of democratic federalism and its implications for the EU

Alberta M. Sbragia

Introduction

The question of federalism in the United States has been intertwined with territory, electorates and markets. The representation of territory, while central to the conceptualization of at least some aspects of democracy in America, has competed with the representation of electorates in that same conceptualization. The representation of both territory and electorates in the development of a democratic federation in turn has had to confront the imperative of creating a national market within that federation, one without internal non-tariff barriers and with national capital markets. Here I shall simply sketch how these three – territory, electorates and markets – have intersected and thereby shaped American federalism.

How should territorial interests be represented? How should new territories be treated *vis-à-vis* the ‘old’ – i.e., the original thirteen colonies? Electorates are central to democratic representation, but territory and electorates are not easily disentangled. How should the representation of electorates be balanced with the representation of territory? And finally, in a country with an expanding territorial boundary and very sharp interstate rivalries, a process of market construction parallel to that of territorial development raised a series of difficult questions. How were interstate barriers to trade to be avoided in order to construct a common market? The US Constitution mandated interstate commerce but, given the importance of territory in the American elective institutions, how was federal power in support of interstate commerce to be imposed and exercised?

Territory: equality of representation in America

The role of territory was bound to be central in a continent in which the colonies that became the United States were established on a tiny section of a large land mass. Furthermore, that land mass was in some fashion at least under the control of the great powers of Europe. North America might have been a backwater in some sense but it also represented an important example

of the global reach exercised by the major European powers. The process by which the United States gradually expanded its territory involved treaties with foreign powers as well as the westward movement of settlers and wars with native American tribes.

The American Revolution ended with the Treaty of Paris of 1783, which granted to the new nation the western lands up to the Mississippi River. Although George Washington thought the new nation was insulated from foreign entanglements because of its 'detached and distant situation', just a few years later Jefferson thought it prudent to buy what became known as the Louisiana Purchase rather than have to treat the French (who had just recently received the territory from Spain) as a hostile nation (Merk 1978: 141).

The Spanish presence (weakened after the French Revolution) in the once-remote West was replaced by that of Mexico, which gained its independence in 1821. Texas in 1836, (until then a member of the Mexican federation), under the Treaty of Velasco, announced its independence and the following year proposed that it be annexed by the United States. That annexation took place in 1846.

The Mexican–American war of 1846–8 took somewhere from a third to a half of Mexico and claimed that huge area for the United States. The present-day states of California, New Mexico, Arizona and Texas, and parts of Nevada, Utah and Colorado, were originally part of Mexico. In 1846, the British ceded their claim south of the 49th parallel, which gave the US title to the Oregon country. And finally, and most tragically, the continent was also occupied by native American nations (Utley 1984), who were viewed as problems by both the United States and Mexico. In fact, the Treaty of Guadalupe Hidalgo at the end of the Mexican War committed the US to prevent the native Americans from crossing the new border into Mexico.

The expansion of the United States raised a number of key issues of relevance to federalism. A central question was the one of how the new territories were to be treated. The US could have developed in a variety of ways, with the new territories being kept politically dependent, the original thirteen becoming the core of a regional system, various groups of territorial units coming together outside the US itself, or the new lands becoming part of the original thirteen. The answer was to shape the contours of American federalism so profoundly that it is now absolutely taken for granted.

A central feature of the expansion of both the United States and of its federal system had to do with the fact that the inhabitants of the territories knew they would eventually join the union as states and that, when that happened, the same rules that were applied to the representation of the original thirteen colonies would be applied to them. That is, the 'Great Compromise' negotiated at the Philadelphia Convention in 1787 would apply to new members of the United States. That compromise had created a bicameral legislature in which one chamber would represent electorates while the second would grant equal representation to each state regardless of its size or population. The chamber representing the states controlled appointments to the Supreme Court, the ratification of treaties and the removal of the

president, areas in which the chamber representing electorates rather than territory was given no voice. Since the constitution explicitly prohibited constitutional amendments which would change the equal representation of the states in the Senate, territories entering as new states were guaranteed equal representation in the Senate regardless of their size or population. The decision to give states equal representation overturned the traditional rules of international relations. In essence, the Senate heeded the claims of neither geopolitics nor majoritarian democracy.

The promise of statehood had in fact been made as early as 1780 and was reiterated in various forms, the most striking and important being the Northwest Ordinance of 1787 which was adopted by the Continental Congress in July of that year (Onuf 1987). That ordinance became the template for the treatment of new territory (Eblen 1968: 17–20). The path to statehood it promised was to hold until the United States gained new territories far from its mainland in the Spanish–American War of 1898. Whatever political formula was chosen by the Constitutional Convention for the original thirteen colonies would in fact be the *acquis* offered to new territories.

The promise of automatic admission to the United States of the new lands which came under the jurisdiction of the United States by purchase or by war made the new country a magnet for those who settled outside it. It also defined a system in which the representation of territory would be implemented uniformly. While the US Constitution was actually ‘signed by only thirty-nine [mortal men] and adopted in only thirteen states by the votes of fewer than two thousand men’, the compromises which it embodied were to be accepted by all future territories when they entered the US as fully fledged states (Dahl 2002: 2). Pennsylvania, one of the original thirteen colonies, would not be privileged *vis-à-vis* Nevada, which became a state in 1865, for example. No ambiguity existed as to how representation would be defined once the status of statehood was achieved. Statehood – that is, full membership in the United States of America – brought with it certainty in the area of representation.

Representation was not negotiable. Small states could be certain that they would not be dominated by large states. The rules by which territory would be represented, while embedded in the constitutional design accepted by only two thousand men, was eventually to govern a federal state covering much of a huge continent. While the Civil War of 1861–5 changed the way the representation of population in the House of Representatives was calculated (the ‘three-fifths rule’ by which slaves had been counted as three-fifths of a person was abolished), the representation of territory was left untouched.

Territory: representation’s uncertainty in the EU

The experience of joining the United States contrasts sharply with that of joining the European Union. The original rules of representation formulated by the six founding members of the European Economic Community and applied throughout various enlargements were not precisely drawn. Nonetheless, the general rationale was clear and accepted. The number of votes and

representatives given to the smaller states in the Council of Ministers, the European Parliament, and the Commission were disproportionate to their population. The treatment of small states was shaped by what Michael Shackleton, drawing on cultural theory, has called 'the egalitarian way of life' (Shackleton 1991). That approach has made the EU strikingly different from other international organizations, in which the impact of size and power are relatively undiluted (Krasner 1991). In a sense, the standard rules of international relations and geopolitics were modified (although certainly not jettisoned) within the EU (Hurrell and Menon 1996). Shackleton argued that 'the Community reflects the claims of the egalitarian way of life and would look quite different if these claims were not taken into account' (Shackleton 1991: 588). In a similar vein, the equal representation of states in the American Senate is a striking example of egalitarianism understood within the context of the representation of territory (rather than the representation of electorates).

The claims of egalitarianism, reflected in the disproportionate weight traditionally enjoyed by small states in the EU's policy-making processes, were first challenged by the Treaty of Nice, negotiated in December 2000. At Nice, the small states managed to negotiate a more advantageous rule of representation than that originally demanded by the large states (Sbragia 2002). While the intergovernmental conference which led to Nice was called to prepare the Union for enlargement to the east, it also represented the first battle over how to balance the competing claims of electorates and territory. Should the populations living within states be represented – thereby privileging the larger states? Or should states as sovereign territories be represented? The egalitarian tradition was bruised at Nice but retained considerable resilience.

The claims of egalitarianism in the representation of territory, however, have been challenged in a far more serious fashion by the constitutional treaty which was negotiated in 2003–4. That treaty, if ratified by the member-states, will supersede the Treaty of Nice. The issue of representation was so contentious that the first constitutional summit (held in December 2003) failed. Poland and Spain refused to surrender the privileged position they had gained in the Treaty of Nice while the large states insisted on a system of representation which would privilege populous states. Only in June 2004, under the masterful leadership of the Irish Presidency, was a complex compromise found which all could accept (however grudgingly).

The inter-state negotiations for a new constitutional treaty were preceded by the deliberations of a Convention for the Future of Europe commonly known as the Constitutional Convention. The large states, led by France and Germany, used the Constitutional Convention to support their claim that the large member-states should wield more power than they had been granted under the Treaty of Nice. The negotiations for the new constitutional treaty, therefore, re-opened the debate which had begun in earnest during the Nice negotiations and highlighted the critical role which the nature of representation plays in an integrating Europe. Although small and large states do not typically coalesce as blocs during the policy-making process, the constitutional

status of size is a visceral issue in Europe just as it was during the Constitutional Convention of 1787 in the United States.

How should the representation of electorates and territory be balanced? The large states used arguments based on the role that the representation of population typically plays in democratic governance. The negotiating tactics of the large states, however, made clear that the rules of geopolitics, which privilege economic and political power, were also at work. In that view, the most powerful states should have the greatest voice in decision-making. Thus the large states supported a scheme which required that legislation be approved by a majority of states only if that majority represented 60 per cent of the EU's population. In that case, the logic of geopolitics and the logic of majoritarian rule based on population coincide.

By contrast, the smaller states used arguments based on a more egalitarian notion of the representation of territory, a tradition which, as we have seen, also exists in the fashioning of democratic federalism in the United States. The arguments made by Spain and Poland, the two countries which were treated particularly well by the Treaty of Nice, used the criteria of both population (they are larger than the 'small' countries) and of territory (smaller states should have disproportionate representation). What can be viewed as 'democracy' understood as 'rule by the people' or as majoritarianism within a federated state is easily viewed as 'geopolitical coercion' within an international organization which had been shaped by the influence of egalitarianism for nearly half a century. It is not surprising that both old and new member states in the EU, when faced with the prospect of having the rules of representation which they thought would govern the Union being modified in ways which would disadvantage them to the benefit of the larger member-states, reacted angrily. Although the smaller states felt they could not win the battle, it was not unexpected that Poland and Spain, wielding both significant population and geopolitical clout, strongly opposed the prospect of changing the rules agreed to at Nice and had to be listened to. It may be, in fact, that without the impact of the Iraq war on Spanish politics (which led to a change of government in 2004), the final compromise arrived at in Brussels in June 2004 would not have been possible.

The negotiations leading to the Treaty of Nice and to the treaty (which at the time of writing in July 2004 must still be ratified by all member-states) clearly demonstrated that representation within the Union has been negotiable; the rules for representation have not yet been settled once and for all. If the Constitution is not ratified, uncertainty over future rules will certainly prevail. If the Constitution is in fact ratified and comes into force, it is possible that the rules of representation adopted by it could in fact become permanent. However it is even more likely that, if and when the EU is ready to move from a constitutional treaty to an actual constitution, the debate over representation will be re-opened. Viewed over the medium to long term, the rules of representation still hold a relatively high degree of uncertainty even if the Constitution comes into force. Renaud Dehousse has argued on behalf of the Club of Florence that 'states as such' will remain key actors in the Union, and

that 'state legitimacy and democratic legitimacy are the two pillars on which the Community's institutional system must rest' (Dehousse 1997: 39). Yet the fact that states enjoy so much legitimacy in the eyes of their citizens highlights the importance of the question of how states of varying size are treated within the Union's institutions.

The United States offered new states the absolute certainty that they would be represented by population in the lower house and would have equal representation in the Senate, representation equivalent to the states which had formed the United States in the first place. The small states within the United States – whether old or new – did not fear that their representation would be diminished by future constitutional amendment. The US Constitution explicitly prohibits changing the system of representation by constitutional amendment. Thus, the only way to change the equal representation of the states in the Senate would be to overthrow the entire constitutional system of the United States. In the United States, the conflict between the states was not to be over representation, but rather over the extension of slavery to the new states.

Within the European Union, the issue of representation has taken centre stage – and is likely to take it again in the future – precisely because rules which would guarantee certainty have not yet been agreed to. Until an actual constitution – rather than a constitutional treaty – is agreed to, the European Union's system of representation faces a higher degree of uncertainty than did that of the United States. The 'Great Compromise' has not yet been negotiated in the EU in an actual constitution. Thus, the balance between the representation of territory and of electorates is not yet settled. And neither are the competing claims of geopolitics, majoritarian democracy and the representation of territory.

Territory: inequality of state control

While the conflict between the American states was not to be over representation (but rather over the extension of slavery to the new states), the states were not in fact equal. A key difference was introduced outside the area of representation which has become important in contemporary American federalism. That difference has to do with the issue of public lands. There is no equivalent in the European Union, but the American experience does indicate that federal systems can accommodate various types of asymmetry once the rules of representation have been accepted and institutionalized.

The most common image of American federalism is one in which the federal power applies equally to all the states. Similarly, each state exercises jurisdiction in many policy areas within its own territorial borders. That image is one which most Easterners would accept and one which, by contrast, is unrecognizable to Westerners. The reason for that discrepancy has to do with the pattern of land ownership in the US.

Decisions by Congress and the Supreme Court led to the federal government retaining its ownership of land within a territory even when that territory

became a state. The basic policy towards land was established between the peace treaty with Britain in 1783 and the Northwest Ordinance of 1787. The federal government claimed land ownership of all the new territories which were known as the public domain. That land was subsequently disposed of through sale and land grants – a huge task. Between 1785 and 1880, roughly 3,500 laws addressing issues related to the public domain had been passed by Congress (Carstensen 1962: xxii). A total of thirty-one states were created from the public domain.

For a variety of reasons, in the western states in particular, vast tracts of land were neither sold nor granted to the state government. Land was retained under federal ownership and is currently managed by a variety of federal agencies, with the Bureau of Land Management in the Department of the Interior playing a key role. The amount of federally owned land is huge: roughly one-quarter of all the land in the United States. Most of that ownership is in the West. Thus, western states do not have nearly the same control over their territory that the states in the East and the South do. Nearly 80 per cent of Nevada's land is controlled by the federal government; the comparable figures are 63 per cent in Utah, 60 per cent in Idaho, 52 per cent in Oklahoma, 45 per cent in Alaska, 45 per cent in California, 42 per cent in Arizona and 36 per cent in Colorado. Those figures mean that states within the federal system have very different capacities for control of the land within their own territorial boundaries (Sparrow 2000).

We therefore find a federal system in which enlargement proceeds on the principle that new members are treated the same as the existing members when it comes to being represented in federal institutions. However, that principle of equality is not found when it comes to the control state governments have within their own territorial boundaries. In other words, the governor of Pennsylvania or Virginia has far more to say about what happens in Pennsylvania or Virginia than the governor of Nevada has to say about what happens in Nevada.

This system of land ownership allowed federal institutions – and therefore the national electorate – to make decisions affecting the internal activities of most western states. The clash between the state electorate and the national electorate has become fiercer over the years (especially as federal environmental policy has affected land use) and far more visible. The state boundaries of the western states are therefore far more visibly permeable than are the boundaries of the southern or eastern states. The West is 'penetrated' in a way which the rest of the country is not. In that sense, the United States is characterized by what might be termed 'asymmetrical federalism'. The backlash to that situation helps explain the political dynamics of much of the West, a dynamic which was clearly evident in the presidential election of 2000.

Territory versus electorates

The hostility felt by many Westerners towards control of their territory by 'outsiders' (i.e., the electorates and states represented at the federal level) is

one important expression of the conflict between the representation of territory and the representation of electorates which is a fundamental feature of the American federal system as a whole. As one analysis has put it, the United States 'combined both republicanism and federalism' (Tsebelis and Money 1997: 26). That conflict underpinned the compromises at the Constitutional Convention which gave the United States a bicameral legislature in which the equality of territorial representation is enshrined more strongly than in any other federal system. The Senate, with each state represented by two senators, the special powers of the Senate, and the Electoral College were established to protect the interests of the small states *vis-à-vis* the large states (Slonim 2000). The tenacity of the small EU member states during both the negotiations over the Treaty of Nice in 2000 and the negotiations over the European constitutional treaty in December 2003 does not surprise scholars of American federalism, for the small states were also very determined to protect their interests in the American Constitutional Convention held in Philadelphia.

The Senate subsequently became the institution which allowed the slave and non-slave states to coexist such that the union was not torn apart until 1861. The so-called balance rule in the Senate was one of the important institutional mechanisms allowing the interests of slave states and non-slave states to be kept in balance (Weingast 1998: 151). When the huge territories obtained in the Mexican–American War came on line, however, the balance rule failed to work and a profoundly traumatic civil war resulted.

The fact that the small states managed to have such an impact during the Philadelphia Convention shapes American politics today. More than a quarter of the American population is represented by six senators while 7 per cent of the population is represented by thirty-four senators: the Senate is now the 'most malapportioned legislature in the world' (Lee and Oppenheimer 1999: 2; Dahl 2002). The Senate is co-equal with the House of Representatives, that is, it is a full partner to the House of Representatives in the adoption of legislation. It can therefore veto any piece of legislation accepted by the House. And, as we have seen, the Senate also holds a privileged position when it comes to foreign affairs and the appointment of Supreme Court judges. Thus, it can be argued that the Senate is actually more powerful than the House, especially given the enormous power of the Supreme Court in the American political system.

The Senate, by institutionalizing the role of the small states, is emblematic of the role that territory plays in American politics. A national electorate is filtered through the Senate which is clearly based on very unequal state electorates. Just as the Electoral College privileges small states, the role of the Senate showed that electorates were not going to trump territory.

In fact, the prism of the conflict of the small versus the large state is terribly important in understanding the role which non-majoritarian institutions play in American politics. The existence of the Electoral College itself was a product of a coalition between the small states and the slave states, both of which saw the selection of the executive by either the House or the (white

male) electorate at large as inimical to their interests (Slonim 2000: 18). Similarly, the Senate, although now an elective institution, is so malapportioned that it is far from being a majoritarian institution. The fact that the legislative process requires that the Senate adopt the same version of a proposed law as the House of Representatives, as well as the role that the filibuster (and the threat thereof) plays in the dynamics of Senate decision-making, means that senators from small states are potentially key veto players.

The consequences of equal state representation are clear and unsurprising. A recent study concluded that 'Senate apportionment works to the advantage of residents from the small states and to the disadvantage of those from the larger states' (Lee and Oppenheimer 1999: 228; see also Dahl 2002). Given the absolutely pivotal role of the Senate in both domestic and foreign affairs, the privileged position of small states in that legislative body means that the electorates of the small states of America play an extraordinary role. California, with its 30 million inhabitants and the power of Hollywood, may indeed shape American popular culture, but it can be argued that the political dynamics within national institutions is influenced far more by states such as, for example, Montana, North Dakota or Utah than by California.

The Great Compromise that allowed the United States to emerge as a federal union and still underpins its political architecture ensures that political power is far from becoming territorially centralized. For example, senators from West Virginia, Montana and the New England states have been as important in fashioning American environmental policy as those from the large populous states (Sbragia 2004). Europeans wishing to understand American politics – including its foreign affairs – need to remember that senators from Iowa are as important in the US Senate as those from California.

The conceptualization of the 'American electorate' is therefore a difficult one. Only the House of Representatives can be viewed as a majoritarian institution in the conventional sense. Yet, its role in adopting legislation which affects the internal operations of selected (western) states throws into question some of the most fundamental assumptions of federalism. When it comes to controlling their internal affairs, all states in the American system are not equal in that some states have far less control over the use of their territory than do other states. In a similar vein, the pivotal role of the Senate allows senators from small states to act as 'veto players' in ways which are not familiar to those living in more majoritarian systems.

The role of non-majoritarianism was also very important in the creation of a single market in the United States. Here the Supreme Court was a critical actor, as it struck down nearly every attempt by the state legislatures to construct non-tariff barriers. Using the 'interstate commerce clause' found in the American Constitution, the Court had to spend so much time striking down states' non-tariff barriers that it became, in the words of an eminent historian, 'a major judicial project consuming much of the Court's docket and intellectual energy' (Bensel 2000: 327; see also Fine 1956).

In this case, a non-majoritarian institution was able to use a constitutional provision to trump the role of territory. Try as they might – and they tried

mightily – the states were unable, for example, to discriminate against out-of-state corporations or to inhibit the flow of goods across their borders. The representation of territorial interests was not allowed to sabotage the consolidation of a national market. The similarities with the construction of the European single market are clear. The European Court of Justice (ECJ) played a critical role in establishing the legal foundations necessary for the single market to emerge. As Michelle Egan argues, ‘a large measure of the credit for creating a regional market belongs to the ECJ. It has consistently viewed Treaty Provisions concerning the free movement of goods . . . as a means of establishing a single, unified market’ (Egan 2001: 83). Cross-border markets do not emerge spontaneously when territorial interests are strong; a non-majoritarian institution such as a court is necessary to subordinate territorial interests to market creation.

In a similar vein, capital markets were also shaped by the judiciary. For example, both the system of public debt and the capital market(s) which provided the capital for that system were defined in significant ways by the judiciary. The power of state and local governments to borrow for the provision of infrastructure and the promotion of economic development – and the restrictions placed on that power – depended on the decisions of the state and federal judiciary, including the Supreme Court. Markets – their development and their boundaries – have been inextricably intertwined with non-majoritarian institutions in the American experience (Sbragia 1996; Sbragia forthcoming).

Conclusion

The American federal system is shaped by the intersection of territorial representation, electorates and markets. This intersection represents a structural feature of the federal system which is often treated as a given, taken as so natural that it becomes part of the institutional landscape. Yet, as Europeans argue and debate about their institutional development, I think it is useful to highlight those aspects of the American system which represent compromises – compromises between majoritarian and non-majoritarian institutions, market creation and territorial autonomy, and uniformity versus differentiation of territorial autonomy within the federal system itself. The American federal system is underpinned by a series of bargains which help illuminate the kinds of debates and conflicts that have characterized the process of European integration. While the European context is much different from that of the American, I would argue, nonetheless, that American bargains and compromises are indeed relevant for understanding the creation of a new Europe.

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7 Citizens in American federalism

Locating accountability in a dispersed system

Bruce E. Cain

Introduction

Most analyses of US federalism, for good reason, assume a top-down rather than a bottom-up, or citizen-level, perspective. By this, I mean that they concentrate more on the macro-level issues of federalism than on the micro-level implications for citizens and politicians who operate within them. The core of the federalism literature consists primarily of institutional design questions that lend themselves to macro-perspectives: e.g., what are the different types of federal arrangements, and are they more or less advantageous for certain tasks than unitary designs?

Consider, for instance, the question of whether federal arrangements are better at resolving the conflicting governance demands of coordination and territorial autonomy (Wheare 1987; Elazar 1987). The question itself implicitly reflects the perspectives of national and local territorial interests, asking how territories can get the benefits of common action without losing sovereignty over policy areas. The interests of citizens per se are reflected only indirectly through their national and subnational identities. Macro-issues also dominate micro-perspectives in literature discussions about the policy-making advantages and disadvantages of federalism (Elazar 1987; Ostrom 1986; Beer 1993; Burgess 1996; Kincaid 1995) or the role that external threat plays in the development of unitary states (Riker 1964, 1975; Friedrich 1968; Watts 1998).

The critical micro-issues in federal systems most often concern the problems of establishing and maintaining democratic control over elected officials and of coordination across levels of government; namely, how do citizens perform their jobs as voters and participants in federally structured democracies, and can officials in federal systems find ways to divide and share tasks? Some of these discussions are found in the federalism literature, but just as frequently they implicitly permeate the more general American politics and public administration literatures.

The defining and characteristic problem of representation in US politics is accountability. Unitary systems concentrate power and hence responsibility at the national level. When things in the country are not working properly,

national government leaders must take responsibility. In parliamentary systems, accountability is concentrated on prime ministers and their cabinets. Informal norms of collective responsibility and strong party discipline prevent individual politicians from evading accountability for political advantage. These norms are weaker or non-existent in the US, and the country's characteristic fracturing of power and responsibility lessens clear accountability.

Federalism by definition divides the power and responsibilities for various government functions between the nation-state and subnational governments. In order to keep governments responsive and accountable to majority opinion, constituents in federal systems need first to be informed adequately about the significant actions that all the relevant government entities take, and then secondly to show up at numerous elections and wade their way through a dizzying array of choices on the ballot. Fracturing power increases the citizens' burdens in terms of the information, resources and actions required of them. For this reason, the characteristic problems of American democracy centre on accountability and citizen commitment. Can citizens accurately locate who is responsible for governmental actions that affect their lives? Can they hold those officials accountable? Is the burden of being a citizen under such circumstances sometimes excessive, and does it contribute to ballot fatigue and low participation?

In this chapter, I explore the ways in which federal structures have shaped citizenship in America and the democratic theory issues that result. By concentrating on the micro-issues of citizenship, I do not mean to understate the importance of the macro issues of policy and governance. But I do hope to suggest that the US experience might foreshadow some issues that the EU and its member states will have to deal with as they move towards a closer federal union. Currently, the EU debate focuses a great deal on the democratic deficit caused by the predominance of state ministers and bureaucrats in EU decision-making (Geddes 1995). But a theme of this chapter is that, even if EU member states were to cede more power to the European Parliament and less to the EU bureaucrats and ministers, there will likely still be accountability issues arising from the complexities of shared powers. In this sense, the US experience is illustrative for all emerging federal systems.

The burdens of federalism: cognitive demands

It should be stated at the outset that the federalist division of power between individual states and the nation does not account for all the complexity placed upon American citizens. The size and scope of the US government also contributes. The division of power between the three branches of government at the local, state and federal levels significantly increases the cognitive requirements for being a good constituent. The federal government and all states but Nebraska maintain a bicameral legislative system, setting up possibilities of buck-passing and diffused responsibility between the upper and lower houses. Many states in addition divide executive power with

so-called plural executive schemes (i.e., elected attorney-generals, secretaries of state, etc.), making it hard to determine which part of the executive branch has the primary responsibility for a given issue (see the subsequent discussion of education policy). And in many policy areas (e.g., affirmative action, forced busing, immigrant rights, etc.) court decisions have been determinative, further blurring responsibility and limiting the attempt of responsible and conscientious citizens to hold government officials accountable.

However, even after we acknowledge the roles that division of power and court activism play in complicating the mechanisms of accountability in the US, the federal structure itself complicates life for US citizens in at least three ways. To start, it increases the cognitive requirements of being a citizen in the sense that the conscientious citizen must assimilate or know a good deal about the governmental process in order to signal his or her preferences on policy. By this I mean that, if they are going to hold the government accountable for its actions, conscientious citizens must not only understand the intent and impact of policies, but also have an idea about who makes and implements the decisions in a given policy area. They might, for instance, have very strong views about the state of education, but they need to know who is responsible for education in America in order to influence the policy. And the answer to the process question in the US varies with the education type (e.g., local governments control kindergarden through twelfth grade and state governments control some of the universities), the historical period (i.e., the federal government's role in K through 12 has varied over time) and the school financing method in any given state (i.e., are the schools funded primarily through state controlled sales and personal income taxes, or through locally controlled property taxes?).

In some cases, the division of responsibility is quite clear-cut. Defence and foreign policy are the best examples. The national government exclusively controls US armed forces and negotiates with foreign nations. Individual states might promote trade with other countries, and specific cities might have so-called sister relations with foreign cities, but, when foreign or military policy goes awry, US citizens know that the president and the Congress are primarily accountable. But, in many other instances, the cognitive confusion over who might be responsible for a particular government action can be traced to the structural ambiguity that is increasingly common in federal systems.

There is some evidence on this point from public opinion surveys. A 1973 Harris survey asked respondents to evaluate their knowledge of 'what is going on in the federal/state/local government'. The data reveal several findings (Reeves and Glendinning 1976). First, over half of the respondents reported that their knowledge was either fair or poor. Second, they felt more secure about their information with respect to the national and local governments, and least secure in their knowledge about state governments (60 per cent fair or poor for national, 73 per cent for state and 57 per cent for local). Other studies have corroborated the lower salience of state governments.

Another survey in the same year examining the accuracy of citizen knowledge about the different levels of US government tested to see whether they could identify which level had primary responsibility for setting up a city university, delivering the mail, passing import taxes and collecting garbage: 62 per cent of the adults sampled got all of the answers right and 99 per cent got at least one right (Reeves and Glendenning 1976). It is hard to draw any firm evaluative conclusion about this. To put it in perspective, however, it is clear that people's knowledge about process is higher than their ability to identify the names of particular elected officials such as their state legislators or local congressman. Of course, we should bear in mind that these were relatively easy process questions, and that, where the funding arrangements and authority relations are more complex (e.g., welfare or health care for the poor), the answers might have been less accurate.

The evolution of US media markets has complicated the citizen's task of keeping track of who does what. Thirty years ago, before the advent of cable television and the Internet, the three major networks and the newspapers were the primary sources of information about the government. Local television news was only beginning to become important. Presently, cable shows and local news dominate, with several consequences. First, cable coverage creates enormous imbalances with their 24-hour, exhaustive format for crises and scandals. This means that national events sporadically wipe out news coverage of events at almost any other level of government (e.g., the Gary Condit–Chandra Levy scandal, the destruction of the World Trade Center, etc.). Secondly, local television news is now the primary source of political information for a plurality of American voters. Local news tends to favour entertainment over news and, within the category of politics, local and national over state. This exacerbates some of the earlier findings about the low salience of state politics. And finally, for better or worse, cable and the Internet tend to segment information, lessening the level of common knowledge and possibly creating larger gaps between the informed and the uninformed.

To put it another way, the federalism of the political system interacts with the decentralization of the media in ways that create inequities and gaps in public knowledge. Trends in the media, in short, may be complicating the cognitive task of the conscientious citizen in a federal system.

In sum, the first challenge a federal system presents is cognitive. The conscientious citizen has to know more about process in order to choose responsibly. If the functions of government shift over time, or if the division of power changes from separate realms to the so-called marble-cake model, the cognitive tasks multiply and the lines of accountability become less clear. In addition, whether a particular citizen has more or less confidence in a particular level of government may also vary over time, depending upon which party is dominant at the national, state and local levels, and which governmental problems are most salient at the time respondents are questioned (Farnsworth 1999).

The burdens of federalism: time, resources and action

The second burden of federalism on citizens is participatory. In a pure unitary state with a parliamentary form of government, the act of choosing is relatively simple. For instance, in Britain until recently, voters had two regular choices: to select a member of parliament in a national election and a councillor in a local government election. This has been complicated of course, in recent years, by European Parliament elections, more referendums and elected mayors but, in the country's earlier incarnation at least, the average British citizen had less to do than the average American citizen.

At the other end of the spectrum is the poor fool who lives in California. In any given national election, he or she might have to decide three national offices, numerous state offices, some city races and, of course, a dozen or more local and state referendums, initiatives and bond measures. That would still represent an underestimate of the total burden, because many other California citizens would not be conscientious if they did not vote in off-year state and local contests and special elections called for emergency bonds and for filling vacant offices.

Federal systems therefore can be more demanding in terms of participation in several senses. There are more choices on any given ballot. There are more ballots. There are more demands upon the time and resources of involved citizens who might want to give money to or volunteer time for candidates. What we know from years of research about participation in America is the following. The number of people who take advantage of all the opportunities to participate in the US is small. Voting is the most common form of participation and, as many studies have shown, US turnout levels are comparatively low (Boyd 1981; Dalton and Wattenberg 1993; Powell 1986). Other forms of political participation are even less frequent.

Second, expanding the number of participatory opportunities citizens have does not increase the overall level of participation. Voting normally drops off below the national level (Teixeira 1992), particularly in the off-year contests (i.e., when local elections do not coincide with national elections), and roll-off rates (i.e., people not voting in particular races in a given election) rise at the bottom of the ballot. This points out an interesting phenomenon in US politics: the numbers of elected offices and initiative measures continue to proliferate because voters do not trust officials to make the right decision, but participation rates have been dropping over the last thirty years. In essence, voters have increased the number of opportunities to hold officials accountable, but have exercised that opportunity less frequently in recent years. Whether this represents a kind of 'ballot fatigue, lack of adequate information' or new form of 'strategic citizenship' (i.e. only participating when an issue or office is salient) is hard to say (Wattenberg *et al.* 2000; Engstrom and Caridas 1991).

Third, as we have all learned from the 2000 presidential election, the complexities of a federally organized election system produce inequities and

complications for candidates and voters alike. The rules that candidates and voters must follow are a *mélange* of federal, state and local regulations. The qualifications for federal offices, the criteria for congressional redistricting and the rules for financing federal elections are set by federal law and the US Constitution, and do not vary by state. That represents about the full extent of uniformity in the US system. The time, place and manner of elections are set at the state level. Hence, states control the types of ballots voters are given (e.g., the infamous butterfly ballot, punch cards or ATM-like machines, etc.), the number of polling stations, and the procedure for registering in federal as well as state and local elections.

Nothing is more illustrative of the federalized complexity of the US system than the presidential primary system. Presidential candidates in both major parties face a bewildering array of different rules in the state contests. The dates of the elections shift from one cycle to the next as states vie to be more decisive in the final outcome. Some states use 'closed' rules (i.e., only registered party members can vote in a given party's primary), some use 'semi-open' rules (i.e., only party members and independents can vote in a given party's primary) and others use 'open' or 'blanket' rules (i.e., allowing people to cross party lines to vote in another party's primary). The sheer number of contests and the fact that different rules favour different kinds of candidacies complicate the strategic calculus that candidates must make.

Even within a state, there are jurisdictional variations in electoral rules. Different counties use different voting systems and, in some states, different criteria for recounting disputed ballots. Conscientious citizens who would like to give money to support the candidates they favour may find that the contribution limits in city elections bear no resemblance to the state or federal limits, or that the disclosure thresholds vary for each race. It is very easy for a citizen to make a mistake in this situation, failing to comply with the regulations of a given jurisdiction out of ignorance or confusion. This can produce anxiety among groups and individuals who simply want to be a part of the process. It might even on the margin discourage potential candidates or contributors from getting involved.

High participation costs affect citizen mobilization tactics. If you want to change a policy, you may find that you have to lobby or mobilize at the several different jurisdiction levels. Groups often have to have lobbying offices in both Washington and their state capitols. Recently, for instance, my neighbours wanted to change some proposed congressional district boundaries. To effect that change, they had to lobby simultaneously the California congressional delegation and the state legislature. At various times they would have the agreement of the one, but not the other, causing them to spend a lot of time negotiating between elected officials at different levels.

In short, creating more opportunities to participate also produces more democratic responsibilities and burdens. The sharing of responsibilities for election administration results in different standards and procedures, which in turn makes the tasks of citizenship and being a candidate more complex. The

resources that citizens and groups need to influence policy also go up when jurisdictions share policy responsibilities.

The burdens of federalism: locating responsibility in a strategic environment

The cracks and crevices of decentralized power in the US provide plenty of opportunities for political self-protection. Ambiguities in power allocations allow individual political officials to avoid or deflect blame for unpopular policies, and to claim credit without proof when policies succeed. Consider the US election of 2000. Was Bill Clinton responsible for the remarkable prosperity during his eight years in office? Certainly, the rhetoric of the Democratic presidential campaign would have you believe that he was. But critics argued with equal plausibility that the architect of prosperity was Alan Greenspan, chairman of the Federal Reserve Bank. Since the US president does not directly control interest rates, it is conceivable that the fate of the economy – the most important issue in presidential elections – is actually determined by a non-elected official. That in fact is precisely the argument that politicians use when the economy falters. Advisors to George Bush believed that Greenspan's actions in the early 1990s doomed the Republicans in 1992. As Mayhew (1974) once argued about Congress, one might parsimoniously assert that the federalist structure, like the congressional committees, can be used to maximize the re-election prospects of individual politicians in America.

The elements that cause political figures in America to take advantage of the strategic possibilities offered by decentralized power are several. First, there is the professionalism of US politics. Many who hold office want to make politics a career. In large cities and many state legislatures, the pay and support staff for elected officials have increased significantly during the last thirty years. Many who hold office in these places do so on a full-time basis, and do not rely as heavily as before on outside income. Indeed the thrust of recent conflict-of-interest reform has unintentionally reinforced this dependence upon a purely political career by forcing elected officials to avoid the appearance and reality of economic gain when performing public duties. Divesting their holdings, no longer serving on corporate boards, and recognizing that post-public service employment in the private sector might be limited in certain industries, public officials find that it is no longer as easy to have one foot in and one foot out of government service. The public career track has increasingly become an all or nothing route. Elected officials are understandably anxious to stay on course. Career survival assumes a great importance, and survival strategies of necessity include ways to mitigate blame and maximize credit.

A second factor in the strategic use of the federal structure is that US elected officials have wide discretion and ample resources to fashion individualized campaigns. The messages that members of Congress choose to deliver to their

constituents are not dictated by the party, the president or even closely allied colleagues. What members choose to say may determine how much support, financial and otherwise, they get from these sources, but, in the end, candidates and their consultants are sovereign with respect to message and strategy. Hence, a candidate at any level of government can choose to run against the record or platform of a president, governor or other candidates in their party. Indeed, they may be encouraged to do so if it helps the party retain the seat.

Ironically, the breakdown of the so-called Buckley regime in campaign finance regulation has lessened the autonomy of candidates a bit. Parties now use soft money to run ads in support of specific candidates, but must do so without explicitly coordinating with the candidates themselves and without using words that specifically call for election or defeat. Those who make independent expenditures are even less restricted in what they can say and do as long as the effort is truly independent. Occasionally, in the last election cycle, this meant that candidates were saddled with messages that they would have liked to avoid, such as the famous 'a little too much diversity ad' that opened up a theme on race and diversity in some midwestern media markets, embarrassing the Bush campaign. But, this trend aside, candidates generally are free to formulate their own messages, strategies and tactics.

The first two conditions then interact with the third – structural decentralization – to produce a number of common US political pathologies intended to please voters. For instance, it is common for governors to blame Washington for adverse conditions in their states. California's Governor Pete Wilson, for instance, had to deal with a severe recession in the state's economy in the early 1990s. With re-election looming in 1994 and historically low poll numbers, Wilson successfully redirected public attention to the federal government's immigration policies, arguing that the Clinton administration's failure to control the borders was costing California millions of dollars for government services used by undocumented workers. The result was Proposition 187, which, had the federal courts not declared the measure invalid, would have denied non-emergency services to illegal immigrants.

Another example of the strategic manipulation of the federal system for political advantage is the practice of unfounded mandates. US politicians at all levels are reluctant to raise taxes to pay for programmes. But they also recognize that the public demands certain services and will punish those who are unresponsive. Requiring that a particular policy or service be implemented at another level without providing the funding for those measures has the political advantages of seeming to provide a benefit without incurring the political cost of finding the necessary resources. Sometimes this is even done in the name of accountability. Recent proposals to hold kindergarden through twelfth grade schools responsible if their students do not achieve a certain minimum level of standardized tests will have the effect of requiring local schools districts to do more but will not provide the federal resources to accomplish those goals.

Even the courts are subject to strategic gaming. Opponents of controversial initiatives often calculate the odds of victory in state versus federal courts before they decide on which grounds to attack an initiative. Shielded from public opinion by lifetime appointments, federal courts have become the venue of choice for those who seek to overturn initiative measures they do not like (Cain and Miller 2001; Miller 2001).

The argument here is not that strategic manipulation is absent in non-federal states or even that it is more prevalent in the US. Rather, I am arguing that structures induce certain kinds of characteristic behaviour, and that decentralized and federal systems encourage and make possible strategies that shift blame and responsibility onto other levels of the political system. The division of power feature has a similar effect with respect to the legislature and the executive branches, and bicameralism with respect to both houses. Added to the cognitive burdens of keeping track of the process and the resource burdens of making more choices at more levels, the strategic behaviour of professional politicians who want to stay in power can worsen the problem of holding the system accountable for policy outcomes.

Coping with federalism

By focusing on the problems and burdens that federalism places on US citizens, I have painted a gloomier picture of the problem than is warranted. As some of the earlier discussion revealed, survey data indicate that most citizens have at least a fair idea of what is going on, and that satisfaction and knowledge levels are not disgracefully low. Americans do cope, and, while there is little or no appetite for creating any new layers of government (e.g., the resistance in many states to creating regional governments), there is no widespread sentiment for reducing federalism either. How do citizens manage?

There are several answers to be gleaned from the US politics literature. With respect to the added cognitive burden issue, one school of thought argues that we tend to overestimate the cognitive requirements needed to be a good citizen (McCubbins and Lupia 1998). If, indeed, citizens had to have perfect and complete information in order to perform basic citizenship tasks such as voting, then American democracy would break down. However, we observe that it has not broken down, and that citizens manage to muddle through. While bad policies sometimes get enacted, there is no empirical basis for saying that bad policies are more common in the US than in stronger state democracies, or that the quality of decision-making has dropped as US federalism has become more complex. How do American citizens do it?

Perhaps the answer is that there are enough 'information cues' in the political environment so that citizens can adequately protect their interests. Research on initiative voting, for instance, finds that, even when they have not fully read or do not completely understand the fine print on a ballot measure, citizens choose as if they were informed by looking at the groups and individuals who endorse particular measures (Lupia 1994). In the spirit of the

old Lazarsfeld and Berelson (1948) two-step flow model, the public trusts certain groups (e.g., Common Cause, Taxpayer Associations) and individuals (e.g., Ralph Nader) to bear the costs of assessing various measures that make it onto the ballot, and then act on their recommendations. In addition, partisan and ideological labels are transportable from federal to state and local levels. The assumption that liberals and Democrats prefer a higher level of government services and greater redistribution is as valid in state elections as in federal ones. American voters may not be as closely tied to parties as voters in other democracies, but they seem to understand the meaning of the labels and use them to guide their decisions.

In addition, the US has very strong freedom of information and open meeting laws at all levels of government. The former require the government to surrender documents that pertain to its policies. They are widely used by individuals and groups to get reports, memos and data that might otherwise be kept from public view. Open meeting laws require government decision-making laws to post agendas and meeting times in advance, and for them to take votes in the open. The aggressiveness of transparency policies in the US affords ample opportunity for citizens (or groups and individuals working on their behalf) to obtain detailed information about how particular decisions are made. With such information filtered through the press, opposition politicians and public interest groups of all sorts, it is hard for US governments at any level to keep anything a secret for very long.

The participatory problems alluded to earlier are more difficult. It is disturbing to see turnout in local elections at less than a third, let alone the low voting rates in national elections. But whatever our good government intuitions tell us, it may not matter. There is evidence that low turnout does not necessarily bias policy outcomes – non-voters and voters have roughly the same distribution of preferences (Wolfinger and Rosenstone 1980). After all, we do not have to poll everyone in a population to determine what that population thinks. Similarly, if non-voters are a random selection of the total potential electorate, then in essence we have democracy by sample. And that might be more efficient.

Along the same line of reasoning, it is possible that the US is in transition from a classical to a strategic model of citizenship. In the former, citizens always participate no matter what the stakes because it is their duty to do so. In the latter, citizens vote when things matter, or when their participation might make a difference in the outcome. In essence, by not voting when their interests are weaker, they eliminate what Phil Converse has called ‘non-attitudes’ from the public calculus (Converse 1970, 2000). Selective participation may even address to some degree the intensity of preferences problem that Robert Dahl wrote about in his *A Preface to Democratic Theory* (1956). And if, as the Downsian model suggests, voting is costly, selective participation may even be efficient (Downs 1957). In short, the adaptation of US citizens faced with an overload of civic obligations may be strategic citizenship.

But what about the third challenge to citizenship posed by federalism: the strategic manipulation of federal ambiguities to blur the lines of accountability. The answer here is similar to the one we would give for the accountability problems of bicameralism or the division of power: that political gamesmanship is undermined by the American press in its role as adjudicator of competing political facts. The American press is not generally thought to be as openly partisan as the European press, but it plays an equally powerful political role. It takes a great interest in the political process and in tactics – in most instances, more than in policy per se. Following the model of sports reporting, the newspapers regularly cite and the television stations employ as commentators insiders and former players (i.e., officials) who recount the tactical logic of decision-makers at all levels, and who interpret the subtle rhetoric of public statements that candidates and government make.

Against a background of traditional mistrust of government, many citizens are more likely to accept the interpretations of pundits and journalists than the statements of political figures. Hence, to use an earlier example, the statements and logic of the state politician who attempted to shift blame for state budgetary problems on to the federal government was thoroughly and cynically scrutinized. The likely tactical motivations for his actions became as much the story as his policies were themselves, and people came to understand the policy in a framework they found credible.

The fractured nature of US politics has shaped the way that people cope with the citizen demands placed upon them. Relying heavily on interest group and individual intermediaries, adopting a strategic form of citizenship and learning as much about the tactics of politics as the policies, the US electorate manages to muddle its way through without too much embarrassment to the democratic cause.

Conclusion

Europeans rightly worry about the democratic deficit in the new institutions of the EU. Power still resides primarily in the hands of state ministers and unelected bureaucrats. But as Europeans come to address that problem by strengthening the European Parliament, accountability problems will take a new form. Comparative lessons are always dangerous because the assumption that everything else (i.e., every other causal factor) is being held constant is usually false. And as there are so many other factors that complicate American civic life, I need to be particularly cautious here. Still, the clear challenge for Europe is whether national electorates will be sufficiently interested and informed to express their interests clearly in EU elections. Given the technical nature of the problems for which the EU will have primary responsibility in the foreseeable future (i.e., trade relations, economy policy, etc.), and given the likely resistance that EU member states will have to turn over more salient and politically powerful issues (e.g., the right to determine

third world immigration levels), the level of interest in the EU in most years may be more similar to how Americans feel about subnational politics. If so, then the question of whether the democratic deficit has really been addressed by strengthening representative institutions becomes much more complicated.

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Part III

Market, state and social rights in the EU and the US

8 Building a market without a state

The EU in an American perspective

Sergio Fabbrini

Introduction

The adoption of a single currency by twelve of the fifteen countries of the EU on 1 January 2002 was a major step forward in the process of European integration. The Euro exerted further pressure on the EU to become a supranational polity, rather than, or more than, an international organization. Moreover, the single currency concluded a process of integration that has been largely driven by economic factors and promoted by legal actors (primarily the European Court of Justice). It was the gradual formation of a common market which gave substance to the project of integration. The need to build a continental economic space without national barriers and open to transnational competition introduced a systemic mechanism of change into the economies of the EU member states. The two Rome treaties of 1957, especially, engendered a dynamic process of successive changes which eventually gave rise to the transfer of internal monetary sovereignty into a supranational financial institution: the European Central Bank. But it was the European Court of Justice (ECJ), as Alec Stone Sweet explains in his chapter, with its interpretation of the Rome treaties as quasi-constitutional documents, that transformed those treaties into compelling arguments for the dismantling of national barriers to the formation of a continent-wide market.

The EU thus constitutes a case of market-building promoted (at the Community level) by legal rather than political action. Moreover, the lack of a generally accepted political strategy by the member states (at the Community level) fostered the development (at least before the 1980s) of a market dynamic devoid of social considerations. This chapter will seek to answer the following questions. First, is the EU experience of market-building unusual in democratic countries? Second, is the separation between economy and society an obstacle for the EU's legitimacy? Third, is the EU's model of governance likely to be successful in promoting a wider and more active Europe? To answer these questions, I shall locate the EU experience in a broader comparative perspective. More specifically, I will compare it with the US experience. For too long, European political development has been taken to be the paradigmatic case of state-building. American political development

was deemed radically different – so different, in fact, that Europeans consider it an ‘exception’, while the Americans, too, use it as an argument for their ‘exceptionalism’. Whatever the case may be, both European and American scholars have done much to keep the political trajectories on each side of the Atlantic separate, even when the two trajectories started to converge.

The EU as a market without a state

As we know from the chapter by Alec Stone Sweet, the creation of a European common market was greatly favoured by the ECJ, but it was supported by domestic economic actors operating on a continental scale, such as multinational corporations or export-oriented firms, with a material interest in reducing or neutralizing national constraints on free trade within the European market. By claiming before national courts that national legislation conflicted with Community rules, those economic actors prompted a revision of domestic laws which strengthened national judiciaries *vis-à-vis* parliamentary actors. The interactions between firms, national courts and the ECJ (‘the triangle’, as Stone Sweet [2000] has called it) generated powerful pressure for so-called *negative integration*: that is, the dismantling of the main barriers against the formation and functioning of a *single* European market. But, of course, once the previous differentiated barriers had been dismantled, the need to create a more homogeneous regulatory system arose: a need for *positive integration* largely met by the Community institutions, and by the Commission in particular. The EU member states were not passive onlookers, of course, but, apart from decisions of historical importance, they tended to operate within a policy framework established by the Commission and supported by the actors in the ‘triangle’. All three of these actors had something to gain from the harmonizing of market interactions: firms could operate in a larger and more predictable market; the national courts could increase their influence over political decision-makers; and the ECJ could impose its role as the ultimate interpreter of the treaties. In sum, with the backing of the national judiciaries – more than their national constitutional courts, which in fact resisted (as in Germany and Italy) the constitutionalization of the treaties – the ECJ promoted a judicialization of politics previously unknown to Europeans (Shapiro and Stone Sweet 1994). Note, however, that this judicialization concerned domestic rather than Community legislation.

Thus, supranational Europe has endeavoured to build a continental market without the institutional machinery that was instrumental in creating national markets. By calling for the dismantling of many of the national rules which obstructed the free movement of goods, capital, workers and services across the Community member states, the ECJ has been instrumental in promoting a supranational legal order for a European common market – a legal order, again, that has required specific political decisions (first, at the member-state level and then at the Community level) for it to be institutionalized. Viewed from the perspective of the European nation-states (Poggi 1991), this process

is astonishing, for never in European history has market-building been separated from state control and intervention. Indeed, it is taken for granted by social scientists that, in Europe, the capitalist market has been the outcome of a sequence of state decisions and choices. As Polanyi (1944) argued persuasively, without public intervention it would have been impossible for the market to take root and develop. Contrary to neo-classical ideology, the capitalist market that arose in the European nation-states required institutional and political conditions which only the public authority (represented by the parliamentary majority) could devise and implement. One can thus plausibly argue that, in Europe, the *state arrived before the market* or, better, that the formation of territorial nation states created the structural and behavioural premises for the building of a modern economic system. This is why the territorial state, in the long transition from pre-modern to modern Europe, won the competition with its rivals, the Italian city-states and the German city-leagues. And it did so because of its greater capacity, *given its larger territorial size*, to mobilize societal resources in order to neutralize internal particularism.

Economic particularism, in fact, entailed transaction and information costs which precluded economic efficiency. As Spruyt has written:

central administration provided for gradual standardization of weights and measures, coinage and jurisprudence. Undoubtedly this was a lengthy process . . . but . . . the dominant political actor, the king in France, the king-in-parliament in England, had vested interests in limiting defection and free-riding and in furthering the overall economy. The greater autonomy of urban centres in the Hansa [league] and the Italian city-states made such objectives more difficult to achieve.

(Spruyt 1994: 185)

Scholars (Caporaso 2000) have talked in this regard of the formation in Europe of a *Westphalian state*, by which they mean an institutional construct with the capacity to exclude external powers from its internal decision-making process, a capacity guaranteed by an internal organization of public authority around the dominant rulers. The Westphalian state which dominated European history from the seventeenth to the twentieth century was a large territorial unit, enjoyed external sovereignty from outside challenges, and ensured its own autonomy by means of the centralized organization of decision-making resources. It was on these institutional bases that a national economy could develop.

For this reason, from a European perspective, the current evolution of the EU is problematic from both an analytical and a political point of view. The EU has apparently created a continental market without a continental centralized state, or at least without a powerful or effective central administration. It has adopted a supranational currency without a supranational government to control it. The EU member states have surrendered broad

margins of their sovereignty on numerous domestic policies to the Community, although they retain their sovereignty on military and foreign policy. This is exactly the opposite of what happened in other federal or quasi-federal systems of the past, where the constituent units preserved their control over domestic policies but transferred authority over external relations to the centre. Moreover, the supranational currency is not supported by supranational policies in strategic aspects of monetary governance. The EU does not yet have a common fiscal policy, nor does it have a coordinated macroeconomic policy. Above all, the EU has not constrained its monetary governance with *social considerations*. In fact, whereas historically the public support of the economy was legitimized by the state's intervention to reduce the harmful effects of the workings of the market, only in the late 1980s did the EU begin to consider (with Delors' Social Charter) the need to give social legitimacy to the common market. In sum, if the European welfare states have been the necessary side-payments for popular acceptance of the national capitalist economy, at the EU level economy and society still appear to be significantly separated.

Public authority and market-building in America

The experience of America has been quite different. The difference between state-building in Europe and America is not solely a matter of degree, with the former pattern (the European one) connoted by a state in constant growth (in terms of its economic and social responsibilities) and the latter (the American one) by a state which has grown to a lesser extent. Rather, the distinction relates to the different types of public authority wielded by the state (Fabbrini 1999a). In the countries of Western Europe, where the bureaucratic (territorial) state generally preceded the formation of a modern market society, that authority has defined social relations, while in America, where the market society preceded the formation of a modern bureaucratic (federal) state, the authority wielded by the latter has been regulatory in character. In short, in the former case, the state has defined society as such; in the latter, it has done no more than regulate the dynamics of its growth. Unlike in Europe, in America (Offe and Preuss 1991: 145) 'the individuals [could] pursue their diverse interests and their particular notion of happiness . . . [without] the danger of an omnipotent government imposing its notion of collective happiness upon the people.'

This different structuring (in the nineteenth century) of the relationship between state and society in the two parts of the West inevitably conditioned the history of Western democracy. In the United States (Lipset 1979) a contractual view of democracy arose, while in the European countries democracy resulted from a sequence of hard-fought conflicts between social classes and bureaucratic interests for control of the state (Daalder 1995). When comparing the American and the French experiences in the nineteenth century, Grimm remarks:

in America, where class distinction, feudalism, state controlled economy had never been established, there was no need for a liberal reform of society . . . In France, on the contrary, political power first had to bring about the situation which, for the Americans, seemed to be the natural order. Hence, the French revolution destroyed the absolute monarchy, but not the sovereign state. It merely changed the subject of sovereignty.

(Grimm 1985: 97)

In short, in the United States, democracy did not have to contend with an absolute state to ‘constitutionalize’, nor was it conditioned by a socio-economic context of scarce resources to be distributed among a growing population, as happened in Europe (continental in particular). Thus, whereas in the United States freedom of economic enterprise – although restricted since colonial times by communitarian-religious constraints – anticipated the birth, and thereafter guaranteed the growth, of political freedom itself (Dahl 1967), in Europe, and in France and Germany in particular, it was the conquest of political freedom that created the conditions for the development of economic freedom (Tilly 1990).

Because of this differential time sequence, it has been claimed that in America, unlike in Europe, a modern market economy was able to develop in a stateless context (Nettl 1968). Indeed, the differential time sequence influenced the *ideological* predispositions towards the market (which traditionally enjoyed much more legitimacy in America than in Europe), rather than its material structuring. In fact, in both America and Europe, economic freedom had to be guaranteed by public power in order to become institutionalized and to develop. In both cases, the formation of a market economy (which is the empirical outcome of economic freedom) required specific political intervention so that the public could be distinguished from the private in terms of property rights to protect, legitimate interests to recognize, and realms of actions to promote. As Karl Polanyi stressed, everywhere markets are political artefacts, not natural phenomena. However, ‘although Polanyi is correct in recognizing that the legal order must support market activity, and understood the vital role of the state in constructing and maintaining the market, he did not specify the particular instruments that the state might use in pursuing that goal’ (Egan 2001: 38). And here emerges an important difference between the American and the European experiences of market building. In nineteenth-century antebellum America, the market was promoted primarily at the local and state level. As McDonald wrote (1990: 218), ‘state and local governments engineered a massive shift of resources from public to private uses through the distribution of public lands, the granting of legal privileges and immunities, direct capital investment in some projects – especially railroads – and the provision of a wide variety of police, education and social welfare services.’ James Bryce, in his celebrated *The American Commonwealth* (1888), noted that, throughout the antebellum period, the federated states had been instrumental in promoting economic

activity within their territories, which they jealously protected against external encroachment, and they pursued mercantilist policies no different from those of many European nation-states.

This decentralized support of the market was made possible by a crucial factor: the control exerted by the states over fiscal resources. Only with the sixteenth amendment of 1913 did the federal Congress acquire the 'power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.' Thus, according to several reports (Mann 1993), throughout the nineteenth century, with the partial exception of the Civil War period (1861–5), the ratio of government expenditure to gross national product was routinely one-fifth or one-sixth of the ratio recorded in the largest European nation-states. Thus, for more than the first century of its life, the new American republic was based on states' rather than federal power. The federated states resisted any attempt to centralize power in Washington, DC. 'Locally rooted legislature [guarded] the right to initiate – or, more likely, not to initiate – new tax laws. Unlike the Jacobin legacy for France, republican ideology in America merely deepened the distrust of national [that is, federal] mobilization' (Wiebe 1995: 70).

The different structural and institutional contexts of America and the individual European nation-states generated two opposed trajectories of market building. In federal America, the segmentation of the market along state lines very soon proved to be a constraint on its further development. 'Between 1875 and 1890 business organizations began to challenge state restrictions, and pressed courts for relief' (Egan 2001: 35). Why courts? And which courts? With the federal Congress largely controlled by state and local interests, and the president still not enjoying sufficient policy-making influence, those interests pressing for a national market appealed to the judiciary to challenge the legislation in force: after all, judicial review encourages the courts to assume a policy-making role. But, because the state courts sided with the states' claims to preserve their own tariffs and barriers, it fell to the Supreme Court to create a national free-trade economy proportionate to the federal dimension of the polity. Building on the landmark cases of *Gibbon v. Ogden* (1824) and *Brown v. Maryland* (1827), and on the basis of the so-called Commerce Clause (Article 1, Section VII.3 of the Constitution, which states that 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes'), the Supreme Court began dismantling state trade barriers, and thus set a legislative agenda in favour of a national market. Yet, the institutional dispersion of national sovereignty inherent to the American political system, coupled with the legitimacy enjoyed by the *idea* of an unrestrained market economy, prevented any direct intervention by the federal state, in the stead of private economic forces, to foster economic growth in strategic sectors.

Thus, post-bellum industrial America set a new pattern for public intervention in the economy: the *regulatory pattern*. Through the formation of

ad hoc independent agencies, to which the Congress delegated legislative as well as judicial and administrative functions, the federal state laid down rules to regulate competition among the economic actors operating in a particular sector. It is of no importance here to establish the strategies pursued by private interests to subjugate the regulatory activity of these independent agencies. What is of interest, though, is the regulatory nature of state intervention in America entailed by the separation of powers system, and solicited by a powerful policy-making role of the Supreme Court. Nothing comparable happened in the European nation-states. While in America the judiciary was crucial for the building of a national market, in no European nation-state could the judiciary have played an autonomous policy-making role for the same purpose. The legal order of the market was established by legislative or executive decisions, in relation to both the predominant political ideologies and parties and the stage reached by the economic development of the country. This was therefore political rather than judicial intervention. After all, since the Colbertist experiment in absolutist France, it has been clear to all European states that their (military) fate ‘was naturally much affected by their economies. [This is why] European states were generally much involved in [their] workings’ (Calleo 2001: 48). If classical mercantilism served the absolute state’s need to support its wars against neighbours, Calleo writes, the liberal mercantilism of the nineteenth and early twentieth centuries enabled it to catch up with the colonial expansion of the capitalist economy – which, for the European state, was another way to wage war against its neighbours. ‘Mercantilism encouraged imperialism – as the means to control more trade and thus gather more resources’ (*ibid.*: 42).

Hard pressed by the formidable challenges raised by war and economic competition, the European nation-states did more than limit themselves to establishing a reliable system of property rights, taxation and commercial regulation. In continental Europe, especially, the state defined the sectors crucial for the country’s growth. In many cases it assumed direct responsibility for their development and promoted corporatist arrangements between the representatives of the main economic interests in order to exert political control over the main economic resources (investments, profits and wages). Europe responded to the dramatic economic crisis of the 1930s and the epochal transformation induced by the Second World War by extending public control or ownership to large sectors of the economy. America, for its part, responded by further extending its policy of market regulation (Majone 1994), thereby preserving the private nature of its economic system (the mobilization of national industry to support the war effort was largely overseen by private businessmen operating in public agencies).

In the twentieth century European nation states, mercantilism was gradually replaced by the nationalization of strategic sectors coupled with Keynesian policies for the public support of aggregate demand. Public control over macroeconomic variables was ensured by centralized fiscal policies. In some cases, nationalization was imposed by the economic need to speed up

technological development in order to reduce the gap with the more industrially advanced countries. In other cases, it was required by the political endeavour to establish new industrial relations between workers and employers in the context of a corporatist or communitarian national ideology. Whatever the reason, the European state was an economic actor per se, rather than the creator of the institutional conditions for a market economy. Not so in America. The market was supported by legal, rather than political, rules. And even when the federal state began to intervene conspicuously in the economy with the New Deal policies of the 1930s and 1940s, it made sure not to substitute market forces with public actors. In the post-Second World War period, American Keynesianism served the purposes of the military-industrial complex rather than those of a universalistic welfare state.

In Europe, the free market economy never achieved the degree of legitimacy that it enjoyed in America. In order to do so, the market economy needed to become a social economy or an *économie contrôlée*. This explains why European market economy has always comprised an interweaving of private and public ownership, and why the pursuit of private interests has been considered appropriate (by post-Second World War national constitutions) only if coherent with the public interest as defined by the state through its sovereign parliament (as stipulated by the French Fourth Republic constitution of 1946, the Italian Constitution of 1948 or the German Fundamental Law of 1949). There were thus two quite different paths to market-building in democratic countries: the American legal-regulatory one and the European mercantilist one. The path taken by America was congenial to a political system organized around a multiple *separation of powers* and thus with a very weak and quite incoherent central public authority (Fabbrini 1999b). The path taken by Europe's nation-states, by contrast, was congenial to political systems characterized by a *fusion of powers*: that is, systems centred around the parliament and whose decision-making was determined largely by the preferences and resources of the government and its parliamentary majority. Retrospectively, one may say that America's path was one appropriate for a compound polity, while the one followed by Europe's nation-states was appropriate for unified polities.

Thus, just as in the American experience of market-building, in the post-national Europe of the second half of the twentieth century it was the Community judiciary that neutralized state barriers, and thereby made it necessary to fill the void with positive rules on integration issued by the EU's institutions.

In dealing with the discriminatory effects of regulatory barriers to trade, the European Court of Justice has played an active role in *negative* integration. [At the same time] the Court has provided the window of opportunity for the Community to foster *positive* integration through the creation of a new regulatory regime.

(Egan 2001: 108)

One may therefore plausibly argue that the EU has been *governed with judges* (Stone Sweet 2000), as the US continues to be (and was especially in the nineteenth century, when it was simply what has been called ‘a state of judges and parties’; Skowroneck 1982). In sum, the lack of centralized institutions did not impede in either case the building of a market on a continental scale, and whose successful functioning furnished the new political system with the necessary support.

Asymmetries in the social responsibilities of the state

From the point of view of the relation between state and market, therefore, there is no single Western pattern of experience. Although, throughout the West, the state has been given the task of defining the necessary public rules for the economic game, those rules take different forms and have been used for different purposes. This feature has conditioned the very nature of the democratic system. In Europe, democracy has been *statist* in character in the sense that it is based on a reality and ideology of equivalence between the state and public interests, whereas in America democracy has been *social* in character because it left the task of approximating public interests to the interplay of private actors (Tilly 1975; Hartz 1955). These two different patterns of the democratic development of the state traversed the history of the West in the nineteenth century, and continued to do so in the early decades of the twentieth, notwithstanding pressure to turn the democratic state into a *welfare state*. In fact, between the two great world wars of the twentieth century, and in particular under the impact of the economic crisis of 1929, both America and Europe dramatically increased the economic and social responsibilities of the state. In short, on both sides of the Atlantic, the state of civil and political rights expanded to the point that it became the state of economic and social rights (Marshall 1950). Nevertheless, the different paths along which they developed constrained the tendency towards convergence.

Various factors were responsible for the birth of the welfare state. First, the spread of electoral suffrage meant that the Western democracies came to operate in a context of increasing mass participation in the political process. By exercising their voting rights, the working classes were able to transform the harmful effects of wars and crises into demands for the participation and social protection that only the state (obviously) could provide. Second, structural changes in the capitalist market gave rise to oligopolistic economic groups and powerful interest organizations able to control the policy-making process. Pressure was thus applied on the state to reorganize the conditions governing economic competition. Third, once the state had internalized social conflict (by endeavouring to help the less affluent classes or by forestalling potential market turmoil) through social and economic policies, it set about constructing administrative and political apparatuses internal to itself and which would continue to pursue those policies whether or not the circumstances

that had originally justified them still obtained. This was owing not only to the result of the lock-in effects of institutions; it was also due to the fact that public policies, however they may have been devised in the first place, tend to institutionalize a given coalition of social interests, thus preventing its replacement with an alternative coalition.

The result of these processes on both sides of the Atlantic was the institutionalization of highly uncertain boundaries between state and society (Benjamin and Elkin 1985). The welfare state inaugurated a double power structure. On the one hand, it conserved the (formal) power structure centred on the legislature and geared to the approval of general legal acts; on the other, it activated the (less formal) power structure of the interventionist state characterized by arenas and practices for negotiation among the representatives of the main interest groups, the heads of specific administrative agencies and the members of the executive, and geared to the implementation of specific public policies. In other words, the rise of the welfare state determined in all Western democracies (albeit with different institutional implications for the systems of separation or fusion of powers) not only the predominance of the government over the parliament – or of the president over the Congress – which was already apparent before its arrival, but also the displacement of crucial decision-making resources outside the formal legislative circuit.

Of course this process towards an extended social responsibility of the state was unable to erase the distinctive features of specifically American and specifically European experience (Rimlinger 1971). Europe (from the British Labour government of 1945–50 onwards) responded to the social crisis induced by the collapse of the market and wartime social mobilization with a redistributive and *universal* welfare state – that is, one designed to reduce social inequalities through the delivery of social services. America responded to the same crisis by creating an industrial and residual welfare state – that is, one not intended to affect the workings of the market and which therefore provided welfare only for groups excluded from it (Esping-Andersen 1990). In sum, in the course of the twentieth century, on both sides of the Atlantic the state was called upon to remedy the failures of the market. On neither side was there any better means than the state to satisfy the social needs of millions of new voters integrated into national politics by the mass parties and to ensure balanced economic growth. On both sides the state responded positively to these needs. With the end of the Second World War, all the Western countries began a historically unprecedented process of accelerated and general economic growth and increased social well-being sustained by the state through its welfare social policies and Keynesian economic policies. This led to the further expansion of the Western states, a process also driven by the functional adjustment of nation-states to the twin requirements of promoting capitalist accumulation and guaranteeing democratic legitimacy.

Nevertheless, divergence still persisted. The United States maintained its residual welfare state model whereas Europe continued to develop its

universal one, in both its social democratic and corporatist versions (Esping-Andersen 1990). The roots of this divergence were historical and institutional.

America's precociously democratized federal polity has always made it difficult for either capitalists or industrial workers to operate as a unified political force in pursuit of class projects on a national scale. . . . American workers learned to separate their political participation as citizens living in ethnically defined localities from their workplace struggles for better wages and employment conditions.

(Skocpol 1992a: 574)

Moreover, in America social and public expenditure was controlled largely by the states. In sum, America *has* had a proto-welfare state since the second half of the nineteenth century, but its social programmes were either tailored to the need to protect specific groups (Civil War veterans and their families, women and children; Skocpol 1992b) or organized at the local and state level.

Moreover, early male suffrage and ethnic divisions among industrial workers notwithstanding, the American system of horizontal and vertical separation of powers proved to be a formidable constraint on any strategy of national mobilization in favour of universal social protection policies. Moreover, the easy access of interest groups to the courts further segmented social claims for protection, whereas in Europe the need for social protection could be satisfied only by gaining a majority in the elections for the national parliament. Thus, while in Europe the failures of the market were met by (and further triggered) the organization of few, inclusive and hierarchical associations of workers pressing for class-wide (and not industry-wide) public protection, in America the same failures were met by a policy-making process organized around a pluralism of functional interest groups and lobbies. Only with the 'war on poverty' programmes of the 1960s did the federal state start to promote country-wide schemes such as Medicare or Medicaid. But again, in the 1970s and 1980s, with the fiscal difficulties created by the defeat of the Vietnam War, with the dramatic increase in oil prices, with the declaration of inconvertibility between dollar and gold, and with the electoral success of the neo-conservative wing of the Republican Party, the pendulum swung back towards the states. Many federal programmes, especially those targeted on ethnic or social minorities, were transferred to the states, which drastically reformed (or cut) them.

If we consider post-war government revenue as a percentage of GDP as indicative of the state's involvement in society – and if we compare the four main European countries (Great Britain, Germany, France and Italy), with their different welfare state versions of the universal model, against the United States – we find that, regardless of the differences among the European models, the latter grew increasingly distinct from the American model during the period 1960–97 (see Figure 8.1). Moreover, as Figure 8.1 also shows, the effects of the neo-conservative revolution of the 1980s and the

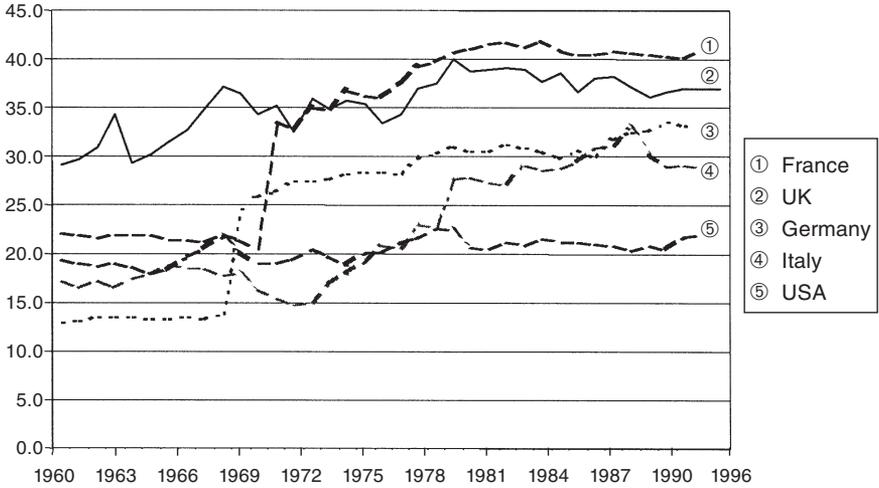


Figure 8.1 Government revenue as a percentage of GDP, 1960–97.

Source: IMF, *Government Finance Statistics Yearbook*, various years; IMF, *International Financial Statistics*, various years; OECD, *National Accounts of OECD Countries*, various years.

Note: For Germany, until 1992 figures cover only the Federal Republic.

first half of the 1990s in both America and Europe did not reduce the differences between them. On the contrary, the European and American welfare states were more distant at the end of the 1990s than they had been at the beginning of the 1960s. Consequently, the EU's social policy has been much more similar to the American pattern than to that of the EU member states. In fact, the EU has a very weak social policy at the Community level and quite strong welfare systems at the nation-state level. This situation does not question the legitimacy of the American federal state, also because social policy is considered by the prevalent political culture of the country to be the business of the states, and not structurally connected to the functioning of the market. It is difficult to assert that the prevalent European political culture will continue to consider social policy as structurally unconnected to the functioning of the market.

Conclusion

In this comparative framework, it seems evident that the EU experience of market-building is much closer to America's than to that of the European nation-state. If it is true, as Elkin (1996: 597) puts it, that from the beginnings of the new American republic it was thought (by Madison and Hamilton as well) that 'commerce was to be the engine for the prosperity . . . valuable in itself and necessary for the stability of the new republic', it is all the more true that the building of a common market was the essential rationale of the

European Community. Like the American federation, the EU has been primarily a 'commercial republic', to use Madison's expression. The EU's foundations reside in the functioning of the market, and the EU's success has been frequently presented (to the larger public) in primarily economic terms. Nevertheless, the ECJ, with the support of a transnational coalition of economic and social élites, has fostered a process of constitutionalization: in fact, a commercial republic requires more than an economic constitution if it is to function properly.

The EU has been a success *so far* because it has been able to generate, or to allow, the development of a positive-sum game between member states and economic and political actors (Gilbert 2003). This situation has given rise to an instrumental view of the EU among the general European public. The EU is considered to be worthwhile in so far as it increases individual and collective opportunities. But the EU has been an élite-driven experiment, among other things because the European publics do not perceive it as a challenge to their national equilibria. Indeed, whenever the EU has sought to increase its supranational scope, there have been hostile reactions in the various member states. Supranationalism has thus become an ambiguous term which enables the EU to meet the needs of actors wanting to bypass nation-state boundaries, but without alarming those actors fearful of the formation of a European federation. Will the EU be able to change from being a commercial republic to being a constitutional republic as promised by the treaty of June 2004? Will the EU be able to create a system of public authority so effective and democratic that it can curb the power of the main economic and financial institutions? As we know, social scientists are reasonably good at describing the past, but they are notoriously bad at predicting the future.

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9 European polity-building

Searching for legitimacy between economic and social Europe

Vincent Della Sala

Introduction

It is not surprising that attempts to provide the European Union with a constitution as an integral step in the polity-building process have generated comparisons and references to the United States (Tagliabue 2003). Constitution-makers and state-builders have borrowed from other experiences throughout history, and commentators have engaged in comparison for just as long. The utility of the comparative approach is that the search for similarity and differences sheds light on possible tensions within an existing or emerging polity. Many of Europe's architects over the past half-century have fallen into the temptation to hold up a vision of a United States of Europe, with more than a veiled reference to the transatlantic democracy. As Europe struggles to take the broad step of drafting a constitution in its polity-building evolution, there may be lessons learned from the American experience of how to balance the various tensions that may arise in the process. The purpose of this chapter is to use the case of the United States to point out a fundamental tension in European integration and the attempt to constitutionalize its version of post-national democracy. In a word, there is an emerging strain between what we can call 'economic' and 'social' Europe. Economic Europe here refers to the requisites of building a continental market in Europe on the basis of economic liberalization as exemplified in the completion of the internal market and the single currency. It is based on giving greater space to markets to make decisions about the allocation of resources and governing social relations such as those between capital and labour. Social Europe is concerned with the post-war mode of governing the economy that, rather than giving primacy to market forms of social regulation, seeks to use instruments such as the state to temper the market and regulate social life.

The debate on European constitutionalism and its basic elements has been fairly conventional. There have been questions about identity and who to allow as rightful citizens of the Union. Should references be made to Judaeo-Christian heritage? Who is going to be allowed to join, when and on what terms? There have been the fairly predictable battles about the relative balance of power between small and large powers in the Union. Nor has the

debate been without a struggle over which balance of power between various institutions can guarantee both efficiency and representativeness. We have seen all of this before. The United States fought a civil war on the question of who had the right to be considered part of the community. The struggles between small and large states were a central concern at the Philadelphia Convention, and American federalism has found endless ways in which to balance these different positions. Finally, the debates over the powers of the Commission at the expense of the Council are not all that different in substance than those over the powers of Congress at the expense of state rights and the presidency. However, what does distinguish the two is the way in which fundamental questions about regulating social and economic life find expression in the polity-building process. Part of the genius of American constitutionalism has been that it has been able to adapt to different approaches to governing the economy. This is largely because there was a fundamental symmetry between American visions of society and the economy. There was, and continues to be, a consensus on basic liberal premises that state intervention should remain limited in economic and social spheres. Moreover, there have been few challenges to the notion that a market-based economy and the imperatives of market-building were wholly consistent with those of state and nation-building.

We will argue that these imperatives clash in the European project and that they trace out a constitutive and constitutional tension within the EU. This is friction not simply over the institutional design to cover such topics as voting rights to be included in a European constitution; but over what constitutes Europe as well. Unlike the American experience, where the arrival of a relatively extensive role for the state in the economy and society with the New Deal came after the completion of an economic union, the EU has had to create a market and redefine the role of the state and politics at the same time. In more precise terms, Europe has moved away from more direct modes of governance to those that are indirect while trying to construct a new polity. This has meant a shift away from what has been called the 'positive' state to the 'regulatory' state. Our discussion will argue that this is part of a process that has seen the emergence of a mode of governing called 'new governance' that is seen as the means to guarantee efficiency or what might be called performance or output legitimacy. However, attempts to generate a broader base of legitimacy, what has been called regime and polity legitimacy, might be in conflict with new governance and its attendant state form, the regulatory state. While performance legitimacy centres primarily on how effective the polity might be in resolving policy problems, regime legitimacy responds to whether it is seen as a just and fair polity, and polity legitimacy is concerned with whether it has political authority as a 'self-standing' political community (Walker 2003). Polity-building, if it is to be a continuous process, must develop beyond effective policy outputs and provide the polity with an intrinsic capacity for legitimate political authority. The American experience is a useful one here in that there was hardly any opposition in its history

between the mechanisms seen to provide input legitimacy – that is, markets and the means to regulate them – and support for the regime and the polity. In the building of the European market, the case for some kind of regulation at a distance might be made; but, as we will see shortly, it is not so clear that this is consistent with the basis for regime and polity legitimacy.

The discussion will be divided into two sections. The first will highlight forms of governing, namely the regulatory state and new governance, that have emerged from the American experience and are increasingly coming to characterize the European Union. The second section will illustrate the tension between economic and social Europe as a possible obstacle to the emergence of more indirect forms of governing, such as those based on governance and the regulatory state. We will see that trying to constitutionalize this tension may provide yet another hurdle for the EU and may prevent it from developing its post-national polity in a way similar to that of the United States.

New governance and the regulatory state

Constitutions are useful instruments to explore questions about the relationship between societal structures, institutions and political integration. They are constituted by, and constitutive of, the structures and processes which shape markets, polities or states, and political communities. Constitutions are the ultimate political moment in that they provide not only a map of the organization of political power, but the basis of legitimate political rule as well. And maps do more than describe a terrain; they also shape the way it will be used by those who traverse it. Successful, enduring constitutions demonstrate flexibility as well as a capacity to capture and shape symmetry between market-, state- and political community-building processes. The American case is particularly instructive in this instance, as American constitutionalism has adapted over the centuries largely because there was harmony between constitutional elements and the objectives of creating a continental market with a limited state. There are a number of constitutional features which facilitated this. First, the Commerce Clause which gives to the Congress the power to act in matters of interstate commerce is an important element that has shaped relations between the federal and state governments. Not only did it serve to enhance federal powers but it was also instrumental in dismantling state barriers to trade; federal regulation meant, for the most part, freer rather than restrictive trade and markets. Second, the American Constitution contains little of the language and mechanisms that might be seen as a counter-balance to market forces. For instance, the 1948 Italian Constitution opens by claiming that the Republic is founded on labour; German and Canadian federalism contain constitutional guarantees for a redistribution of wealth between different constituent parts of the federation. The American constitutional preference for expressions of negative liberty and the space given to a free market economy is generally not found in European (especially continental) economies. Moreover, without constitutional references to

mechanisms of what came to be called in post-war Europe the social market economy, American market and polity-building could evolve without great space given to measures and actions that would include social citizenship claims. This is not to assert that market forces reigned uncontested throughout American history; as Theda Skocpol argues, there is an important history of American social policy (Skocpol 1992). Rather, it is simply to claim that social policy has not been as important an element in the polity-building process as has market-building and the forms of regulating it. Moreover, the jurisdiction over social and welfare state policies is, at best, constitutionally ambiguous. It has fallen largely on the states, especially in recent decades, to chart a path for social policy. In some cases, as that of welfare reform in the mid-1990s, it is state programmes (in this case, Wisconsin was particularly important) that set the course for federal programmes. Yet, the notion of a national social policy has always been limited and filtered through the lens of state rights (Noble 1997; Hacker 2002).

It is this acceptance of markets, rather than states, as one of the primary instruments to regulate social and economic life that allowed for the emergence of what has come to be known as the 'regulatory state' (Majone 1996). This refers to a mode of governing in which an important place is given to decision-making sites that are not dominated by elected representatives. The key structures are regulatory agencies, charged with a great deal of discretionary power, along with the judiciary which also plays a role in this more indirect form of governing. The most important actors are the regulators themselves, policy experts and interest and lobby groups who share an expertise and a need for information in a particular policy question (Majone 1997). The state acts not through the direct forms of ownership of industry, taxing, spending or commanding, but through the establishment of rules and independent agencies to implement them. This form of state assumes, in addition to an almost boundless trust of expertise, a great deal of consensus on the role of markets as the basis for social and economic life, and that the state is to ensure that they operate effectively. The regulatory state does not operate in a normative vacuum, nor is it the result of a simple technical choice of one form of social regulation over another. It is the product of an ordering of collective priorities in policy-making, reflecting a concern with the smooth functioning of markets rather than a redistribution of resources or economic development through state action (Majone 1996).

The regulatory state also is conducive to, and reflects, an approach to governing in which formal constitutional institutions based on elected representation give way to more amorphous, flexible structures that emphasize resolving complex policy questions more than giving voice to traditional notions of representation. This is consistent with a growing concern with governing without government, or governance (Rosenau and Czempiel 1992). Elements of governance arguments may be found in work from a range of fields, from corporate structures and behaviour to international relations to development policies for industrializing societies (UNDP 1997). Not

surprisingly, they have generated a range of interpretations of what constitutes governance. They share an emphasis on ways of creating order and structuring collective action that rest on cooperation, mutual interest and accommodation rather than the authority and command capacity of the state (Stocker 1998).

One strand of the governance literature has gained a great deal of attention in the public policy literature and is important for our discussion of the regulatory state. 'New' governance arguments are about finding modes of regulating social life without a monopoly or dominance of authority and capacity for control resting with the state. They emphasize the processes and networks that are formed to solve problems less than the structures of economic, social and political power. They begin with the assumption that there has been a displacement – largely but not exclusively brought about by globalization – of the political authority that rested with the modern national state (Pierre 2000: 1). The direct intervention of the 'positive state' is seen to be less effective in complex post-industrial societies. Its monopoly is now challenged on a number of fronts: from other levels of formal government, from parts of civil society (especially markets), and by regulatory agencies that may be created or recognized by the state but are not parts of the state. Jon Pierre and B. Guy Peters have spoken of 'moving up', 'moving down' and 'moving out' of governing to represent the challenges to national states by, respectively, transnational forces, subnational authorities and NGOs and other parts of civil society (Pierre and Peters 2000: 83–7).

Many of the new governance arguments, as those for the regulatory state, claim to be apolitical, contending that the recent shift in thinking about governing represents an emphasis on solving policy problems and finding 'efficient' ways to allocate resources. Pierre and Peters illustrate four different governance structures: governance as hierarchy, as markets, as networks and as communities. Relying largely on literature from political economy and public policy, they claim that governing through hierarchies, namely the state, is giving way to other governance structures in response to a series of different pressures. New governance arguments point to a series of elements that have led to a shift away from states to markets and, to a lesser extent, networks. These include the 'crisis' of public finances in most industrialized states in the 1990s, the failure of state intervention to meet expectations, globalization and social change. The resulting blurring of divisions between public and private, state and markets, national and other levels of political institutions is presented simply as an outcome of processes that seem to have a life of their own. New governance proponents argue that the new models of governance are 'better geared to the politics and political economy of the late twentieth century' (Pierre and Peters 2000: 94). What exactly are the politics and political economy being referred to and how can new governance models be more appropriate forms of governing? The new condition is one where social complexity, globalization and the fiscal problems of the state lead to questions about the traditional forms of governance based on the political authority of

the state. In particular, the new forms of governance are better placed to 'work in non-coercive coordination with private capital'. Formal political institutions are consigned to the roles of coordination and 'steering' in the new governance universe, while decisions about the allocation of resources are best left to the other forms of governance.

It is, perhaps, the sovereignty of the state that faces the strongest challenges from new governance arguments. This applies just as much to sovereignty seen with respect to other states as it does to the capacity for autonomous action within its own borders and, related to this, the notion that the state is the supreme legal and legitimate political authority. Governance arguments point to a multiplicity of sites, from corporate boardrooms to international financial markets to local housing cooperatives, outside the reach of the political authority of the state. They emphasize that large parts of regulation can now be carried out by a range of new actors in new sites that do not fit in well with the hierarchical organization of political power that is associated with sovereignty. The formal political institutions that have characterized the modern liberal democratic state are ill-equipped to deal with social regulation where political authority is so fragmented it often seems non-existent. However, the structures of the regulatory state may provide greater symmetry. It too is based on networks that are formed around policy expertise and is focused on finding solutions to problems rather than addressing questions about redistribution and equity. Like new governance, the regulatory state assumes a great deal of consensus that there is no alternative to market mechanisms to regulate social and economic life.

It is not surprising that 'governance', and more specifically new governance, arguments have become as central to debates about the nature and evolution of the European polity as have those about the emergence of the European 'regulatory' state (Jachtenfuchs 2001). The European Union escapes easy classification; and, as many contributions to this volume argue, perhaps the American comparison, whether it is to the 'compound republic' or federalism, may provide some useful insight into modes of governing in post-national democracy. The shift to indirect forms of governing, with the regulatory state and new governance, may also provide the basis for a useful comparison. The emerging polity does not have the capacity for command and control that characterized the hierarchical organization of political power in the modern European state. Its fundamental characteristics are the diffusion of decision-making powers, amorphous boundaries between different levels of government and between the public and the private sectors, an emphasis on policy-making effectiveness and on policy expertise (Everson 2002). More importantly, polity-building has been generated through rules aimed at building and consolidating a continent-wide market. The use of the concept of governance in Europe is understandable when the aim of establishing a political union with a clear locus of power is not shared by all. However, without a clear consensus that addresses questions of who has power, where and how – the very essence of a political union – any attempt at trying to find a

constitutional settlement becomes problematic. The notion of governance has been at the heart of attempts to reform European Union institutions for the last decade. Indeed, the Commission has produced a white paper on governance that is supposed to be the blueprint for building and governing the emerging polity. The Commission's definition claims that governance includes 'the rules, processes and behaviour that affect the way in which powers are exercised at European [*sic*] level, particularly as regards accountability, clarity, transparency, coherence, efficiency and effectiveness' (Commission 2000: 4). This form of governing does not envision power organized in the centralized, hierarchical structure that characterized the modern state. Rather, it sees something along the lines of the regulatory state, emphasizing problem-solving and policy expertise centred on diffused networks with political authority guiding and steering rather than commanding. It welcomes and entrenches the regulatory state.

Economic and social Europe: searching for legitimacy

As mentioned earlier, the legitimacy of the regulatory state as a mechanism not only for policy legitimacy but also for regime and polity legitimacy depends on a consensus on collective goals and priorities centred on market mechanisms as the principal mode for regulating social life. Indeed, proponents of the regulatory state argument indicate that dissatisfaction in Europe with the welfare state and the post-war mode of governing economic life began to manifest itself in the latter part of the twentieth century. However, despite two decades of changes that have moved in this direction, it might not be entirely clear whether such a consensus exists around a new role for the state.

Debate about the extent and nature of changes to forms of governing the economy in Europe have raged in the last decade as a reaction to both global economic pressures and European integration (Crouch and Streeck 1997; Berger and Dore 1996; Crouch 2000). Attention has centred on a number of key issues that explore whether there is still room for national diversity in managing the economy, or whether there is a process of convergence towards models that have been called liberal market economies (Hall and Soskice 2001). The proponents of the national diversity position contend that economic and monetary union (and economic globalization more generally) does not mean that states have given up their ability to govern their economies in the face of irreversible pressures for market liberalization. Indeed, the Europeanization of the economy is a way of preserving the role of the state and distinct national approaches to governing the economy (Fligstein and Merand 2002; Zysman 1996). On the other hand, proponents of the convergence thesis claim that, among other things, economic and monetary union has accelerated the dynamics of convergence in policy inputs and outcomes (Gill 1998). The arguments in the European case are that it is essentially an extension of the process of economic globalization; that is, it is a project of economic liberalization. This implies that it locks in states to modes

of governing that reduce direct state intervention and disable the 'positive' state. Moreover, it throws into question the continued viability of the European approach to regulating social life that defined and shaped European polities in the post-war period.

There is little dispute in the literature that changes have occurred; questions abound as to what exactly has triggered them and what they may mean. For instance, Giandomenico Majone argues that a political and social transformation had taken place in Europe in the latter part of the twentieth century and this led to a reordering of priorities (Majone 1996). The result was that the positive state, including many of its social welfare components, could no longer count on a broad political consensus; and political movements that sought its transformation were successful throughout Europe. However, this suggests that the effect of market-building developments, such as the Single European Act and later European Monetary Union, have been largely benign in shaping policy priorities. The construction of a European market has necessitated the creation of more indirect forms of governing the economy, relying less on the command and control structures of the state, and more on the diffuse, amorphous structures and mechanisms of new governance and the regulatory state. Some have argued that the transformation to modes of governing the economy in Europe was constructed on the basis of a discourse of economic imperatives in an age of global capitalism, and were not the natural result of some shift in social preferences or perceived failure of the positive state (Rosamond 2002).

The causal sequence is less important here than the fact that both sides in the debate would agree that the result has been a more indirect form of governing, both within national states and certainly at the EU level. Market-building has featured a less interventionist state, and the convergence requirements for entry into the single currency and the Stability and Growth Pact have ensured that government at all levels will have a limited range of instruments to affect economic policy (Quaglia 2003). The last two decades have seen privatization, deregulation, liberalization of key services and an emphasis on efficiency rather than redistribution or economic stability. Diversity may continue to characterize approaches to governing among the EU member states, but they do share a number of similar policies. Moreover, at the European level, they are increasingly engaged in approaches to governing that blur the boundaries between public and private, rely on networks, emphasize best practice and emulation, and look to the role of political institutions in regulation more in terms of guiding and steering than of commanding. Finally, Europe may not have become a liberal market economy, but the basic features of macroeconomic policy in the EU are grounded on its essential features. The EU is committed to sound money, control of public finances, and price stability. In order to achieve these objectives, many parts of economic decision-making have been disembedded from the social and political spheres and entrusted to independent agencies or bodies such as the European Central Bank.

Market-building has been an ideal mechanism for polity-building by stealth. It has, operating under the radar, put in place mechanisms and structures that have led to a need for continent-wide rules, institutions and decision-making processes (Egan 2001). The construction of a European market was kept largely separate from difficult political decisions about what kind of political authority would govern the European space and about what priority would be given to collective objectives such as redistribution of resources. This has helped develop a form of regulatory state that has come to challenge the dominant forms of governing that emerged in post-war Europe (Harcourt and Radaelli 1999). However, unlike the American case, where this form of regulation was based on a consensus on the role of markets in the organization of social life, it is not so evident that the need to create and sustain a continental market will not run into resistance based on different historical and social trajectories. It has raised the question of whether regime and polity legitimacy in the European Union may develop from market-building and economic liberalization. The objective of finding such a basis for legitimate political authority was at the heart of the discussion of the European social model that emerged in the 1990s.

The European social model

Europeans may have been surprised to learn in the 1990s that one of the elements that defined and held them together was a particular form of social regulation (Wincott 2003). The post-war settlement that had spawned three decades of literature that tried to understand national diversity such as the Swedish or German model was now responsible for a distinctly European approach to governing the economy. In the 1993 white paper on growth, competitiveness and employment, the Commission extolled the virtues of the post-war attempt to temper markets while also pointing out how this might be a cause for endemic high unemployment rates. With growing intensity, the vision of a distinctive European approach to regulating social relations came to dominate political and policy discourse. It comes in an area, social policy, in which the Commission, and the EU in general, has limited jurisdiction. It remains one in which national structures, legacies, policies and approaches remain paramount. Yet, the notion that there was a European model not only became central to policy discourse but also entered into the polity-building project.

Before addressing why the European social model (ESM) enters into the European lexicon, it is useful to highlight some of its central features. First, European states shared a concern with ensuring that individuals were not left to their own devices in dealing with the consequences of a market economy. The ESM is consistent with what has been identified as a coordinated market economy – that is, social regulation that tries to distinguish between a market economy and market society (Trubek and Mosher 2001). Second, the ESM implied an approach to industrial relations that favoured consensus and

working in concert rather than the competition and risk that characterized labour markets in the United States. Third, the ESM was based on a particular macroeconomic regime that did not necessarily accept price stability and fiscal discipline as ends in themselves. Rather, objectives that characterized the post-war settlement and were more consistent with traditional Keynesianism, such as full employment and demand management, were part of the governing of the economy among all the member states at some point in the second half of the twentieth century. This was complemented by a labour regime that relied on a welfare state that decommodified large areas of social policy in an attempt to collectivize risk. This form of social regulation contributed to polity legitimacy found in many European states not simply because of the social and economic outputs it provided. It also reflected a consensus on collective priorities such as equity, economic stability, collectivized risk and redistribution (Hollingsworth and Boyer 1999).

It is no coincidence that discussion about an ESM became a central feature of discussion about European governance at roughly the same time as the economic liberalization projects of the single market and currency were becoming the basis of policy-making within member states. What had previously been an area of almost exclusive national jurisdiction and therefore diversity, that is, social policy, became seen as an area that provided a thread that bound all Europeans (Grahl and Teague 1997). There was an attempt, in the wake of the Single European Act, to make Europe more than just an economic project. It was in the idea of a particular basis of organizing social life that supposedly made Europe distinct and could provide a form not only of what has been described as policy legitimacy but regime and polity legitimacy as well. There is nothing unique in looking to social policy as the means to generate a sense of belonging and attachment to a polity; for instance, Canada's public health-care system is an important source of national identity, especially as a point of comparison with its omnipresent neighbour to the south. However, what might be different about the ESM is that the discussion of the model seems to grow in intensity in relation to the increasing pressures on its preservation and transformations may be calling its very nature into question. More importantly, it is an attempt to generate consensus around the European polity in an area in which the Union has few legal powers and which is still identified primarily with national states. It is still to national capitals that Europeans look to resolve employment questions, pay their pensions and ensure their health.

The need for an ESM to create a sense of polity legitimacy stems also from the consequences of trying to achieve the convergence criteria in the Maastricht Treaty and to respect the terms of the Stability and Growth Pact. The Union became the scapegoat for unpopular policies aimed at bringing public finances under control and creating competitive conditions in a more open global economy. The European Union found itself faced with an unusual situation in the 1990s. For most of its first forty years, it rarely had to doubt its capacity to generate policy legitimacy. The post-war economic reconstruction

and economic miracle was attributed, in no small part, to the attempts to free up trade between member states. However, the commitments made to achieve entry into the single currency were certain to bring short-term (and possibly longer) pain with perhaps no guarantee of diffused gain. The political objectives that may have been achieved with a single currency might not have been enough to offset the perception that the Euro was responsible for cuts to social programmes. Policy legitimacy could no longer be taken for granted when national leaders who once lauded European commitments now conveniently blamed them as responsible for unpopular policy choices. Having the EU begin to assume a prominent role in a discussion about how to organize social life, then, was essential to balance the consequences of exposing larger parts of society to higher levels of competition and individualized risk.

There is a possible tension, then, between a community-building process that is driven by economic imperatives and dynamics centred on the creation of a competitive market economy and the need to create polity legitimacy around a series of policy areas that have been largely within the purview of national states. Moreover, trying to create a sense of attachment around a social model which itself has been transformed seems even more arduous. It is a tension that has been one of the challenges in Europe's post-national constitutionalism (Habermas 2001). The challenge that Europe faces is that it is trying to create a political community on the back of a liberal market economy with an attendant form of regulatory state with few command and control features and powers. However, unlike the United States, where attempts to regulate the consequences of the market were established after the market had been created, the creation of the market has to contend with welfare states that have been in place for at least half a century and have been the basis for policy, regime and polity legitimacy of national states. These tensions have come to a head not only with the creation of the Euro and its attendant institutions, such as an independent European Central Bank, but also in recent attempts to provide Europe with a formal constitutional structure.

The friction between community-building and the central place given to market-building in European integration has spilled into the constitutional process in both direct and indirect ways. Indirectly, a dispute arose between, on the one hand, the European Commission and some of the smaller states and, on the other, France and Germany, at the same time as member states were considering a draft constitution in the second half of 2003. France and Germany, with budget deficits above 3 per cent of GDP for three consecutive years, had breached the terms of the Stability and Growth Pact. The decision by the economic and finance ministers on 28 November 2003 not to sanction the two largest members of the Union confirmed the fears of some of the smaller states about a trend towards increasing power by larger members (Parker 2003). This helped to harden divisions at the Brussels summit in mid-December 2003 when agreement could not be reached on the draft constitution. The issue that sunk the summit was how to divide powers between smaller and larger member states.

More directly, the draft constitution contained many of the contradictions of economic and social Europe (European Convention 2003). For instance, Article I-3 of the draft constitution provides a list of the Union's objectives, including social cohesion, solidarity, a single market with free and undistorted competition, a social market economy that is also highly competitive, and the pursuit of social justice and progress. However, later, in Article II-29, the draft states that the primary objective of the European Central Bank, whose independence is affirmed, is price stability. The European Central Bank, in its comments on the draft constitution, complained that the explicit reference to price stability and non-inflationary growth was not included in Article I-3 as one of the Union's objectives (European Commission 2003). It may not be listed as one of the Union's objectives, but the fact that one of the principal institutions has a mandate to promote price stability (there is nothing similar found, for example, for full employment or income redistribution) reveals that economic Europe does have a prominent place in the draft. The draft also incorporates the 'Charter of the Fundamental Rights of the Union', which lists basic individual freedoms. In the sections on equality and solidarity, no mention is made of any right that could involve a redistribution of wealth in resources. The references to gender, generational, racial and religious equality are a positive step; but it is interesting that it is largely silent on socio-economic rights. It is in the section that deals with the Union's internal policies, especially the internal market, that the stamp of economic Europe is most clear. It is perhaps one of the first instances we have of a written constitution enshrining economic objectives such as liberalized labour markets (Article III-19), and it follows a number of examples of constitutional amendments throughout the industrialized world that limited government deficits (Article III-76). Finally, the sections dealing with employment and social policy (Article III-97 to Article III-115) enshrine many of the elements of new governance. They accept that the command and control of formal political authority is of limited capacity. They emphasize the role of networks created with social partners and other levels of government, and that the role of the Union is to facilitate the exchange of information and creation of policy communities, establish best practices, and set broad objectives without powers to sanction or enforce decisions. Enshrined in the draft constitution was what is known as the 'open method of coordination', whose very name captures the essence of governance. This is a form of governing in which the essential features of political power, that is, the capacity to sanction and enforce compliance, are absent. It relies on policy expertise and communities and seeks to define issues in technical rather than political terms.

Conclusion

The European Union is at a crossroad because, unlike the United States, it has avoided having to choose between the imperatives of market-building and the requisites of polity and regime legitimacy (Stephens 2004). The process of

drafting the constitution did not escape the tension between ‘economic’ Europe, with its attendant regulatory state and emphasis on the indirect forms of governing, and ‘social’ Europe, which emphasizes a more ‘positive’ role for the state. The willingness to abandon the terms of the Stability and Growth Pact may be based, as proponents of the move suggest, on the view that they are too rigid to deal with cyclical constraints. However, it also reflects the fact that many European governments have found it difficult to abandon the structural features of the social, positive state that was created in the post-war period. Despite all the fanfare around what is known as the Lisbon process (a reference to the 2000 summit in the Portuguese capital which set out the objective of making Europe the most competitive economy in the world by 2010 through liberalization), governments have stalled in taking the next step in the market-building exercise after the creation of the single market and currency. Governments of both the left and the right have been torn between the discourses and policies of market building and liberalization on the one side, and the inability to create regime and polity legitimacy on the back of these objectives.

Creating the United States of Europe requires more than establishing a single market, supranational institutions and a constitution. There also needs to be symmetry between market-building, polity-building and forms of governing society. This is manifested in the United States of America, where the creation of a continental market reflected broader collective objectives and the capacities of a regulatory state. The European polity-building project is constrained by the institutions, ideas and interests that have been constructed over the last fifty years in the member states. While it may prove easy to change the demands on governing by creating a continental market, it is much harder to change the basis of governing. European polity-building, then, faces great challenges in establishing the same diffused acceptance of economic imperatives for social regulation and legitimate political authority. Entrenching indirect forms of governing such as those consistent with the new governance and the regulatory state presupposes a widespread rejection of the positive state and a willingness to accept market mechanisms to regulate social life. This is hardly a foregone conclusion in Europe. The polity legitimacy that is the objective of a European constitution and has proven elusive is not based on a democratic deficit understood in institutional or procedural terms. It also reflects a lack of symmetry between economic and social Europe.

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10 Is social capitalism exportable?

Considerations from the EU enlargement

Donald Sassoon

Introduction

In the course of the next decade the member states of the European Union will confront a formidable challenge: the unprecedented opportunity to unify the eastern and western parts of a continent devastated, between 1914 and 1945, by a cataclysmic ‘civil war’ and divided, between 1945 and 1989, by the Cold War. The division between ‘Eastern’ and ‘Western’ Europe, however, had preceded these events by several centuries. In the Eastern part, serfdom and absolute rule prevailed for a more protracted epoch than in the West. Later this area was under the sway of authoritarian regimes and oppressive forms of socialism. In the West a complex entwining of economic, political and cultural patterns resulted, first, in the development of the Renaissance, the Enlightenment and political liberalism and, later, the concurrent rise of capitalism and social democracy under the aegis and protection of nation-states. At the beginning of the third millennium the limitations of these European nation-states – in both East and West – are manifest. Nevertheless, obituaries are premature. Nation-states are as popular as ever.

Within them the great gains achieved by social democracy and social Christian values after 1945 – the commitment to full employment and the welfare state – have been eroded. It has become increasingly recognized that key issues of growth, employment, monetary stability and labour market regulation require a collective transnational approach. The EU is by far the most important institution available for this purpose. Like the nation-state, it was born as a ‘capitalist’ club and, consequently, ostracized by most social democrats. Forty-five years after Messina, there is far more hostility and suspicion from the right – above all in Britain – than from the left. The future shape of Europe, however, is far from predetermined. Those on the left have to consider what institutional arrangement will provide the best opportunity for the development of social democratic politics.

The nation-state is still the most relevant unit for the development and implementation of policies aimed at greater social justice, a more equal distribution of opportunities, an efficient health-care system and a high quality education system. However, national macroeconomic management can no longer effectively ensure that separate European states are able to

achieve full employment, growth, a healthy balance of payments and price stability. Even social democrats, once so committed to national roads to socialism, cannot ignore these variables. They impinge upon socialist parties whenever they are in power.

The German SPD-led government, so proud of *Modell Deutschland*, was able to withstand the first oil shock, in 1973, but not the second, in 1979. In 1981–2 German GNP fell, the balance of payments deficit became excessive, and monetary policy was linked even more to US interest rates. Helmut Schmidt recognized that Germany was as interdependent as everyone else. In the 1970s, the oldest and most admired social democracy in the world, that of Sweden, was forced to abandon its highly prized solidaristic wages policy. By the end of the 1980s the Swedish model itself was widely regarded as defunct as unemployment climbed to levels unimaginable a few years previously. The social democrats grasped the European nettle and Sweden joined the European Union. In France in 1981–2 the attempt of the socialist government to reflate the economy while others were deflating made the resulting balance of payments problems unsustainable.

Other policies, besides macroeconomic management, require supra- or transnational coordination: energy, the environment, security and defence, cross-national transport, competition and regulation. Much of this is widely accepted by European social democrats and reformers, who are increasingly united in their determination to press for greater European integration. The European objectives of most neo-liberals have been achieved: there is a single market for goods and services, most barriers to intra-European trade have been removed, the degree of regulation has been considerably harmonized. Consequently, some claim, the time has come to slow down or freeze the tempo of integration.

This chapter starts from two premises. The first is that what is at stake is an environment for further development of the reformist process, while defending existing achievements. It implies that there is nothing ultimate and conclusive, no miraculous millenarian end-state. The second premise is that the past successes of reformist politics have depended on the extent to which their values were absorbed and accepted by their conservative opponents – whether out of conviction or opportunism or simply because compelled by the prevailing climate of opinion. The successes of the European model in the post-war period – what was called, appropriately, the ‘social democratic consensus’ – required not only favourable international economic conditions – and particularly economic growth – but also the collaboration of ‘the other side’. Left parties and their conservative opponents established a common political framework, that is, a de facto constitutional settlement, within which they contested elections. Successful nation-states rest on majorities and a consensus far larger than any government can have. They are grounded on a trans-party consensus. An authentic constitutional settlement – if it is to survive – is one which is accepted by a large majority.

The development of the EU as a true ‘union of nations’ must, inevitably, proceed on a similar basis if the edifice is to be sturdy enough to resist

ephemeral political changes. A Europe in which progress thrives is one in which the fundamental organizing rules, its institutions and legal framework, facilitate the development of a 'social' Europe. It is one in which full employment can become, once again, an attainable goal, one in which employees' organizations are regarded as legitimate as those of employers and not as a conspiracy against economic growth, one in which a significant percentage of the population is not excluded from material prosperity. This can only be the result of some form of cooperation with Christian democrats, liberals with a social conscience (e.g., the British, Swedish or German liberals), and those conservatives committed to social cohesion (such as many supporters of Gaullism in France and the remaining 'one-nation' Tories in the UK).

Problems facing the project of integration

It has become commonplace to talk of a crisis of European integration. Action has not followed from words. A community whose great boast is to have brought prosperity to Europe still faces nearly twenty million unemployed and has little idea what to do to put them back to work. This massive joblessness has multiplied the pressure towards an expansion in public expenditure. The Stability and Growth Pact has been called into question. A community exulting in its contribution to the maintenance of peace on the continent found itself paralysed when faced with the war in Bosnia. Uncertainty and self-doubt prevail. The Maastricht Treaty found little resonance in the European electorates. The Danes had to be bamboozled into two referendums before acceding to it. Only a fistful of votes ensured France's assent, thus saving the treaty – and the country's political establishment – from ignominy. The vote in favour of joining the EU in Sweden and Finland was hardly overwhelming – 52.3 per cent and 56.9 per cent respectively. With some economic justification, the Germans, and not just the Bundesbank, were deeply worried about renouncing the Deutschmark. For different reasons the British are equally worried about giving up the pound. The Irish have voted against Nice. How many more referendums will be required before they understand which way they are supposed to vote? The rise of xenophobia in the EU, associating immigrants with rising criminality, seems unstoppable.

Among Europeans there is little European consciousness. The construction of Europe is seen as dominated by complicated economic considerations: 'West European governments seem mired in technocratic, soulless discussions' (Moïsi and Mertes 1995; Noël 1995). Some declare themselves to be 'in favour of Europe' out of fear of being left outside. Others are against it because they dread losing the little control they have over their own political system or because they are suspicious of becoming submerged in an indistinct cultural homogeneity. The European electorate is increasingly disenchanted with Europe. At each election for the European Parliament fewer vote: 62 per cent in 1979, 61 per cent in 1984, 58 per cent in 1989 and only 56.5 per cent in 1994. In 1999 the overall average turnout was 49.8 per cent, with national

turnouts ranging from 91 per cent in Belgium (where voting is obligatory) to 24 per cent in the UK, fewer than those who voted in the television programme *Big Brother*. In 2004 it was even less; the low turnout in the new entrants pushed the overall average down to 45.5 per cent. It should be added, however, that there is a systematic diminution in electoral participation throughout Europe and North America. Many of those who vote do so to punish their national governments because there are no clearly defined European issues and few people know what their representatives can do. In any case MEPs have too often allowed themselves to be bullied by their national parties and have yet to learn to think and behave as members of transnational parties (Moisi and Mertes 1995: 123).

Yet the European Union is unquestionably the central institution of the new European architecture. 'The Six' became fifteen and now are twenty-five. The Union includes the whole of Western Europe (except for Norway, Iceland and Switzerland, absent by self-exclusion), all the Eastern and Central European countries (apart from Bulgaria and Romania) and the Mediterranean islands of Cyprus and Malta. There is not a major political force anywhere in the EU openly campaigning to withdraw. The internal market in goods, capital and services is almost accomplished. The resources earmarked for the less favoured areas of the Union, the Structural Funds, have been expanded. There are no other extant projects which can be an alternative to the EU. Those outside in Western Europe are small states whose 'sovereignty' will touchingly be preserved while they will be forced to comply with EU decisions upon which they will have no say. More generally there is a near-universal recognition (at least outside the UK) that many of the problems facing the nation-state require a supranational approach. Even among the Europhobes, few talk openly of withdrawal. In sum, not all is gloom. For instance, so far the Euro has been a resounding success. But, of course, the real test will be the result of the enlargement to the East and to the South (Nugent 1995).

Thus, while it may be accurate to talk about crisis, it is far from terminal. The real players are still the governments. Historically speaking, the key moments in the construction of an integrated Europe, 'an ever closer union', have always been the result of the interaction of independent sovereign states, drumming out a compromise on the basis of their self-interest and entrenching it into a treaty, that is an agreement between states. Thus, for the second and third pillars, dealing, respectively, with the Common Foreign and Security Policy and justice and home affairs, are covered largely through an intergovernmental decision-making procedure system, unlike the first pillar, which is based on Community procedures established by the treaties and subject to the jurisdiction of the European Court of Justice.

More or less integration?

The major problems confronting the member countries of the EU – including unemployment, democratic deficit and security – are more likely to be dealt

with effectively by further political integration than by merely consolidating the status quo. Until not so long ago, at least in Britain, such assumption has been held by a relatively small, though influential, band of Euro-enthusiasts. Conscious of being in a minority, they have tended either to embrace more or less uncritically any move towards further political integration or to disguise their ultimate federalist objectives by defending political integration in purely economic or national terms. The British Conservative Party, except for the period when it was led by Edward Heath, so far the only firmly pro-European prime minister the UK has had, has maintained a minimalist and reactive approach towards Europe. It has approved of 'passive' economic integration (i.e., the removal of tariffs, the formation of a single market), which is consistent with its neo-liberal principles, but opted out of or opposed clauses that are not so consistent, such as the Social Protocol of Maastricht. The so-called conservative 'Euro-sceptics' (a characteristically British euphemism for Europhobe) advocate a relatively unregulated free trading area.

This is the royal road to Euro-disaster. A largely unregulated free trading area with a few abstract rules would lead to a massive widening of regional differentials within the Union. A large single market without some form of overall political direction may 'work' in the neo-liberal sense provided there is considerable homogeneity among the countries participating. This homogeneity does not exist. We are still far from true convergence. Profound differences will remain in unemployment and growth rates, GDP per head, and productivity. It is difficult to imagine that elected national governments could possibly sit back while their countries turn out to be at the losing end of such minimalist integration, particularly if there is no prospect of the situation being improved by initiatives from the Union. The pressures on these governments to withdraw into some form of nationalist protectionism would become unstoppable.

Moreover, minimalist Europe offers little hope to the countries of Eastern and Central Europe. They would, in practice, be asked to remain defenceless in the face of formidable competition from the West and to subject themselves to the kind of shock therapy which has led to the downfall of so many post-communist governing coalitions. Minimalist Europe based on negative integration (i.e., removing barriers to integration) may have been appropriate for the original six formed at a time when Europe as a whole was on the way towards a spectacular expansion in term of growth rates and general prosperity. By the time the six had become twelve (after three rounds of enlargement) the degree of interdependence linking the European countries had grown immensely while confidence in the possibility of constant growth and full employment had considerably diminished. The previous enlargements brought in relatively rich countries. The last and any further enlargements (assuming Norway, Iceland and Switzerland stay out) brought and will bring in countries close to or poorer than the lowest ranking members. Such a process cannot be envisaged without a drastic revision of the existing architecture of the European Union.

The guiding tenet should be that of *la politique d'abord*. Economics has been for too long the key driving force of the Union: originally a Steel and Coal Community, then a Common Market, then an Economic Community leading to the development of a Single Market, and finally the prospect of Economic and Monetary Union (EMU). Politics has taken second place. Keen Europeanists have for too long held on to the idea that economic integration would, eventually, spill over into political integration (the so-called functionalist position). Those less than keen have hoped that it was possible to integrate economically but not politically. What this suggests is not simply that we should reverse the order of priorities and declare that political union leads to economic union, but that we should devise a suitable political framework for further economic and social progress.

Nothing epitomizes more clearly the economic inclination of the Maastricht Treaty than the sharp contrast between EMU and EPU (European Political Union). The section of the treaty dealing with EMU was a meticulous and tightly constructed document equipped with clear goals, setting out well-defined objectives and the institutional mechanism for meeting them. The EPU treaty was a timid and equivocal document imbued with good intentions: 'harmonious and balanced development of economic activities', 'non-inflationary growth respecting the environment', 'raising standards of living', 'the implementation of a common foreign policy', 'strengthening the protection of the rights and interests of the nationals of the Member States'; the more it moved towards a social democratic agenda, the vaguer EPU became: the Union would develop a policy towards the environment, and contribute to a high level of health protection, to 'education and training of high quality' and 'to the flowering of the cultures of the Member States', and so on.

As usual the political and social dimensions were tacked on at the end as some kind of afterthought. The member states, through their executive, would decide on some momentous economic steps, then, as if realizing that outside the proverbial smoke-filled rooms there were real women and men, citizens on whose behalf the decision-makers supposedly acted, a few bones called 'democratic accountability' and 'social dimension' would be thrown in to make the overall economic package more alluring: first the direct election of the European Parliament, then a modest extension of its powers, later a social protocol, with, in addition, a few pacifying endorsements of citizenship.

What is at stake is not the construction of a European centralized super-state. This is not on the agenda – and has never been. What is in contention is the shape of an evolving community of nations. The dividing line is between those who will defend – come what may – the principle of intergovernmentalism as the guiding force in the European community and those for whom political integration and the pooling of sovereignty is the surest way to build a democratic union of citizens. For the former, sovereignty is a zero-sum game. Whatever is lost by the nation-state is gained by others – the Commission, the Germans, the French. For the latter, the loss of national sovereignty is a gain as long as one pools resources, power and rights. That one

can, and often does, benefit from a de facto loss of sovereignty is hardly a novel discovery. The key issue is the establishment of a framework for the exercise of collective sovereignty. It has to be seen whether the constitutional treaty of June 2004 is a step in this direction.

The challenges of the EU enlargement

The Maastricht Treaty resolutely reaffirmed the principle of the *acquis communautaire* as the fundamental procedure for the acceptance of new members (Art. B and Art. C). This may be referred to as the ‘classical’ method (Preston 1995). It asserts, once again, the tenet that every new member must accept all that has been achieved so far, lock, stock and barrel: the treaties, the entire corpus of legislation so far adopted, the case law of the European Court of Justice, all resolutions approved and all international agreements. It has been estimated that these amount to 90,000 pages of official texts. It means that, as the Community deepens and expands, the conditions facing new members multiply. It also means that existing members face challenges they may not be equipped for or willing to countenance.

This is why, in practice, the *acquis* has become more a general declaration of intent than an inflexible principle. This is not a novel position. In 1975 the Tindemans report envisaged a two-speed Europe to enable economic integration to proceed even if not all participants were ready for it (Chaltier 1995). Since then prospective members have been asked to meet certain conditions before entry, but are then allowed a considerable paraphernalia of temporary derogations and transitional arrangements. The crucial point is that everyone should agree on the common goals. In other words, countries are accepted once they have demonstrated that they will be able to reach the *acquis*. The *acquis* itself is no longer a pre-entry condition. It is an ever-changing and perhaps ever-receding goal which tends to shift the burden of adjustment borne by the applicant, especially those whose standards are lower than those existing in the EU.

The entry of Austria, Sweden and Finland in 1995 was the last relatively ‘painless’ enlargement. These new members had successful market economies with a well-entrenched system of social protection and higher health, environmental protection and safety standards than the EU minimum. They were members of EFTA and, as such, participants in a multiplicity of established arrangements with the EU. All of them had reached the ‘post-industrial’ stage, unlike even the most developed of the countries of Eastern and Central Europe. In spite of their small population, Austria, Sweden and Finland actually *raised* average GDP per capita in the EU, albeit by only 1 per cent. Austria, Sweden and Finland are net contributors to the EU budget. The recent and future members will be recipients.

However, even this painless enlargement did not meet the *acquis* from the start. Sweden and Finland brought within the EU Arctic and sub-Arctic remote regions characterized by exceptionally low population density. New

density criteria for EU programmes had to be introduced. The right of unrestricted passage by HGVs through EU members was shelved in the case of Austria until 2004, in recognition of the fact that the country was at a crossroad between Northern and Southern Europe and was concerned for the environmental protection of her narrow Alpine valleys and her thriving tourist industry. Austria and Finland obtained a transition period before accepting the full CAP *acquis*.

All these are minor adjustments compared to those which the EU will have to impose on recent and future entrants. Some, like Turkey, are culturally and socially backward in the sense that they have low literacy rates, a vast rural population, conspicuous subordination of women, and a poor human rights record. Others, like the countries of Eastern and Central Europe, are not so distant from established EU members: they have high literacy rates, well-entrenched education systems, good universities, a strong commitment to democratic values and greater gender equality in employment than most EU countries (Rose and Haerpfer 1995: 445). Some of them, in spite of their choice to join the Union for obvious geopolitical reasons, are recoiling at the prospect of the burdens they will have to face. Hungary is already asking to be allowed to opt out of the CAP as well as the free movement of capital, services and labour. Or take the bleak prospect for Polish farmers. Should Polish agriculture reach the productivity level of French farmers (not the EU highest), between 3.1 million and 3.6 million Polish peasants (out of a total of 5.4 million) would have to leave the agricultural labour force and jobs would have to be found for them.

The more formidable the conditions for pre-entry and the more onerous the adjustments imposed on new entrants, the greater is the likelihood that a lasting disaffection will be created among significant segments of their electorates. The seeds for systematic anti-Europeanism, thus implanted, will blossom as, inevitably, national politicians will find it politically rewarding to blame the EU and the taxing conditions which existing wealthy member countries will have imposed. If the EU were a cohesive and homogeneous bloc, a compact of homogeneous countries which had all subjected themselves to strong internal discipline, then the rigid adherence to the principle of the *acquis* might be justified in terms of consistency. This, however, is far from the case, particularly when one bears in mind the reluctance of some EU members to join the single currency, the Schengen agreement, and the British opt-out, since abandoned, over the Protocol on Social Policy of the Maastricht Treaty.

The real *acquis*, then, is something less than what the name suggests. It is not what has been acquired so far by the EU members, but a more limited nucleus of rules and decisions. It is because everyone is perfectly conscious of this that there has been a proliferation of terms and proposals to designate a union as an association whose members are not all subject to the same duties and obligations. These terms are varied: a Europe *à la carte*, a flexible Europe, a hard core Europe, a two-speed Europe, a multi-speed Europe and so on.

Some of these terms are – as we shall see – tautological but, taken together, they point to a version of variable geometry (where certain states may create different integrative arrangements on different policy issues).

Differentiated integration strategies

À la carte Europe

This is the minimalist position favoured by Britain's Euro-sceptics. At first sight this position appears to be the most reasonable. Against the federalist insistence that we all do the same thing, *à la carte* Europe gives each country the freedom to join in the activities it wishes and refrain from joining if it thinks it best. This position assumes that the interdependence which has been created in the last twenty or thirty years can be conveniently waved away. However, while one may be able to opt out of policies, one cannot opt out of interdependence. The circumstances of those who do not join are as much affected as those who do join. The existence of a single currency affects those who do not join too.

The hard-core concept

In this approach, the core would advance boldly towards further integration while the group of peripheral countries would be expected to catch up later. We witnessed this approach in the Iraqi crisis and in the subsequent decision of the United Kingdom, France and Germany to create a common military unit for rapid intervention. Of course, the single currency area has also been created on this basis. The difference between this and other forms of variable geometry is that there is a clear differentiation between an inner and an outer circle. Needless to say, this approach continues to cause alarm in those countries excluded from the hard core.

The hard core is far less disruptive than the *à la carte* option, nevertheless it does not actually add anything new to the kind of Europe resulting from the Maastricht Treaty, which, explicitly, establishes the principle of two tiers. It is not a programme for the future. What is necessary, and what the document of the Christian Democrats (CDU/CSU) does not do, is to establish the common principles which must hold together all existing and future members. The inevitability of a variable geometry is now widely recognized even by countries unlikely to be part of an inner core and hostile to such a concept, such as Spain and Portugal. The real task of Europe-building is to start from the point of view of the heterogeneity of the continent and to devise a framework which meets two apparently contradictory objectives: an 'ever closer union' (as Maastricht puts it) and a plurality of nation-states. This heterogeneity of Europe manifests itself in various ways.

Cultural heterogeneity

At the cultural level European heterogeneity is universally considered as a precious advantage to be protected and safeguarded. No one wishes to 'harmonize', level down or standardize the diversity of languages, cultural and artistic productions, and historical traditions of which Europeans are legitimately proud and which some are keen to defend. In fact, various cultural minorities assume that they have a better chance to thrive or at least to survive within a large community than within a nation-state. It is accepted that cultural diversity is a value in itself even when it may delay or be in conflict with integration. This is why I shall deal with only two further broad types of heterogeneity: the economic and the political.

Economic heterogeneity

The convergence criteria agreed at Maastricht for monetary union have been deemed severe or restrictive. In reality when the treaty was agreed all signatories could meet them; the variables concerned are susceptible to government policies. To include employment, productivity and growth explicitly as criteria for monetary union, as the Labour Party has suggested (Labour Party 1995: 4), is not appropriate because, if high growth and high employment could be met by states operating independently, the need for monetary and economic union would be reduced – though, obviously some degree of 'real' convergence is needed. Labour's policy is – in reality – a statement about how the system should be focused and run after EMU. Growth and employment are key goals, but they should be set for the EU as a whole, as part of subsequent stages of development.

An additional problem with variables such as the Maastricht convergence criteria is that European countries are, strictly speaking, not always easily comparable. Public spending is defined differently in different countries. Federal governments, such as that of Germany, are less able than centralist states such as France or Britain to impose on regional authorities public spending restrictions. Inflation rates reflect the cost-of-living index. This is not constructed in a uniform way across the Union – 300,000 items are used in Germany but only 20,000 in Denmark – reflecting the differences in consumption patterns and, hence, in cultural habits (changes in the price of beer and wine have different repercussions in Northern and in Southern Europe). The creation of a single EU index would not only assume a homogeneity which does not exist, but would interfere in many national arrangements linking pay and benefits to the rate of inflation. Other economic variables – such as unemployment or growth rates – can be changed, if at all, only in the long term. Differences in unemployment patterns generate different attitudes in economic policy. For example, the countries of Southern Europe, especially Spain and Italy, have a higher level of youth

unemployment than the others. Consequently, they have been prepared to accept a higher level of inflation. Convergence around one particular variable does not imply convergence on others. For instance, Spain has had a growth rate roughly similar to that of Germany but twice the unemployment rate. Inequalities in Britain have grown much more than in Germany, though inflation rates are fairly close.

Thus the Danes, Germans and Austrians are roughly three times better off than the Portuguese and Greeks. The Italians, the British and the Finns are twice as rich as the Greeks but half as rich as the (few) inhabitants of Luxembourg. Recent entries extend this range and lower the average. Cyprus and Malta rank above Greece but below Spain. Hungary and the Czech Republic rate around half the figure for Portugal, Poland one-quarter of it. Of course different circumstances do not prevent a consensus emerging on policy issues (otherwise the European Community would never have been established). Huge differentiations make such consensus more difficult to establish. This is why convergence on real economic variables is important but not sufficient. In spite of the economic differences, many of the problems – such as unemployment – are sufficiently similar. One must start on the basis of the common values which underline the Union: these include liberal democratic values, social cohesion, economic growth, environmental protection, anti-discrimination and the struggle against joblessness. These are all, ultimately, political values.

Political heterogeneity

This can be taken to mean that, as EU member states have different sizes, geographical positions, wealth and historical traditions, they will have different interests. If that is the case any attempt to impose a common policy and especially a common foreign policy would result in some countries not pursuing their national interest. While creating obstacles to further integration by using one's veto and negotiating further opt-outs will have an impact, it will not prevent the expansion of variable geometry. If a group of countries move forward it will impact on the laggard ones in unpredictable ways.

Whatever form variable geometry takes, Germany will be the key country, the core of the hard core, the centre of the inner circle. The smaller the core or the circle, the greater will be Germany's influence. The legitimization of German interests, which was the original basis of the Paris–Bonn axis, is not as compelling as it once was. The collapse of communism has made the Federal Republic more secure and has provided it with great economic opportunity: it is well positioned to reap the greatest reward from any economic development in Eastern Europe. The heritage of its Nazi past forced the German state to channel its 'power complex' into the economic field with considerable success while the French and the British channelled it into the politico-military field. The legitimization of the *Bundesrepublik* has been obtained through its

cautious international behaviour and its economic achievements based on a model of social market capitalism with impeccable European credentials. This is a distinct advantage in a situation in which security can be better achieved by economic than by military means. The Paris–Bonn axis served its purpose because it was not aimed against anyone and because there was a clear division of roles between the two powers.

While Britain's Euro-policy has little international appeal, that of Germany brings greater security to other West European countries because it establishes a set of constraints for Germany. In turn Germany is quite willing to be so constrained because this reassures everyone all round. Its past foreign policy, especially Ostpolitik and the principle of common security, has been predicated for a long time on the principle that Germany can be secure only if her neighbours are secure. Security 'against' Germany was resolved by creating a system of security 'with' Germany.

In fact the impetus towards integration seems to be directly proportional to the strength of Germany. The stronger that country is, the more other member states – particularly France – push for integration. After all, the original catalyst for EMU was France which proposed it in 1988 as a way of containing the power and influence of the Bundesbank. When the German economy looked as if it was faltering – as it seemed in the early stages of unification – France became visibly cooler towards monetary union. British policy should not be based on such short-term considerations. In the medium term it is prudent to assume that German influence can only grow. Further integration with Germany is the only safe bet. Integration *à la carte* is no integration at all. Economic integration, that is, integration with the politics left out, leaves out also all the political problems. Integration on the basis of a strict acceptance of the entire *acquis communautaire* is unrealistic. It did not work with fifteen countries. It will work even less with twenty-five members. The way forward is the open recognition of the need for 'variable geometry'. This has yet to be defined. Countries which remain reluctant Europeans will be left out of the definition and will be condemned to accept what others have decided. The correct strategy consists in identifying what is in fact the real *acquis*, the core acquisition of the EU, that which makes it what it is, and proposing with boldness and realism the changes which must be made.

The EU as a new constitutional polity

The different parts of Europe are now interdependent, with or without sharing membership in the European Union, and this is clearest in the richest and most powerful country in Central and Eastern Europe and the EU, the Federal Republic of Germany. How can this disparate community be held together and enlarged? What should be its central rules? The question is not so much about what it is supposed to become with the new constitutional treaty but about what it should do now. We know that it must be democratic and be seen to be democratic, that its diversity must be protected, and that it

must provide economic and political security. The European Union may not be a state, though it has some of its attributes such as a system of laws, but, unlike a state, it does not have enforcement agencies or repressive forces such as a police force or an army. Its evolution is conditional upon consent, not force. In its institutional and economic arrangements it is the most developed form of supranational association in the world. It is the only one which can produce legislation binding on every one of its constituent nations and members. In so far as it is a 'state-in-formation' it presents a significant departure from state-building as it has hitherto occurred.

When the modern nation-state emerged in the nineteenth century it was a substantially undemocratic institution characterized by limited suffrage, the residual power of the nobility and a rudimentary system of rights. Popular legitimacy was obtained gradually through the development of three dimensions, one political, one social and one economic:

- 1 Democracy: The nation-state was democratized, thus becoming truly 'national'. The suffrage expanded until everyone was enfranchised. Civil and political rights were enshrined either *de facto* as in Britain or in a written constitution as in the rest of Europe. Subjects became citizens.
- 2 The welfare state: This form of state was endorsed not only by the political parties of the left – who promoted it vigorously from the beginning – but, eventually, also by their opponents, whether one-nation conservatives (as in Britain or France) or Christian democrats (as in Belgium, the Netherlands, Germany, Austria and Italy). The state became the people's state.
- 3 Economic growth: When the nation-state emerged, economic prosperity was still the privilege of the few. Constant productivity growth ensured that rising material prosperity was enjoyed, for the first time in history, by the vast majority of the population. The development of the modern European state is indissolubly linked to the advances of capitalism. The current attachment of so many Europeans to the nation-state is thus not the mere reflection of an old-fashioned and questionable sense of nationalism. It is the product of momentous social, economic and political progress.

Today, continuing progress can no longer be taken for granted. The European Union can be regarded as an attempt to defend and/or extend these gains at the supranational level *while preserving the nation*. It is impossible, however, to follow the model of the nation-state: first the political construction of the nation, then a system of political and social rights. What we are dealing with here is an association of states with no predetermined goals and, until now, no clearly defined system of rules.

The constitutional treaty of June 2004 tries to introduce some order, but it has to be seen whether it will be approved by the member states. In the meantime the EU has the *acquis communautaire* which is an entrenched

assemblage of legislation which is applicable to all members of the body politic. It provides the fundamental framework under which all legitimate activities can be exercised. To join a club you accept the rules. You may seek to change them but only after you have joined. The problem with this EU 'constitution' is that it is a rambling construction, a mish-mash of fundamental and grand principles, directives, petty regulations. Considering the great reluctance with which Britain has been dragged into Europe and her behaviour since, it is an irony of history that the nearest constitutional model which resembles the *acquis communautaire* is the so-called British Constitution: a mixture of written statutes, precedents, habits and conventions which can be broken or left dormant when circumstances require. This method of governing leaves much to be desired in a state such as Britain which is relatively homogeneous (compared with the EU). In a complex multi-state community it is simply unworkable. The process of clarifying the *acquis* is a process which is similar to that of constitution-making. Its task will be to highlight the central rules of an organism, the criteria for acceptance and the procedure for expulsion. This process is sharply different from that which led, in the past, to the construction of nation-states.

Regardless of the fate of the constitutional treaty of June 2004, an EU constitution will have to defend and enhance the cultural and political rights of the participating nations as well as the diverse ethnic, cultural, religious and linguistic rights of minorities within the Union – including those of minorities within the nations constituting the Union. After all, all European citizens or residents belong to minorities, since no single nationality forms a majority within the Union. Countries of Eastern and Central Europe would see in the EU a further way of consolidating their transition to democracy. The Union has to reinforce rights European citizens already have and establish some they do not have. It has to counteract, perhaps even eliminate, a purely economic notion of the EU as the pathway to modernization (the view in much of Southern Europe) or the fear that existing social rights will be eroded (the view in the Nordic countries) and the anxiety that national cultural differences would be wiped out. Europeans do not want to be put into a melting pot. They want to retain their right to be different, not only as individuals but also as nations. Therefore, the European project must aim for a civic union of nations. It has to stress what the European citizens have in common: the values of the Enlightenment (liberalism) and social and economic rights (social democracy). So far very few rights have been established by the European Union. They are quickly enumerated: equal pay for equal work, non-discrimination on grounds of nationality, freedom of movement, the right to vote and stand as a candidate in local and European elections in the member state in which the citizen resides, the right to enjoy consular protection by the representative of another member state in non-EU countries, and the right to petition the EP (Maastricht Art. B, Art. 8 to 8e and F(2)).

These are significant rights, but they fall far short of the general system of rights which the citizens of the European Union, if the term ‘citizen’ is to have any meaning, should expect. This is why it has been necessary to incorporate in the constitutional treaty the European Convention on Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights. The constitutional treaty has to bring to the fore a vision of the European Union as a real community of citizens, not only as a set of economic arrangements. It has to reflect the dominant ethos of Western Europe and strengthen this ethos in Eastern and Central Europe – an ethos which stresses the principle of non-discrimination on grounds of gender, race, sexual orientation, age and disability and the rights to preserve and develop cultural and ethnic identities. The charter of fundamental rights of the Union has to signal to the countries of Eastern and Central Europe that membership of the European Union entails the acceptance of the European model of social capitalism, not a destabilizing shock therapy leading to a kind of unregulated capitalism which has never existed in Western Europe.

Conclusion

All the constitutional treaty will have to do is certainly to establish the rules by which everyone must abide and the fundamental areas where national prerogatives must be defended, but also to define and to protect the rights of EU citizenship. This will pave the way for a form of enlargement which would intensify and solidify the process of democratization of the countries of Southern, Eastern and Central Europe and of any future members. It will meet their aspiration for greater political and economic security. It will be the best way of asserting forcefully that ‘belonging to the West’ is not a matter of allowing market forces to rule supreme. Belonging to the West means belonging to a democratic system, based on the rule of law, on civil rights, and on the reciprocal respect of different cultures; a system which is committed to making capitalism serve the interest of the wider collectivity, of all citizens. This is the task facing Europeans – all Europeans, West Europeans, East Europeans, Central Europeans – in the twenty-first century.

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Part IV

The constitutional challenges of a supranational polity

11 Post-national democracy as post-national democratization

Alberta M. Sbragia

Introduction

Since no acknowledged post-national democracy exists today, an empirically oriented political scientist might conclude that the discussion of post-national democracy is better left to theorists. What can we, as political scientists interested in contemporary politics, contribute to the discussion of post-national democracy? Based on what we have learned, can we move the discussion forward? I think we can make progress by grounding such a discussion in those realities of governance that we routinely investigate in our work as political scientists. The work of political scientists who compare political systems has provided us with a great deal of knowledge about operating democracies. Furthermore, scholars of international relations have been investigating how democracies interact with one another at the international level. I think that the knowledge can in fact help us think a bit more clearly about the possible contours of post-national democracy.

Here, I would like to link my discussion of post-national democracy to the realities of governance by focusing on the European Union (EU) as well as on operating democracies. The EU is an ideal focal point for this discussion, for it is in Europe that the debate about post-national democracy is the most developed. In other parts of the world, economic integration is proceeding but political integration is either not desired (as in the North American Free Trade Agreement – NAFTA) or so embryonic (as in Mercosur) that the debate about post-national democracy is just beginning (Sbragia 2002a; Sbragia 2000; Telo 2001). In the world outside Europe, in fact, the linkage between democracy and the national is taken for granted.¹ It therefore seems appropriate to focus on the implications of post-national democracy within a politically and economically integrating Europe.

Post-national democracy and decision-making

Citizens of the EU live in democracies and thereby already enjoy a wide range of rights – not only the freedom to choose among candidates and political parties during elections, but also the freedom of the press, the right to criticize

their government, the right to worship as they please or not to worship at all, and the right, when arrested, to be tried under the rule of national law which is applied fairly uniformly across citizens. Although a national democracy certainly includes an electoral control over decision-making, such control is embedded in a concern for other rights which we now take for granted in democratic systems (March and Olsen 1995: 2, 3).

Given the importance of all the rights citizens already enjoy in their own national democracies, the discussion about post-national democracy becomes focused, almost by default, on the mechanisms by which citizens can influence decision-making. It is in the area of decision-making that the EU is particularly relevant. (Citizens do not need the EU to grant them the freedom of speech, for example.) Electoral influence over decision-making becomes the central component of post-national democracy since the citizens concerned already enjoy other rights within their own national democracies.

Post-national democracy in Europe will not transform our general notion of political rights, although it will 'transnationalize' rights such as the suffrage which already exist at the national level. Rather, it will involve allowing the citizenry to exert a more direct influence over the decisions made in Brussels. That in turn implies that national governments and public administrative officials will lose the monopoly they have traditionally exercised over policy made beyond the borders of the nation-state. Governments and public officials will no longer be the guardians of national sovereignty as traditionally understood (Keohane 2003). The relationship between élites and the mass public will be reshaped.

That concern with decision-making, however, coexists with a lack of a common identity, of a people, of a *demos*. Many scholars, in both political science and sociology, as well as journalists, have focused on the problem posed by the lack of a European identity, the lack of a European public sphere in which citizens of different nationalities could debate with one another, and the lack of feelings of solidarity across national boundaries.² The fact that in Europe 'contentious politics', to use Sidney Tarrow's term, is still nationally based and nationally organized clearly illuminates the consequences of the absence of a *demos* (Tarrow 1998; McAdam *et al.* 2001; Imig and Tarrow 2001). Since the 'national' is so important to the structuring of power, it is not surprising that the 'national' is equally important in structuring identity, protest, the boundaries of public space and 'cultural self-image' (Hedetoft 1994).

My assumption, however, is that the debate about democracy in the EU will not be stopped by the lack of a *demos*. Those arguing for greater democracy at the EU level have been listened to since 1979 when the European Parliament was directly elected for the first time. Since then, the power of the European Parliament has been consistently expanded. The current draft of the European constitutional treaty strengthens its power once again – as did the negotiations for the Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam and the Treaty of Nice. The existence of a democratic deficit,

however defined, has come to be part of the landscape of European integration; it is perceived as a real problem by practical politicians. Not only do they acknowledge it rhetorically, but they acknowledge it by consistently changing the institutional arrangements which govern the making of legislation.

The diplomats and elected politicians who are involved in negotiating institutional change are not likely to be swayed by the arguments of scholars who argue that without a demos there can be no post-national democracy.³ After all, the preconditions of national democracy are not necessarily the preconditions of post-national democracy. Just as national democracy required a movement from the clan as the key form of social organization to that of territorially defined citizenship, so too post-national democracy is likely to be underpinned by important differences *vis-à-vis* national democracy.

National democracy was closely linked to a nationally defined demos, but post-national democracy may in fact distinguish itself from its national predecessor by incorporating within itself the lack of such 'we-feeling'. New types of institutional arrangements will need to be developed in order that post-national democracy might be able to coexist with the lack of a political community. Such arrangements will need to address the relationship between the governors and the governed and the fact that both the governed and the governors are inextricably tied to the national.⁴ Here, I privilege the discussion of institutional arrangements within a post-national democracy. Given the lack of a demos and the lack of strong pan-European political parties, the organization of institutional power necessarily becomes extremely salient for a discussion of post-national democracy within Europe.⁵ Just as institutions (along with market forces) have been key to the process of integration, I argue that institutions will be key to the evolution of post-national democracy.

The European challenge

As we think about the literature on existing democracies, the key premise of that literature is that operating democracies differ among themselves (Sartori 1997; Lijphart 1999; Fabbrini 2003). We know that the practice of democracy varies rather widely – in Europe as elsewhere. In many cases, what is viewed as integral to one form of national democracy is seen as peripheral or even undesirable in another – even within Europe. However, once we begin thinking about the EU as a potential democracy in and of itself, we realize that we have to be careful about using historical antecedents. First of all, no large democracy has adopted its democratic institutions from scratch. In the case of the US, it is important to remember, as Robert Dahl reminds us in his final chapter of this book, that the US, by today's standards, was a very small country when it chose its democratic institutions and designed its system of governance. Even then, it had to suffer a very bloody civil war before its national integrity was well grounded. Would the US choose the same institutional arrangements if it were becoming a democratic federation in 2003?

Would California, with 33 million people, agree to be represented by only two senators when Wyoming, with a population of half a million, also is represented by two senators? The answer to that question is not, by any means, obvious.

The question of post-national democracy in the EU therefore has to face the critical problem of scale. The population of the EU, since May 2004, numbers roughly 500 million inhabitants. Governing such a large population would present problems to any traditional democratic nation-state. It is even more of a dilemma for an entity that is not a traditional nation-state. Second, the heterogeneity of the population is quite high. True, the EU's entire population is all relatively wealthy in global terms, but their linguistic diversity, their history of frequent warfare, their strong links to different parts of the world outside Europe, their negative stereotypes of each other, their different post-war experiences (with the West Europeans experiencing national democracy and prosperity and the East Europeans experiencing the opposite), do not make the path to a democratic EU very easy.

Moreover, the history of colonial empires is significant in thinking about how diversity within Europe has been shaped. The British, the French, the Spanish, the Portuguese, the Belgians and the Dutch all had significant empires of different duration. For the British, the French, the Portuguese, the Belgians and the Dutch, decolonization is associated with the post-Second World War period. Seen from a historical perspective, decolonization happened very recently. Therefore, many EU member states have been – and still are – oriented not only towards Europe but also towards other areas of the world. European nations were the colonizers of the world, but they competed against one another in the process of colonization.⁶ That historical experience underpins the difficulties the EU faces in becoming a more effective (unitary) global foreign policy actor. Sovereignty in the exercise of foreign policy is nourished by historical experience, ongoing relationships with ex-colonial states, and the existence of extra-European linguistic communities based on the previous colonial experience (i.e., the Portuguese, Hispanic, francophone, and anglophone world).

Third, the experiences of the Second World War have given many Europeans their favourite and most widely used negative nationally based stereotypes. The Dutch and the Germans have had a summit meeting discussing how to increase the amity between those two populations, the French have had to work very hard at creating societal links with Germans and vice versa, German schoolchildren visiting Britain have been attacked as Nazis, the Poles often trust the US more than their European neighbours to protect them in case of attack, and so on.

Fourth, within national systems, there are also differences *vis-à-vis* integration – or there might be if given the opportunity to mobilize. The Federal Republic was born a 'semi-sovereign state', to use Peter Katzenstein's term, but no referendum has ever been held in Germany on the question of integration. A large majority of the German population opposed the replacement

of the Deutschmark with the Euro, but the Euro was adopted nonetheless. The referendum in France on the Maastricht Treaty won by the slimmest possible margin, and integration went ahead. The Irish and the Danes have both had to vote twice to approve initiatives promoting integration. Enlargement has taken place in spite of widespread opposition within the mass public if public opinion surveys are to be trusted.

Finally, the EU's population is divided into many small states as well as a relatively few large states. Both the citizens and governing élites of the small states view their counterparts in the large states as predisposed to be overbearing, arrogant, and willing to run roughshod over their views. The citizens of small states, regardless of partisan identification, easily feel threatened by the (political and market) power which big states wield as a matter of course. Although the EU has given small states a greater share of power than has any other international organization, the small states are constantly worried that their relative share of power will be eroded. The controversy in 2003–4 between small states, which have respected the strictures of the Stability and Growth Pact, and the large member-states which have ignored those constraints, is a case in point.

The question of how citizens as opposed to governments are to be represented within the EU is critical, and is the usual focus of the debate about the democratic deficit within the EU. However, it must be remembered that the citizens of small states worry about being ruled by the citizens of more populous states. This worry is exacerbated by the fact that big countries exercise market power in an economically integrated post-Euro Europe as well as political power. From the point of view of small Euro-zone countries, the economic actions of the big countries can lead to policy consequences which are damaging to small countries. Governments which are viewed as protectors by the citizens of small states *vis-à-vis* the governments and citizens of large states cannot be marginalized without the citizenry of the small states feeling aggrieved. On the other hand, democracy does imply that some kind of majority, however inclusive, has a substantial say in what gets done.

The perennial question of democracies – how to protect the interests of the minority – takes on a particularly difficult twist when territorially based identity is involved. When the territorial identity involved is also recognized as sovereign in the international arena, the problems of constructing democratic governance with its overtones of some kind of majoritarian impulse are exacerbated. One of the most common responses is that of giving greater autonomy to the territorially defined group in question. However, within the EU, that becomes particularly problematic because economic integration is the core purpose of the Union. Such integration requires a 'level playing field' for all economic actors regardless of their nationality or claims to uniqueness. For that reason, 'subsidiarity' as it concerns competition policy, the single market, trade policy and monetary policy is explicitly excluded within the EU.

Economic integration is important in another way as well. Since economic integration is the underpinning of European integration, market considerations

must be given a very strong hearing in any kind of policy conflict which pits the market against other claims, whether social or environmental.⁷ Whereas a traditional democracy has the luxury of choice when it comes to its national political economy, the EU is far more constrained in the degree of choice. After all, economic regionalism necessarily privileges trade – which in turn privileges the market economy that underpins trade. The construction of a regional union is therefore very different from the construction of a nation-state. The role of the market is fundamentally different.⁸ For electorates used to a more explicit or more balanced trade-off between the logic of the market and the regulation (correction) of the market, however, the privileged position of the market can lead voters who view the world from a strong social democratic or Christian democratic perspective to view themselves as a permanent minority within the Union (Scharpf 1999).

At the national level, of course, political parties represent different combinations of claims against or for the market. However, the fact that European-wide political parties are very weak indicates that possible solution is still in the future. More radically, post-national democracy may be characterized by a lack of transnational parties (at least as we currently conceptualize parties). Although political rights are very amenable to becoming ‘transnationalized’, institutions which are embedded in the national may well not make the leap to the transnational. There is no reason to expect that all the institutions we associate with national democracy will reappear on the regional stage. The divisive issue of small states versus large states will make it very difficult to construct strong cohesive transnational parties. Ideology would need to trump the ‘national’. Given the lack of a transnational ideology in Europe, it is not clear how such transnationalism would emerge. One possibility lies in the realm of inter-institutional politics at the EU level. The fact that the European People’s Party in June 2004 was able to become an important actor in the European Council’s nominee for Commission President suggests that party cohesion and influence may develop when pitted against the power of national governments acting as a collectivity at the EU level.

Post-national democratization

Having laid out some of the very practical and concrete difficulties which post-national democracy in Europe faces, what can we do to move the discussion forward? I would argue that post-national democracy in Europe should be conceptualized as an ongoing process of post-national *democratization*.⁹ The national experience is useful in that national systems typically have democratized over time. Democracy in national states was an evolutionary process, with national states varying tremendously, for example, in who obtained the right to vote when. Male non-property owners were often given the right to vote later than male property owners, and women were typically given the suffrage after males.¹⁰ It is useful to remember that three of the founding states of the European Union did not allow women to vote without restrictions

until the post-Second World War period – France granted women the vote for the first time in 1944, Italy in 1945, and in Belgium women were allowed to vote without restrictions in 1948.

Democratization, I would argue, rather than democracy as such, is the process which we should study. Whereas national democratization addressed the extension of the suffrage and the limiting of monarchical power, post-national democratization will give pride of place to institutional arrangements. Such arrangements will be the contested focal point of the process of democratization. An institutional design which can produce transnational electoral and partisan minorities, pluralities and majorities while accommodating intense feelings of national identity as well as hard-nosed interstate bargaining¹¹ can only be constructed by extensive conflict, negotiation and consistent dissatisfaction with the status quo (whatever that may be). The EU, for the foreseeable future, will consistently experience an ‘impossible status quo’ (Dehousse 1997) – which in turn will mobilize various actors to push for the evolution of the institutional design then in place. The dynamic which has occurred between the negotiation of the Single European Act in 1986 and the drafting of the constitutional treaty by the Convention on the Future of Europe in 2003 makes my point.

Europe is gradually evolving into what will become a post-national democracy. It has no model, however, to use as a template. In that sense, it is analogous to the experience of British democracy which, in the thirteenth century, pioneered the limitation of monarchical power. It differs from that experience, however, in that the democratization of the EU can draw on a host of national models of democracy with differing institutional arrangements. Those models offer a reservoir of experience which suggests guidelines. However, the EU must also address the political realities which confront it as it democratizes.

The American experience of constructing a new democratic system, for example, built on the British (as well as the Dutch) model (Pinder 1999), but modified it considerably to address the political realities faced by those who wanted to abandon the weak Confederacy and establish a stronger federal system. The introduction of a presidential rather than a parliamentary system, the separation of powers among the executive, legislative and judicial branches (with an overlapping of powers), the introduction of judicial review and federalism, the creation of two equally powerful legislative chambers which, however, kept foreign policy powers restricted to the representatives of state legislatures, and the writing of a constitution by a constitutional convention all represented original contributions of the American system to the world of democratic institutions (Bonwick 1999). The US experience demonstrates that new institutional arrangements typically involve a combination of copying and modifying existing models as well as creating new ones.

While the EU will be viewed historically as the original post-national democracy, its emergence in a world of numerous national models of democracy will lead it to copy and modify existing institutions as well as to

create new ones. It will need to develop original institutions in order to create a system which balances the numerous conflicting forces within the Union. However, just as the US accepted the very notion of a representative democracy, a legislative body and an executive as well as the limitation of executive power from Great Britain, the EU's institutional arrangements will incorporate existing institutional models. The outcome will be an eclectic mixture of the old, the modified and the new. The questions are: What does it copy?¹² How and what does it modify? What does it create that is original?

It will clearly copy the institution of the legislature. The democratization that has already occurred within the EU has been focused on the European Parliament. Although it is fashionable to downgrade its importance, it is noteworthy that since 1985 the Parliament has very significantly increased its power in the institutional system. The Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam and the Treaty of Nice all expanded parliamentary powers; the proposed constitution would do the same. It is now the only directly elected multinational parliament in the world. If we compare it to national parliaments, it has fewer powers, but if we compare it to other multinational assemblies, such as that of NATO, it is incredibly powerful. While its powers may be limited to selected policy sectors, such powers are real within those sectoral constraints. From the point of view of the US Congress, the European Parliament may look relatively weak; from the point of view of the national parliaments as they operate in practice, the view is decidedly different. True, the European Parliament cannot select or bring down the executive, a power which is widely viewed as being intrinsic to parliaments. However, the French parliament cannot bring down the French president, who is directly elected, and the German and Spanish parliaments can only oust the government after a constructive vote of no confidence. That is, they must agree on a replacement for prime minister before voting a government out of office.

The idea of a parliament's untrammelled ability to bring down a government is based, as is much of the implicit assumptions of parliamentary democracy and therefore of the democratic deficit, on the powers of the British parliament rather than the powers of the French, German, or Spanish parliaments. Britain, however, is the archetype of the majoritarian democracy, whereas those systems which restrict the power of parliament to remove a government have substantial elements of the consensual model. Finally, although the British parliament can oust a government from office, its lack of independent legislative authority is such that it is a 'chamber of debate'. In other words, when the House of Commons is not defeating a government, it is not doing much legislating (at least if compared to legislatures with a strong independent legislative authority).

If we separate its power to form or bring down a government from its actual legislative authority, it is clear that the European Parliament has become an ever stronger legislative body. As Kreppel argues, 'the EP has evolved from a ... chamber of debate to a ... legislative body' (Kreppel 2002). The

constitutional treaty agreed to in June 2004, if ratified, would increase the powers of the Parliament still further. Although the Commission exercises the monopoly of legislative initiative, in fact the overwhelming majority of bills introduced in national parliaments are introduced by the executive. In that sense, the European Parliament does not differ substantially from national parliaments as they operate in practice.¹³

The European Parliament, however, does differ from national parliaments in its ability actually to legislate rather than (in large measure) to ratify what the executive proposes.¹⁴ If it continues expanding its power, and if party government does not emerge in Brussels, the Parliament will have a stronger voice in actually shaping legislation than does the French parliament, the British House of Commons or the Spanish parliament. Over time, with respect to its independent legislative authority, the European Parliament will resemble the US Congress more than it will resemble its national counterparts.

For its part, the Council of Ministers already functions (although not exclusively) as a legislative body.¹⁵ Although critics of the EU point out that the Council is not directly elected, that fact is not of itself unusual. Upper houses in bicameral legislatures are indirectly elected in Austria, Belgium, France and the Netherlands. Furthermore, the upper houses in Ireland and Spain include representatives who are indirectly elected (Tsebelis and Money 1997: 47). The *Bundesrat* in Germany is a powerful upper house which represents the German state governments rather than the German electorate; it is co-equal to the *Bundestag* in many but not all areas, and it does not form the government. The Council of Ministers is unusual not because it is indirectly elected or because it represents governments rather than the electorate, but because it is the sole decision-maker in key aspects of EU policy such as agriculture spending and trade policy, in certain areas within justice and home affairs (internal security), and in foreign and defence policy.

Having said that, however, the Council of Ministers has gradually come to share power with the directly elected Parliament. The Single European Act began the process, and all subsequent treaties have in fact expanded the range of policy areas in which both the Parliament and the Council are decision-makers. At this point, the Parliament has a veto over numerous policy areas in which both bodies legislate. Thus, to the extent that democratization involves the Council sharing power with the Parliament, that process is ongoing and is likely to be deepened by the forthcoming intergovernmental conference.

The problem of a ‘government’ versus the reality of an ‘executive’

Given my argument thus far, it might seem that I am suggesting that the process of democratization will either lead the EU to adopt a parliamentary system similar to that of its member states or that it will evolve into a separation of powers system with a powerful bicameral legislature. In fact, I do not think such an outcome of the democratization process is likely. It is far more likely that the EU will very significantly modify the way a political system

works. If we take the next few decades as our time frame, the notion of a traditional European government being formed by a bicameral legislature is very unlikely. Such a government, even if it were made responsible to both houses of a bicameral legislature, and even if one of those houses represented national governments, would be unacceptable to large portions of the European electorate. (The emergence of a major external threat to Europe, however, would change this calculus.) In a similar vein, a directly elected president such as we find in the United States would also be unacceptable. Therefore, I do not think a European government – of any type – is on the cards during my lifetime at least.

Here the lack of a *demos* becomes critical. The existence of a *demos* is far more important for the establishment of a government than for the establishment of a legislature. Given the historic role of monarchical authority in developing executive authority in Europe and in the colonial United States, we take the existence of a government as the norm in a democracy. We equate a ‘government’ with the ‘executive’. However, the kind of cultural and historical underpinning which supports traditional parliamentary democracy in the member states is not present within the mass electorate to the extent that would be required for the formation of a government, with all the cultural, symbolic and ceremonial dimensions that such a term implies. Similarly, the lack of a *demos* militates against the direct election of a president, such as in the United States, within a separation of powers system.

The EU, then, will not have a government as traditionally conceptualized. However, it will certainly have an *executive*. I would guess that the real innovation of the EU will be in creating an original model of an executive body. In institutional terms, European post-national democracy will be distinctive, will be different from national democracy, in the character of its executive.

From a comparative perspective, ‘completely new types of institutions are relatively rare in the history of nation-states’ (Sbragia 2002b: 396). The European Commission is in fact a non-derivative institution. That is, it does not resemble any executive anywhere in the world. It is an original, *sui generis*. It has no counterpart. So too the eventual executive in the EU is likely to be the original institution developed by an integrating Europe. If other regional organizations move towards political integration, the EU’s original construction of the executive will become the referent. The electoral link between the citizenry and the executive is likely to be the most contested issue as democratization proceeds. There will be a real tension between how much the national governments are able to control the executive, how much the European Parliament controls it, and how much the electorate controls it. In general, however, the executive in the EU will be different from a ‘government’ in rather important ways.

The institutional arrangement within the Union will evolve over time. Without going into the details, the constitutional treaty which was agreed to in June 2004 (and awaits ratification across the EU at the time of writing) demonstrates that the kind of institutional experimentation which was

initiated by the Treaty of Maastricht has continued unabated. The convoluted nature of the Union is due precisely to the lack of a traditional government and the impossibility, at least in the medium term, of constructing such a government. The constitutional treaty attempts to address the problems found in the current institutional arrangements and, not surprisingly, the treaty if ratified would make the structure even more complicated.

The area of foreign policy is exceptionally problematic for the EU, for governments above all represent a country externally. The international system is based on intergovernmental negotiations so that the lack of a government renders the Union qua union nearly powerless internationally unless the member states have delegated 'governmental' authority to the Commission (as they have done in the case of trade policy). The impact on the Union of the absence of an EU government thus becomes particularly clear in this area. The complex arrangement set forth in the constitutional treaty highlights both the difficulty caused by the absence of a government and the difficulties involved in compensating for such a lack. Under the new arrangement, a president of the European Council (to be selected by the European Council by 72 per cent of the member states representing at least 65 per cent of the EU's population), who would ensure the external representation of the Union on issues related to the EU's Common Foreign and Security Policy. Such a President would co-exist with a Union Minister for Foreign Affairs (who would merge the 'pre-constitutional' responsibilities of the High Representative for the Common Foreign and Security Policy with those of the Commissioner for external relations). The Minister of Foreign Affairs, who would be a full member of the Commission, would simultaneously be responsible for those areas of external relations under the jurisdiction of the Commission and chair the External Relations Council. The Union Minister, therefore, would answer to both the Council of Ministers (in the form of the External Relations Council) and the Commission while being responsible for the Union's external representation in those areas falling outside the Common Foreign and Security Policy. Third parties would see an entity represented by the Commission President, the Union Minister, and a President of the European Council.

Under the treaty, the European Council would select a candidate for the Presidency of the Commission (an office which would be strengthened *vis-à-vis* the other Commissioners) who would then be presented to the European Parliament for its approval. Within the European Council, 72 per cent of the member-states' prime ministers/presidents representing at least 65 per cent of the EU's population would need to agree on the candidate to be presented. If a majority of the Parliament's members do not accept the proposed candidate, the European Council must present a new candidate within a month. Again, we see an effort to ensure very considerable control by member-state governments, including small countries, while increasing the control of the Parliament, which itself would become a co-legislator with the Council in an expanded range of policy areas.

While the constitutional treaty at the time of writing is simply a proposal which must face the ratification process (by parliaments and electorates voting in referenda) throughout the EU, it does indicate the kind of institutional innovation which the Union has and will continue to experience. Executive–legislative relations, assuming weak pan-European parties, will also differ from either a pure parliamentary or a pure separation of powers system. Such relations may well evolve into a hybrid of the parliamentary and separation of powers system as well as the mixed polity system which prevailed before either parliamentary or separation of powers systems developed.¹⁶ In other words, the institutions which will characterize a democratic EU are likely to include a strong bicameral legislature with co-equal houses except in foreign policy and an executive which will be an original, and not similar to the current national systems of prime ministers and cabinets (or to systems characterized by the election of a president such as we find in the United States). The Commission will undoubtedly be changed over the next few decades, but its successors will exhibit the kind of originality with which the Treaty of Rome endowed the Commission as we know it today. The executive of the future will be similar to the Commission of today in that it will not be a government while nonetheless carrying out many (but not all) of the key functions of an executive.

It must be remembered that the process of post-national democratization is very contingent. If strong pan-European political parties were to develop, for example, a system resembling a standard parliamentary system would be more likely to be adopted. If pan-European parties are weak, a more original format is more likely to be created. Strong European parties would lead to institutional copying; weak parties will lead to institutional originality and innovation.

Conclusion

I have tried to argue that post-national democracy should be conceptualized as a process of democratization which is both ongoing and necessarily evolutionary. Post-national democracy, when it eventually reaches the stage of being a ‘frozen institutional compound of processes of democratization’, will reflect a mixture of recognizable and original institutional arrangements (Someck, forthcoming).

One of the issues which post-national democracy will inevitably face, however, is that of the proper balance between majoritarian and non-majoritarian institutions. Non-majoritarian institutions such as central banks, regulatory agencies, anti-trust authorities and courts have become more prominent in the post-war period, especially in the area of economic management. National democracies vary in the balance which they have chosen, and the EU, thus far at least, has chosen to create two very powerful and very independent non-majoritarian institutions – the European Central Bank and the European

Court of Justice – which are playing key strategic roles in the shaping of Europe's political economy (Egan 2001).

The role of non-majoritarian institutions within a post-national context may well be highlighted even as majoritarian institutional arrangements are created. What kinds of issues should be outside of standard democratic controls? Robert Dahl has pointed out that 'the democratic process is not well equipped to deal with questions of exceptional complexity.' He maintains that the choices involved in nuclear weapons strategy (arguably one of the most important policy areas of the post-war period) were so difficult in both technical and political terms that they were made outside the democratic process. Public opinion and Congress were simply irrelevant. In his words, 'For all practical purposes . . . no public opinion existed and the democratic process was inoperable' (Dahl 1985: 8).

Dahl distinguishes between *delegating* authority to experts, a common feature of the process of bureaucratization, and the *alienation* of authority. Delegation allows democracies to set the terms of delegation and retain some kind of final control, whereas alienation excludes the setting of terms and leads to what Dahl terms a system of 'guardianship' (Dahl 1985: 1–3). The process of guardianship essentially involves decision-making by a well-qualified minority, but in general both the public and legislators are excluded. Dahl views guardianship as the major competitor to democracy as we know it.

Clearly the control of nuclear weapons is, as Dahl points out, an extreme case. It does, however, raise the general question of the degree to which a post-national democracy, however constituted, will choose to place some issue areas under 'guardians' rather than 'delegates'.¹⁷ It can be argued that within Europe the (radical) decision to move to economic regionalism and supranational institutions was made in a context more similar to that of 'guardianship' than that of what Dahl considers 'democracy'. In fact, the process of transnational democratization has arisen in the first place because of decisions made under conditions resembling guardianship.

The EU will face an increasing number of public policy issues of technical as well as political complexity. How will such issues be addressed?¹⁸ How serious will be the tension between guardianship on the one hand and delegation on the other, when technical policy issues with major consequences for the citizenry arise? We should not automatically assume that a democratized EU will eschew guardianship. A post-national democracy could indeed decide to accept a higher degree of guardianship than have national democracies. When it comes to choosing between the 'guardians' and the 'delegates', there is no guarantee that a post-national democracy will make the same choices that have been made by national democracies. A half-century from now, political scientists may argue that delegation was characteristic of the age of national democracy while guardianship has become an integral part of post-national democracy. Ironically, we must consider the possibility that transnational democratization could lead – over the long term – to a significant role for transnational 'guardians'.

Notes

- 1 The kind of intensive multilateralism and supranationality which characterizes Europe is so alien to the rest of the world that Europe is an enigma and a puzzle to many non-Europeans. To many observers, Europe is now exotic – a foreign land where arcane debates about a post-national ‘democratic deficit’ take place.
- 2 For a discussion of how the process of Europeanization has affected the evolution of British, French and German nation-state identities, see Risse (2001). For a discussion of a ‘constitutional demos’, see Weiler (2003).
- 3 In some sense, the notion of democracy can be viewed as being an ‘iron cage’ which has its own constraints. Whereas Weber viewed bureaucratization as an iron cage, democracy may have achieved the same status, at least in an integrating Europe.
- 4 As Schmitter (2000: 9) points out, ‘what is missing are the professional politicians who represent transnational interests and passions . . . there are few persons who identify exclusively with the Euro-Polity.’
- 5 For an important critique of the approach I am taking, see Friedland and Alford (1991).
- 6 The historian Gabaccia argues that ‘in the South Atlantic freer trade with the British empire was a motivating factor in rebelling against Spain’ (n.d.: 13).
- 7 For an excellent discussion and critique of this fact, see Scharpf (1999).
- 8 For an influential analysis of the market and institutional development in several national contexts, see Weingast (1995); see also Sbragia (2002a, 2003).
- 9 The legal scholar Somek argues that ‘what we proudly refer to as “democracy” in a national context is essentially the frozen institutional compound of processes of *democratization* . . . our received understanding of democracy is built upon tacit references to a patchwork of *different* practices of democratization.’
- 10 Minority groups gained the suffrage even later than women. In Australia, one of the first countries to allow women to vote, all Aboriginal peoples were able to vote only in 1965. Only in 1965 were African-Americans living in the American South guaranteed the right to vote. Even in a country such as Finland, where universal suffrage for both men and women was granted as early as 1906, the local indigenous population, the Sami, were not granted their own consultative parliament until 1974.
- 11 Such bargaining will not soon disappear, and in the areas of foreign and defence policy it may well become strengthened once the US is not a key actor.
- 12 See, for example, DiMaggio and Powell (1991), especially the discussion on mimetic processes (pp. 69–70).
- 13 Nonetheless there is a noticeable difference between the *monopoly* of legislative initiative exercised by the Commission and *the right* of initiative by the executive in national systems. Majone (2002: 10) points out that ‘the EC has no legislature but a legislative process in which the Council, the Parliament, and the Commission have different parts to play.’
- 14 For a discussion of the lack of legislative power found in European parliamentary systems, see Judge (1995).
- 15 For a discussion of different ‘images’ of the Council of Ministers, see Wallace (2002).
- 16 For a discussion of the relevance of the system of ‘mixed government’ for analyses of the European Union, see Majone (2002).
- 17 Majone (2001) has broached this issue from a different perspective. While remaining within the paradigm of delegation, he argues that we need to think about ‘trusteeship’ and the ‘fiduciary principle’ when we analyse governance in the European Union.
- 18 For a discussion of how such technical issues are addressed at the national level, see Barker and Peters (1993).

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12 The EU and the challenge of a post-national constitution

Yves Mény

Introduction

The debate in Europe and on Europe has, in large part, changed in nature since the 1970s. During the decade preceding the creation of the Common Market and during the fifteen years that followed the signing of the Treaty of Rome, the attention of pro- and anti-European activists, as well as that of the media and political commentators, was polarized over the methods or outcomes of the much-disputed integration. What should Europe do? Which countries should or could join in this shared adventure? Yet little reflection and discussion were devoted, even by the founding fathers, to the nature of this new creation and, in particular, to its compatibility with national political systems. The main preoccupation at the time focused on the question, at once symbolic and sensitive, of sovereignty, and everything unfolded as though the problem was exclusively one of a transfer of power from one level (state) to another (supranational). The nature of power and its use were not seen to be the order of the day. The institutional rhetoric of the 1950s expressed a clear decision to position itself, at least partially, outside the referential framework of the classic democratic model. For instance, the European Coal and Steel Community (ECSC) was rooted in a High Authority and, later, the European Economic Community (EEC) took shape through the Commission. These new institutions proceeded according to regulations and directives, not by legislative decisions. However, it would be unfair to the founders of the future European Union to suspect them of being indifferent to the democratic principle.

Not only was the question of democracy at the heart of both domestic and international political debate, but major initiatives, such as the creation of the Council of Europe, were being developed alongside attempts at continental economic organization. Moreover, the seeds of a democratic organization, though fragile and modest, were planted in the cradle of a Europe under construction: an embryonic representative assembly that benefited only from an indirect, thus weakened, legitimacy, and the implementation of a court with limited but supranational jurisdiction, the European Court of Justice. It would have been undoubtedly impossible, even counter-productive, to have

gone further at the time. Only a few European visionaries could then dream of a federal system, a United States of Europe, whose powers, structures and *modus operandi* could be developed along the American democratic model. However, those in power at the time, even the most European among them (including De Gasperi, Schuman and Adenauer, to cite the fundamental European trinity), could make only modest strides forward, and these were necessarily veiled. European integration, the democratic structure of this new federal assembly, could only be realized through a functionalist ruse styled by Jean Monnet.

Popular legitimacy and the rule of law

From these early days, it is clear that the EEC contained the democratic foundations of two essential and complementary pillars: popular legitimacy and the rule of law, or, in other words, an embryonic parliament and a supranational court. It is worth noting that the relative weight and historical evolution of these two elements varied from one democratic political system to another. Examples of such imbalances and distortions are multiple, but a few illustrations will suffice to confirm this point. France, for example, brutally and rapidly substituted popular for monarchical legitimacy, with a few lapses (1800–70), a few interruptions (1848) and some delays (women's suffrage). Meanwhile, the pillar of the rule of law developed more slowly, thanks to the Council of State, in the shadow of parliamentary supremacy, receiving a very belated recognition of its constitutional control in the late 1970s. The same can be said of Germany, where the *Reichstaat* long preceded the emergence of popular democracy. In the United States, the opposite phenomenon is evident, that is to say the blossoming of a democracy with populist impulses, while the rule of law developed more slowly and in a scattered way until the end of the 1950s, when southern exceptionalism on the matter of civil rights came to an end.

Criticism of the EU, which mostly consists in underlining its democratic weaknesses, although legitimate, also bears witness to a kind of historical amnesia. Rare are democracies that are born fully formed. Instead, they are usually the imperfect yet perfectible result of specific processes, even when they follow a pattern (such as the Western model) whose rhythm, tempo and inflections are determined by the political, economic and social environment specific to each community. The European process has not escaped this rule; it, too, is unfolding in a slow manner. It is characterized by incremental progress, the absence of any predetermined roadmap, and an often confused blend of big decisions and small events, the result of political will and unintended effects, of explicit decisions and implicit or necessary consequences.

As mentioned above, a shift occurred in the 1970s, one whose amplification has not ceased in the course of the past three decades, and not only in relation to Europe. Scattered throughout the world, a deep wave of democratic demands surged forth – always in reference to the two essential components of

popular legitimacy and participation, on the one side, and the rule of law and fundamental rights, on the other. The European Community, and subsequently the EU, could not escape this wave even though the growth of powers in Brussels continued to increase (Cowles *et al.* 2001; Goetz and Hix 2001; Mény *et al.* 1996). It is not surprising, then, that the emphasis was placed – often in a polemical way – on the ‘democratic deficit’, that is, insufficient popular legitimacy, instead of on the absence of the rule of law. Effectively, from this perspective, not only did the EC not appear too ‘underdeveloped’ in relation to member states, on certain points it could even give lessons to those states unwilling to submit their actions to the role of judges. Moreover, from the outset of the 1960s, the Luxembourg court drew lessons for a potential federal system under construction. Its jurisprudence enshrined both the supremacy of Community law and the direct effect of its directives, thus putting in motion the logic of a European rule of law. The popular gap seemed even more blatant. Paradoxically, the overdevelopment of the rule of law in political society, unaccompanied by a parallel evolution on the democratic side, gave rise to reactions throughout Europe in the form of populist pressures in countries as different as France and Austria, Italy and Switzerland, Belgium and Scandinavia.

According to an article by the British political scientist David Marquand stigmatizing the weak legitimacy of a European Assembly still chosen indirectly at the outset of the 1970s, the ‘democratic deficit’ became a fashionable leitmotif. The success of this new European ‘J’accuse’ rooted itself in a number of sources. Beyond this semantic innovation (a near contradiction in terms), such analysis recalls familiar echoes from several sources: in the first place, it used an analytical and evaluative process that was easy and up to date, consisting in judging the new in relation to the known or taken for granted. In other words, the democratic character of the Community was defined according to the traditions and rules already in effect in European society. If, for example, the democratic character of one parliament was established solely on the basis of its having been elected by direct, universal suffrage, it is easy to deduce that an assembly failing to meet this criterion would quickly become non-democratic or insufficiently democratic. Second, the ‘democratic deficit’ critique achieves an easy leverage by deploying the belief, at once widespread and deep-rooted, that ‘democracy is the people’. Etymologically, this is the correct definition, but the reality of democratic systems reveals that democracy, as we live it, is a mixture of popular input and constitutionalism (limitation and separation of powers, rule of law, etc.). By establishing the equation weakness of parliament = democratic deficit, it is easy to reactivate deep-set beliefs in the collective unconscious and in the historical process of democratization. In an exaggerated and caricaturized manner, current, populist discourse does little more than recycle this imaginary or primitive definition of democracy.

Yet, the echo raised by this critique, partial but certainly well founded, would not have been so significant if this formula had not been transformed

into a slogan and a battle cry for an eclectic and heterogeneous coalition. Its creator has been forgotten, but the creation has made a fortune, reduced though it is to two magic words, 'democratic deficit'. We find a bit of everything in this mixed bag: academic 'learneds' who subscribe to analysis; judges, indeed supreme courts, such as the German Constitutional Court, searching in vain for a European 'demos'; British tabloids of the so-called gutter press but also reputable newspapers noted for their seriousness; Europeans convinced that they want more Europe and more from Europe; Euro-sceptics overpleased with the argument and unhesitating (like some Gaullists) to be content with a skimpy democracy at home, all the while posing as vehement critics of the European deficit; and, last but not least, numerous European parliamentarians wishing to reinforce rightful parliamentary powers and to mount, without hesitation, this tremendous hobby horse.

Whatever its reasons and motivations, which fed analyses, debates and polemic, the essential idea was to place the democratic principle on the political agenda. It has been around for thirty years and remains a persistent question that captivates élites as well as public opinion, obviously a healthy sign. The progress and outcome of the constitutional convention are only the most recent, albeit provisional, illustrations. It is a safe bet that the debate and confrontation on this issue have many days still ahead. In fact, the multiple facets of the 'democratic principle' are not only derived from its definition or content, thus a rich ambiguity enables its adaptation and development. The same diversity is evident in its usage and its impact on many levels: national, regional and European.

Here, I would like to sketch out the dimensions in which the development of the European democratic principle has had a particularly fertile influence. I will make reference to three elements, each related to the denationalization of the principle: first, the effects of spillover on the constituent units of the Union, that is the member states; second, the impact of democratic consolidation on candidate countries; and finally, the elements that shape and stimulate relations with developing countries (Olsen 2002).

A historical detour on democracy

The first element is the one with the least immediate and visible impact, but is undoubtedly the most revolutionary. To understand the earthquake that has shaken the concept of the democratic principle to its core, it is useful to make a brief historical detour to the Enlightenment. The eighteenth century in Europe saw the flourishing of many utopias as well as a great intellectual ferment, with an intense reflection on the origin and organization of political power. In spite of both analytical and normative divergences, a consensus arose almost naturally: democracy was, without a doubt, the best regime possible, but unfortunately its own exigencies and its demanding conditions for proper functioning confined it to particular types of societies. Democracy seemed made for 'God's chosen people' or, in the best case, reserved for

societies of limited numbers as revealed in rare instances in the past. Democracy's origins are Athenian, and its practices as well as its limits are well known. Democracy in a large country was unthinkable since its modalities were identified within a precise historical experience. The eighteenth-century intellectual revolution coincided with the American and French revolutions, even though in these cases the talk was of the republic more than of democracy. This revolution was made possible by yet another revolution, English in its origins and development, that of the principle of representation.

Thus, a new meaning was given to the democratic principle: it was no longer the entire demos assembled in the Agora but select representatives, chosen by the people, that would make decisions on their behalf and be held accountable to them. With representation, the same word, democracy, came to reflect another reality. This intellectual mutation enabled the emergence of the unthinkable: democracy for a large state.

Mutatis mutandis: it is a revolution of the same nature that Europe forces us to make today. As in the eighteenth century, there prevails today a 'negationist' and positivist school of thought: the only recognized democratic model was the one known in the past. In other words, for the proponents of this theory, democracy is not conceivable and possible except on a national level and, as in the past, only in existing states. The argument is at once simple and radical: democracy is founded on a pre-existing demos that serves as a foundation and a legitimate reason for being. Thus, the supporters of this position claim that there is no single European demos but, at best, many 'demoi' that constitute a mosaic of the continent's states and democracies. It is futile to point out that this apparently unstoppable argument is particularly fallacious, both on normative and empirical planes. The definition of the demos is, in effect, quite arbitrary. Examples of democracies that have excluded in law and/or segregated important parts of their population are legion. Without even touching the élitism of Athenian democracy, let us recall the limited suffrage widely practised in the nineteenth century, even in supposed democracies: the exclusion of women, young adults and, still today, foreigners who remain as such because access to naturalization is limited and difficult, and the right of citizenship in the host country is often denied them. All these exclusions, justified normatively, have resulted in historically inflected and differentiated definitions of the demos.

On the empirical level, the same observations may be made. Thankfully, our democracies are not, nor do they pretend to be, armed with Jupiter's brain as 'one and indivisible'. The French demos is an artificial construction built on the ruins of minorities and regional languages. The republican myth retains its grandeur on the condition that we do not tread on the historical conditions that led to its construction. Conversely, we can claim that democratic regimes function in spite of ethnic, racial and linguistic diversity. Switzerland is an example at the heart of Europe, as are in their own ways countries as different as the United States, Canada and India. The notion of a people is artificial and, as such, should not be an obstacle to the development of the democratic

principle beyond its natural milieu, the nation-state. Contrary to what the French Jacobins held on the left, as did the British Conservatives on the right, democracy is possible at the supranational level as long as we are willing to rethink the meaning and content of the very thing we call 'democracy', as was done at the end of the eighteenth century. In some ways, the criticism provided by Euro-sceptics and democratic Jacobins is useful. In arguing for the impossibility of democracy at the supranational level, at the same time that the national level proves incapable on a daily basis of resolving the problems that are theoretically under its jurisdiction, the 'national democrats' condemn themselves to impotence and sterility; most contemporary problems would escape, *de facto*, whatever democratic controls if it were not for the appropriate instruments at the right level. Thus, supranational democracy is an imperative if we want to avoid democracy, restricted to the national level, remaining nothing more than an empty shell.

The history of European integration can be re-read through this lens: it is a long road towards the establishment of democracy on a continental scale which does not define itself exclusively by the notion of a single 'people' or a single state, but instead progressively fashions itself in a differentiated manner through its two constitutive foundations: popular legitimacy and constitutionalism. It is clear that this second branch, notably, the rule of law, spread most quickly and easily. However, the first foundation, thanks in part to opposing yet converging critiques from Europhiles and Euro-sceptics alike, also gained momentum through the direct election to the European Parliament, the expansion of its powers, the drafting of a quasi-constitution, the emergence of groups, and even transnational political forces.

Europeanization as reinterpretation and consolidation

The democratic principle that develops at the European level does not confine its effects simply to the supranational level, even if this is, as mentioned above, of primary importance. The European Community, and subsequently the Union, is not just a structure to transfer authority, whose impact then rebounds top-down on to member states. Rather, the European construction consists of a daily and constant confrontation between differentiated points of view, heterogeneous institutions, disparate processes, divergent economic and social models, and heterogeneous practices and actions. In essence, Brussels has become a vast 'clearing house': a stock market of standards or, to use the current jargon, of 'bench-marking'.

We are witnessing at every level (not only economic) a systematic reinterpretation of national experiences through the prism of a continuous Europeanization. This analytical process, of comparison and imitation, is not unique to the Union and does not need an institutional apparatus from Brussels to set it in motion. All of history is built on such reciprocal borrowings, which experienced an unprecedented rise with colonialism and the first wave of globalization at the end of the nineteenth century. Yet the

European Union, by its very formation, constitutes an accelerator and a stimulator for these learning processes or spillover effects, be they ideological or institutional. Numerous studies (Rose 1993) have been based on these transformations, but these have focused mainly on the administrative or economic levels, rather than the political. The examples of Europe's influence on our conceptions and national democratic values are legion. It is not possible for me to explore here, in all their diversity and intensity, the many facets of these effects. A simple example will illustrate the multiplicity of these omni-directional influences: the possibility of electing citizens from another EU member state to local and European elections; the introduction of electoral rules (proportional representation) in political systems uneasy about their political impact (Great Britain, France); the acceptance of a superior law to which national authorities, including parliaments and constitutional courts, must submit; the adaptation of national parliamentary rules and structures; and the introduction of new, general principles, often unknown in various systems but which have become part of the discourse and law of member states today (for instance, principles of subsidiarity, proportionality, federal loyalty, transparency, etc.). Often, these juridical-political revolutions were not entirely perceptible as they were carried out in a slow, progressive fashion. The result, however, is no less tangible.

Democratic consolidation in a large part of Europe owes a great deal to the growth of the democratic element within the European Community and, later, the EU. With the creation of the ECSC and then the EEC, a political objective was nestled within the economic strategy of a European market: guarantee peace, or at least avoid war at all costs. The democratic objective was absent or not readily apparent, with the possible exception of the primacy given to the four (economic) freedoms. This democratic turn became evident with the inclusion of Greece, even when all the arguments in favour of its exclusion held sway except one: to help avoid the return of dictatorship to the cradle of democracy. The shift was confirmed with the accession of Spain and Portugal, whose democratic systems were still in a fragile state. Europe, thus, became more than a just a common market; it also acted as a protective cocoon, a democratic 'incubator', a club whose membership was reserved for those who shared democratic principles.

The test case was the Austrian affair (Merlinger *et al.* 2001; Falkner 2001), with the entry of Haider's party into the national government. The sanctions adopted by the fourteen members were certainly inadequate, as well as badly conceived and managed. However, some positive elements emerged from this innovative approach to the democratic principle: a sharper awareness and attention to the dangers that extremist parties present to democracy; the strengthening of a European public space, still embryonic but necessary to the development of democracy; and the establishment, in the constitutional treaty of June 2004, of rules and procedures aimed at better confronting these potential dangers if a member state were to deviate from democratic principles (article 58).

Finally, an even more decisive step was taken when the Europe of fifteen affirmed its democratic criteria as a conditional element for accession by candidate countries in Eastern and Central Europe. Even these elements were already part of some association agreements; in the Copenhagen declaration of June 1993, the EU formalized, in precise terms, the economic and political routes and means that candidate countries must adopt to achieve membership. Let us, for the moment, leave aside economic criteria, which are ancillary to our discussion. The political criteria, on the other hand, stated explicitly, and for the first time, the meaning and the tangible content of the democratic principle. According to the heads of state and government of the fifteen, participation as a member of the Union required an institutional stability guaranteeing democracy, the rule of law, human rights, and respect and promotion of minorities. Wedded to the economic criteria and comforted by the desire not to be left behind, this requirement played an important role in the period of transition towards democracy for all candidate countries. Certainly, the functioning of these new democracies remains imperfect, but is this not the same for all democratic regimes, including those that demand, loud and clear, their certificate of good conduct? The decisive progress made in the course of the last decade is empirically measurable, but the positive impact of EU policy goes well beyond it.

The democratic principle as conditionality

The safeguards erected by the EU prevented the emergence of policies that did not respect minorities – despite the terrible lessons of the past – and could serve as antidotes to problems and curb nationalist fervour always ready to resurge. In Hungary, Romania, Slovakia and the Baltic states, the EU played a role of peace-keeping, of transition and of democratization in order to avoid a repetition in Eastern and Central Europe of the dramas in the former Yugoslavia. The same positive impact, albeit slower and more difficult, can be observed in Turkey to the extent that certain observers have asked the EU to adopt a more incisive policy, linking in a more formal and conditional manner progress on the democratic front with accession into the Union. A Turkish observer noted in 2002 that:

On 3 August 2002, the Turkish Parliament approved a 14 article package of legislation drafted to harmonize the country's law with those of the European Union, which included abolishing the death penalty in peacetime, granting the right to conduct broadcasting and education in languages other than Turkish, increasing the rights for the religious minorities and easing press restriction . . . I contend that the achievements so far indicate that political conditionality is working and has contributed substantially to the liberalization of the Turkish political system.

(Kardas 2002)

Nevertheless, the same observer highlights that the ball is now in the EU court: for conditionality to function properly once again, as in the case of Eastern Europe, the other end of the exchange must be defined and precise. In other words, membership in the Union must become a right when all its conditions are met; it cannot be just an uncertain and distant hypothesis.

The test of the effectiveness of political conditionality for entrance into the 'club' comes from the Union's policy towards developing countries. In a resolution of 28 November 1991, following a communication of 25 March of the same year, the Council held that 'the Community and its member states adopt a common approach aimed at protecting human rights and democracy in developing countries.' It highlighted different initiatives that might be undertaken in 'providing active support':

- in countries trying hard to install democracy and improve the situation with respect to human rights;
- in elections, with the creation of new democratic institutions and strengthening the rule of law;
- in strengthening the judicial system, with the exercise of justice, the prevention of crime and the treatment of criminals;
- in adopting a decentralized approach in the area of aid and cooperation;
- in designing measures assuring equality of opportunity for all.

At the demand of the Commission or of one of the member states, the possibility of increasing aid may be considered for developing countries in which positive and substantial changes in the areas of human rights and democracy are being undertaken. While these good intentions have not been futile, it is not excessively pessimistic to note that commercial interests, access to primary resources, diplomatic, and military and geo-strategic considerations have largely attenuated the potential impact of this 'resolution'. While the EU has been a partner of primary importance and a major provider of funds, this aid policy has not had the desired effect: partly because of divisions between member states in relation to states that have not respected basic rights or democracy; partly because of the absence of a strong conditionality analogous to that regulating candidacy for EU membership. The EU has not desired or sought a credible element of conditionality in its relation with developing countries, probably because it would never have had the power or the political capacity to have it respected.

Conclusion

This failure with respect to those on the periphery of our economic, commercial and political partnerships should not, however, lead us to an overly pessimistic assessment. The EU's balance sheet is largely positive: with the passage of time, the Community and then the Union have made their main objective that of the member states – a democratic government – even though

this was not their primary vocation. The democratic principle was then applied at the supranational level, this in itself announcing the evolution of a democracy no longer exclusively identified with the state or the nation. From then on, the democratic debate has rebounded, in an enriching way, on to member states and candidate countries (Pridham 2002; Moravcsik and Vachudova 2002). Developing nations, albeit less efficiently, are also concerned with this strategy, which, despite its slowness and instances of defeat, has revealed itself to be globally efficient. Lastly, for every country that tries (however difficultly) to put in place regional organizations, Europe remains a model for and a challenge to them as a supranational construction whose institutions have achieved the most elevated level, though not fully realized, of democratization (Van der Geest 2002). The gulf between principles and reality is still very wide, but it is not merely euphemistic to say that Europe has brought to the renewal and diffusion of the democratic principle a contribution whose only equivalent can be found in the cumulative contributions of the British ‘Glorious Revolution’, the American Revolution and the French Revolution.

Addressing the European Parliament on 3 September 2003 in defence of his constitutional treaty project, Valéry Giscard d’Estaing declared: ‘We have defined a democratic model on a European scale.’ Without a doubt, this model could, in time, have universal application.

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13 Is international democracy possible?

A critical view

Robert A. Dahl

Introduction

The question ‘Is international democracy possible?’ might be interpreted in two ways. Is democracy possible in organizations and processes above the level of the nation-state or country?¹ Or alternatively, as globalization expands, will the power and autonomy of the nation-state or country greatly decline, much as the power and autonomy of independent city-states declined as they were reduced to subordinate units of the larger nation-state or country? Here, I am going to consider only the first question.² After posing a similar question several years ago, I responded with scepticism (Dahl 1999).³ Nothing in the interval has served to diminish my scepticism. Yet the importance of the problem raised by that question has grown ever more pressing.

Three propositions

To see why, let me put the problem in the form of three simple propositions. First proposition: international systems make decisions that bear important consequences for, among others, citizens in democratic countries. Second proposition: many of the consequences of the decisions resulting from international systems are highly desirable. Third proposition: yet the decisions of international systems are not and probably cannot be made democratically.

The first proposition is scarcely open to question. To list only a few examples, consider the ILO, IMF, NAFTA, NATO, OAS, World Bank, WHO, UN, UNDP . . . Add to these the important consequences of global firms and markets. Nor will many people question the second proposition, even though they may vigorously disagree about the particular decisions, consequences, organizations and systems they may find desirable or objectionable. Yet if the third proposition is also correct, then we confront a deep and serious challenge. For even if international systems are important and desirable, how can they be legitimate from a democratic perspective? And if their legitimacy cannot be established on democratic grounds, what grounds, if any, remain?

This challenge confronts not only those of us who believe deeply in democratic goals and values. It also confronts anyone who, though indifferent

to democratic goals and values, believes in the importance of international systems. For why should citizens in democratic countries accept the policies and decisions of international systems that are not democratic and thus lack democratic legitimacy? Yet if citizens reject the policies and decisions adopted by international systems, then opposition to these systems and their decisions is likely to increase. Indeed, opposition will probably swell beyond the microscopic minority and its even tinier anarchistic fringe that from Seattle to Genoa has recently displayed its discontents for all the world to view. Although these opponents are still few in numbers and often incoherent in their public utterances, they may nonetheless serve, like the canaries that miners once brought into the coal mines, to warn of impending disaster.

How then can decision-makers in international systems obtain the freely given consent of those who are subject to the consequences of their decisions? The solution to this problem arrived at within many countries during the preceding century is a democratic system of government. But if my third proposition is valid, then this solution is unlikely for most international systems and perhaps for all of the really important ones.

Some basic processes for making decisions

Some observers are considerably more optimistic than I, particularly about the possibilities for expanding democracy in the government of the European Union (Archibugi and Held 1995). I profoundly hope that their optimism may prove to be justified. But, leaving aside for a moment the European Union, let me explain why I remain unconvinced and sceptical about democracy at the international level.

To do so, I want to amplify somewhat on what I have in mind in speaking of the policies and decisions of international systems. In democratic countries we can observe the existence – to be sure, at a fairly abstract level – of at least four basic socio-political processes for arriving at collective decisions.⁴ These are hierarchy, or control *by* leaders; bargaining, or control *among* leaders; the price system, or control *of* and *by* leaders; and finally democracy, or control *of* leaders.

These are, of course, highly simplified and highly abstract types. In a modern democratic country none exists in pure form or in isolation from the others. Indeed, as I'm sure we are all aware, the closer we move towards observing and describing concrete systems, the more complex become the interconnections among the four theoretically distinguishable processes. As everyone knows well, political life at its most concrete level is often of baffling complexity.

Nonetheless, my basic point can be fairly stated, I believe, as follows: international systems of decision-making include hierarchies, bargaining among élites, and the price system. What is conspicuously absent, or weak to the point of utter irrelevance, is effective *democratic* control over decision-makers.

Changes in democratic institutions

Democracy can, however, take different institutional forms. Historically, these differences in democratic institutions seem to have depended primarily on the size of the political unit. The institutions suitable for democracy in a city-state, a Swiss canton or a New England town are not suitable for democracy at the level of a nation-state or country.

Because of the larger scale of a country, even a relatively small country, to achieve a satisfactory level of democracy in a unit of such magnitude has required the creation of a set of political institutions that, taken as a whole, never existed in earlier smaller units, such as the democratic city-states of Greece, the republics of medieval and Renaissance Italy, the cantons of Switzerland or the town meetings of New England. As a way of emphasizing the distinctiveness of modern representative democratic institutions, a colleague and I once proposed the term *polyarchy*. If I may use this term for the moment, our question becomes: Can the institutions of polyarchal democracy be created at the level of international systems? If not, will it be possible to create a new set of political institutions that will satisfy democratic requirements at the international level about as well as the political institutions of modern polyarchal democracy now do at the level of the country or nation-state? If so, what would these new democratic political institutions be?

The essential political institutions of modern representative democracy – polyarchy – are familiar to us all. We would agree, I believe, that they must include at least the following:

- 1 Final control over important government decisions is exercised by elected officials.
- 2 These officials are chosen in free, fair and reasonably frequent elections.
- 3 In considering their possible choices and decisions, citizens have an effective right and opportunity to exercise extensive freedom of expression.
- 4 Citizens also have the right and opportunity to consult alternative sources of information that are not under the control of the government or any single group or interest.
- 5 In order to act effectively, citizens possess the rights and opportunities to form political associations, interest groups, competitive political parties, voluntary organizations and the like.
- 6 With a small number of permissible exceptions, such as transient residents, all adults who are subject to the laws and policies are full citizens who possess all the rights and opportunities just listed.

Needless to say, this brief description neglects a host of complexities and qualifications, and my list may also omit some institutions that arguably ought to be included, such as the rule of law. But, brief and incomplete as this list of essential democratic institutions may be, it will, I hope, adequately serve our purposes here.

Why these institutions are necessary for informed consent

You might now ask, however, why these particular political institutions are essential for modern representative democracy. A strictly historical answer would no doubt describe how they emerged, and not necessarily for democratic reasons. But suppose we interpret our question to mean ‘On what grounds are these particular political institutions *justified*? Why are they essential if a government is to be endowed with democratic legitimacy?’ The answer is, I believe, that all of these political institutions – and perhaps others – are necessary in order for a government to obtain the informed consent of its citizens at a reasonably satisfactory level in a political system on the large scale of a country or nation-state.

Ideally speaking, and ignoring the problem of scale, what would informed consent require? Once again, I can do no more than list some requirements without amplification, on the reasonable hope that everyone will find them acceptable. They would surely include the following.

- 1 Citizens must possess opportunities for acquiring an adequate understanding of the laws and policies they will be required to obey.
- 2 They must also possess opportunities for participating effectively in consenting, directly or indirectly, to the laws and policies they will be required to obey.
- 3 In the process of giving their consent, citizens must be entitled to equal votes.
- 4 Citizens must also possess the right and opportunity to exercise final control over the agenda of laws and policies enacted by their government.
- 5 Among the persons who are required to obey the laws and policies adopted by their government in a manner that satisfies the previous criteria, all or nearly all adults must possess the rights, liberties, and opportunities necessary in order for the previous criteria to be satisfied. Citizenship, in other words, must be highly inclusive.

I need scarcely remark that no political system has ever fully met these exacting democratic goals or ideals, nor, I think, will one ever do so. They are useful nevertheless in providing us with criteria that we can employ to appraise the achievements and possibilities of actually existing political systems in the real world, and to design improvements and alterations in political institutions in order to make them more democratic – or at least less non-democratic. Thus when we apply the term ‘democracy’ to the large-scale representative governments of different countries, by implication we believe that, though they do so imperfectly, their political institutions satisfy these democratic criteria at a sufficiently advanced level to provide their governments with a satisfactory degree of democratic legitimacy.⁵ Conversely, when we describe a country’s government as non-democratic, authoritarian, dictatorial or whatnot, we mean, I believe, that the country lacks one or more of the key political institutions that I described, and as a consequence it falls

below a reasonable threshold for gaining the consent of those subject to its decisions.⁶

Why are international systems unlikely to provide government by means of democratic institutions?

Our question, then, becomes something like this: Can we expect international systems to develop the basic political institutions of modern representative democracy – polyarchy, I might want to say – at a level sufficiently high to confer democratic legitimacy on their policies and decisions? Let me suggest several reasons that, I believe, justify a critical answer to this question.

To begin with, the institutions will have to be *deliberately created*. They will not come about through some form of spontaneous generation or blind Darwinian evolution. However, I see virtually no prospect that the full set of democratic institutions will be introduced in any international organization, with the possible exception of the European Union. What is more, the task of designing political institutions that would be both effective in governing a specific international system and sufficiently acceptable to its members is daunting.

Even in the EU, despite the endless barrage of criticism over its ‘democratic deficit’, the challenge of creating a democratic framework faces enormous difficulties. Consider just one problem: should a democratic European Union be designed along the lines of parliamentary systems, which are familiar to Europeans, or, as one American scholar has recently proposed, would ‘the American “pluralist” model with its emphasis on societal interest groups and fragmented governmental structure [provide] a more appropriate foundation for democratic decision-making at the EU’s supranational level’ (Coultrap 1999)? Is the constitutional treaty of June 2004 an answer to this problem? And which answer? Moreover, as it is well known, parliamentary systems themselves vary enormously. Viewed at the simplest level they range from ‘majoritarian’ systems such as that of Britain to ‘consensual systems’ such as those of Sweden and the Netherlands. Electoral systems are equally diverse, and so too are the party systems that result to a certain extent from the nature of the electoral system.

To complicate matters further, the problem that the framers of the American constitution had to confront in 1787 is even more forcefully posed for Europeans. How and to what extent should the constitutional system concentrate powers in a central government or decentralize them to constitutionally protected units? As a British writer recently pointed out:

Europe has been the scene of a veiled competition between three forms of the state to become the model for Europe as a whole: the French, the German, and the British. Despite recent decentralization, the French model remains an essentially bureaucratic model . . . The German federal system, by contrast, takes enormous trouble to disperse authority and

power between the federal government and the *Länder* . . . The third model is the British: a common-law model which privileges custom and precedent rather than formal principle.

(Seidentop 2001)

We might also add another possible alternative: the American federal system. Later on, I'll say a few words about the suitability of American federalism as a model for Europe.

My second reason for criticism is the problem of *size or scale* (Dahl 1984). Two aspects of size or scale are relevant: the number of citizens in a unit, and its area. Considering only the first, as the number of citizens increases, the opportunities for direct citizen participation in decisions decline – even, let me add, if people communicate by electronic means. The arithmetic is inexorable: given a fixed amount of time for discussion, as the number of possible discussants increases, the amount of time available for each person to participate must necessarily decline. Indeed, a point is rapidly reached at which the amount of time available to each discussant approaches zero, even on the unrealistic assumption that citizens would be willing to devote all their waking hours to political life.

This inescapable fact of political life represents one horn of a fundamental dilemma. The other horn is this: the smaller a political unit, the greater the number of matters important to its residents that will lie beyond its control. Other things being equal, then, as a political unit expands its boundaries in order to cope with matters of importance to its citizens, the opportunities for citizens to participate directly in political decisions will shrink inexorably. Conversely, as a democratic unit contracts its boundaries in order to provide citizens with greater opportunities for direct participation, the more it reduces the number of important matters that the government of the unit can deal with effectively. As a consequence of this fundamental democratic dilemma, changes in scale ordinarily involve trade-offs between participatory opportunities and governmental effectiveness.

Two obvious ways of coping with this dilemma are by electing representatives and by decentralizing authority to smaller units within the larger. Both have often provided democratic countries with acceptable trade-offs. However, in the view of some democratic critics, the scale of the nation-state or country already exceeds the level at which an acceptable level of participation is possible. In their view, polyarchy itself is but a pale shadow of 'real' democracy.

Probably few of us adhere to such an extreme view. What we lose in participatory democracy, most of us would say, we gain in a more effective representative government. Yet as we push political boundaries beyond the level of the nation-state in order to achieve the desirable consequences of international systems, we inevitably reduce even further the possibilities for citizens to participate sufficiently in order to express their informed consent to the policies they will be required to obey. Some feeling of this

sort helps, I think, to trigger off the kinds of demonstrations exhibited in Seattle and Genoa – which I’ve suggested just might be like the canaries in the coal mines.

What is perhaps more relevant, the enormous variation in the sizes of democratic countries bears on the way citizens in different countries may view their loss of effective democratic control. For example, people in smaller democratic countries such as Denmark and Sweden may well feel more keenly the costs of yielding authority to the EU than people in large countries such as Germany, France and Italy.

My third reason for criticism is the *diversity* among the putative citizens of international systems: diversity in historical experiences, identities, cultures, values, beliefs, loyalties, languages and more. The relation between scale and diversity is empirically and theoretically imperfect – consider the cultural diversities of Belgium or Switzerland, for example. But in general the relation is positive, in the sense that increasing scale tends to increase diversity. This outcome seems to me obviously true with international systems. For, to the already existing diversities, international systems add diversities within some countries that are by no means duplicated in others.

Because of diversity, decisions have different consequences for different groups. The costs and benefits of virtually all political decisions bear differently on different groups. There are always losers as well as gainers. Losers may yield unwillingly – or not at all. Even in democratic countries, losers or potential losers may resort to violence. In the United States, in 1861, the losers resorted to secession and the result was civil war.

Diversity suggests a *fourth reason* for criticism: the need to create a *political culture* that will help to induce citizens to support their political institutions through times of conflict and crisis. Maintaining stability in time of acute crisis is difficult enough within democratic countries, particularly those with great diversity. A generally democratic and constitutionally supportive political culture that had been developed by Americans over more than half a century proved too weak to prevent secession and civil war in 1861. But if crisis and conflict threaten cohesion even within a country with a widely shared political culture, how much more will they threaten cohesion in international systems that lack a widely shared political culture.

Fifth, the nature of many international decisions makes it extremely difficult and even impossible for most citizens to provide their *informed* consent to the decision. Yet consent resulting from ignorance of the consequences is hardly consent at all. Indeed, even within democratic countries, informed consent to decisions is often weak or effectively absent, particularly, perhaps, within the largest democratic countries. How could international systems succeed where national systems often fail?

Within democratic countries, citizens tend to be least well informed about foreign affairs (Dahl 1999). Alternative options are often poorly explored; yet if citizens were able to gain a better understanding of their interests, and if their views were more fully developed, expressed and mobilized, a specific

foreign policy decision might well go the other way. If this is now true of the process of making foreign policies within democratic countries, is it not likely to be even more true of international systems?

Finally, the global economy, international markets and international business firms comprise an international system that poses peculiar and highly complex problems of legitimacy. Because these are far too complex to discuss adequately here, perhaps I may be permitted to express my main point in just a few words. As we all know, business firms that are predominantly hierarchical in their internal governments, but operate in more or less competitive markets, gain a substantial part of their public acceptability, toleration and legitimacy not only from the benefits of market competition to consumers but also because of regulatory actions taken by the state. If the economic history of the past two centuries tells us anything, it is that state regulation is absolutely essential to ensure a reasonable level of market competition, to reduce the harm otherwise caused by unregulated firms and markets, and to ensure a more just, or at least more acceptable, distribution of the benefits. Without state regulation, political élites and the public at large would soon sweep private business firms and markets into that well known dustbin of history.

But how are business firms and markets to be regulated at the international level? One answer is that they will be regulated by other international organizations and processes – the WTO, World Bank, IMF, and the like. But doesn't that solution, desirable as it may be, simply restate our central problem of democratic consent in another way?

Is federalism a solution?

If my argument is roughly correct, if international systems are both important and desirable, and yet are unlikely to be democratic, what are we to do? Are there alternative although non-democratic ways of gaining legitimacy through consent? I regret to say that I can offer no adequate answer.⁷

However, I cannot forbear from concluding with a brief comment on the relevance of American federalism to the EU.

One democratic response to the problem of scale, as I mentioned, is decentralization, and one special form of decentralization that might be adopted by the EU is federalism. The American experience seems particularly relevant: a weak confederacy under which the newly independent states had agreed to govern themselves was peacefully replaced in 1789 by a federal system designed two years earlier at a Constitutional Convention. What is even more relevant, the American federal system has adapted flexibly to the enormous enlargement of scale – both in population and territory – that has occurred over the last two centuries. However, let me offer a few words of caution about the relevance of that experience.

To begin with, we must not be misled by the later huge scale of the United States. In 1790 the population was just under 4 million – less than that of Denmark today. By 1800 it had reached Denmark's present population.

It did not pass the 20 million mark until the census of 1850. Thus the federal institutions were adopted and developed in a country with a small population.

What is perhaps even more relevant is that Americans acquired a sense of nationhood with extraordinary rapidity.⁸ Although state and sectional identities and loyalties continued to compete with nationhood, by 1790 probably a preponderant majority of white people in the United States already viewed their primary political identity and loyalty as American. This national identity was rapidly solidified in the coming decades, particularly as white Americans in great numbers moved westward from the states of their birth to the territories beyond and created settlements, political units, legal systems, state constitutions and cultural practices, that, like the single dominant language, were – as foreign visitors such as Tocqueville would observe – all distinctively American. Even though American identity would be persistently strained by massive immigration, the predominantly white European immigrants were rapidly assimilated into the prevailing American culture – if not fully among the new arrivals then certainly among their children and grandchildren.

Even so, strong as the common ties created by these early identities, national loyalties, practices and language may have been, they failed profoundly in two important respects. Neither African-Americans, who were predominantly slaves, nor native Americans (Indians) were assimilated; they were, instead, subject to a continuing history of degradation and exclusion. Nor could the ties of nationality overcome the economic, social, cultural and geographical cleavage between white Americans in the southern slave states and in the northern states. As we know, this cleavage led to secession. The refusal by the northern states under the leadership of Abraham Lincoln to accept the disruption of the union that secession would have brought about resulted in civil war. Young men who in other circumstances might easily have engaged in civil discourse were engaged instead in killing one another in numbers far beyond the losses sustained in the French or American revolutions or the English Civil War.⁹

Although nothing may divide Europeans as deeply as slavery and its aftermath divided Americans, the American experience reminds us that that even federalism cannot withstand deep social, economic and cultural cleavages.

Conclusion

I hope that my criticism may prove to be unjustified, and that means will be discovered by which international systems can gain the informed consent of those who are subject to their decisions.

A temptation we should resist is to debase the term democracy by applying it to systems that fall far short of our polyarchal democracies in meeting democratic standards. It may help if we recall how often the word has been

exploited by dictators to disguise the real contents of their undemocratic regime by affixing to it a meretricious democratic label.

I do not mean to suggest in the least that non-democratic international systems are dictatorships. Perhaps our vocabulary lacks a satisfactory name for them. I would be inclined to call them *government by limited pluralistic élites*. That is to say, in making their decisions, *international political and bureaucratic élites* are *limited* by treaties, international agreements and the ultimate threat of national rejection; and they are typically *pluralistic* because of the diversity of views, loyalties and obligations among the élites.

But to call these systems democratic is not likely to deceive democratic citizens in democratic countries for long. By what process did you gain our consent, many democratic citizens will soon begin to ask, for the decisions and policies we are supposed to obey? But if you do not govern over us with our informed consent, or at least the informed consent of a majority of our fellow citizens, why are we obliged to obey your decisions?

These are dangerous questions. Or it might be more accurate to say that they raise potentially explosive issues. Foreseeing this, perhaps we should pay more attention to the signals coming from the canaries in the coal mines.

Notes

- 1 Because not all democratic countries are, strictly speaking, 'nation'-states, I have come to prefer the term 'country', which I'll use here interchangeably (if somewhat inaccurately) with nation-state. A colleague once offered 'national state' as a possible alternative. I'll stick here with 'nation-state' and 'country'.
- 2 Despite predictions of the 'end of the nation-state', it is possible that people in democratic countries will employ their national governments in order to mitigate some of the adverse effects of international decisions. Thus the importance of national governments may be both reduced and increased by 'globalization'.
- 3 About the same time, John Pinder (1999) raised somewhat similar questions concerning the EU.
- 4 I draw freely here on the categories described a half-century ago by C. E. Lindblom and me (1953).
- 5 I'm aware that terms such as 'satisfactory' and 'reasonable' leave a great deal of leeway for controversy, but they will have to suffice for this discussion.
- 6 Admittedly, the threshold between democracy and non-democracy is somewhat arbitrary. Instead of a dichotomy between democracy and non-democracy we might array countries along a scale from a total absence of all vestiges of the necessary political institutions to their complete existence, with perhaps no countries at either extreme.
- 7 An American legal scholar, P. L. Lindseth (1999), proposes to make decision-making in the EU more accountable by creating a European Conflicts Tribunal composed of 'sitting judges from national supreme courts or their equivalent', who would 'rule on the question of the relative competences of the Community and the Member States, not merely of their courts but of their respective "legislatures" as well.' 'Decision-making in the new tribunal . . . would not be limited to "abstract norm control" upon reference by a Member State or Community institution; rather, I would allow national courts and individual litigants to interpose conflicts of jurisdiction as well, as long as individual standing requirements are satisfied and

the available national and EC legal remedies are exhausted first.’ But the decision of the tribunal would not necessarily be the end of the matter. ‘The Community should explore whether to give the Member States a further “political” right of appeal . . . If the concerned Member State cannot negotiate a satisfactory political solution within the European Council, the Member State should then be allowed to opt out of the legislation’ (pp. 731–2).

8 The process was of course far more complex than I can describe here.

9 Secession and civil war did not result from the attempt by the North to abolish slavery, as is sometimes thought. It resulted from the refusal of the northern states to allow slavery to be extended from its then existing boundaries to the new territories and future states in the West, which, as northerners foresaw, would erode or destroy their opportunities to acquire lands and settle as free farmers. The war aims of the North did not go beyond the prevention of slavery in the new territories. Slavery was thus constitutionally abolished through the Thirteenth Amendment to the Constitution (ratified in late 1865), to which additional protections were added by the Fourteenth (1868) and Fifteenth (1870) amendments. However, when northern troops were withdrawn from the defeated southern states after the election of 1876, these amendments were effectively nullified. ‘White supremacy’ was in due time restored throughout the South, and the political rights of African-Americans in the southern states were not effectively protected until after the passage of the Civil Rights Act in 1964.

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