

## Conservative Idealism and International Institutions

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Like many Anglo-American conservatives, Jeremy Rabkin believes that the European Union (“EU”) presents “a serious challenge to American policy aims and American political ideals.”<sup>1</sup> This argument is timely, for the defense of “American sovereignty” seems to resonate in current US political debates. Uncompromising opposition to any surrender of US sovereignty to international organizations is increasingly widespread these days, particularly on the right wing of the US political spectrum. The question whether US foreign policy should be unilateral or multilateral is emerging as a salient electoral issue. Many critics of international organizations are deeply troubled, moreover, by what they know of EU politics, which they view as presumptively undemocratic and suspiciously concerned about social issues. Since writings by Euroskeptic British Tories wield a powerful and disproportionate influence on conservative opinion about Europe in the United States, it is fitting that William Cash, a Conservative Member of Parliament, head of the Euroskeptical “European Foundation,” and a leading public critic of the current terms of British EU membership, joins this symposium.<sup>2</sup> Their arguments—a common position that I shall term “conservative idealism”—are worth exploring in detail because they are typical of much contemporary Anglo-American thinking about the EU.

Rabkin makes explicit the threat that many conservatives perceive to be emanating from Brussels. It is two-fold: strong supranational institutions in the public sector and plentiful non-governmental organizations (“NGOs”) in the private sector. In the public sector, the member governments of the EU tend to support strong international institutions. As Rabkin puts it: “National governments that submit to a European Court and a European Commission find it easy to contemplate international counterparts that can give direction to other states, without the fuss and bother of parliamentary ratification.” European governments, he maintains, tend to

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1. Jeremy Rabkin, *Is EU Policy Eroding The Sovereignty of Non-Member States?*, 1 Chi J Intl L 273 (2000).

2. See Bill Cash, *European Integration: Dangers for the United States*, 1 Chi J Intl L 315 (2000).

favor autonomous secretariats, independent dispute resolution bodies, and uniform international rules without reservations or exceptions. In the private sector, EU governments promote the participation of NGOs in global governance. In Rabkin's words: "The EU is also a great patron of NGOs for reasons that are closely related to its own structure . . . the EU Commission (as well as the European Parliament) have sought to build European-wide constituencies for European policy."<sup>3</sup> Rabkin offers three examples: dispute settlement in the World Trade Organization ("WTO"); strong environmental and labor protection; and the International Criminal Court ("ICC"). In each case most EU member governments favor more institutionalized international cooperation, while the United States is somewhat more hesitant—ostensibly due to pressure from international officials and their clients among the NGOs.

Rabkin views this combination of supranational bureaucracy and transnational mobilization, purportedly sponsored by the EU, as nothing less than "a systematic program of eroding or reconfiguring national sovereignty." In the international system today, this program presents the United States with a "clear ideological alternative." Rabkin warns: "A world more in accord with EU designs will be a world in which national sovereignty has less and less meaning." The issue is clear. "Is that the kind of world Americans want to inhabit?"<sup>4</sup> Rabkin asks. His answer is no. The EU's program "is likely to have less appeal for Americans who care about American independence."<sup>5</sup> The precise basis for Rabkin's concern about US sovereignty and independence remains vague—a point to which I shall return—but it appears to have something to do with two characteristics of the EU: the perceived lack of democratic control on Brussels bureaucrats who help manage the institution, and the tendency of the EU to regulate social issues, such as environmental protection, human rights, and labor standards. The comments of Bill Cash in this same volume elaborate more explicitly this characteristic conservative concern about the EU's democratic legitimacy.

Whatever the precise basis of his objection, Rabkin concludes by recommending that the United States assert itself as "a force for an opposing trend . . . if it does not want to be dragged into the same patterns preached and practiced in Brussels."<sup>6</sup> Cash is even more alarmist when he predicts: "I think [the EU] does

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3. Rabkin also observes that the EU is powerful. "[T]o the extent that Europe negotiates as a bloc," he argues, "it is harder for the United States and other nations to bargain with otherwise like-minded states within the European Union. . . . French insistence on agricultural protection means that 'Europe' resists international agreements for more open trade in this area." See Rabkin, 1 *Chi J Intl L* at 275 (cited in note 1). This straightforward diplomatic issue deserves closer attention elsewhere, but here I focus on the core of the conservative idealist critique of multilateralism.

4. *Id.* at 273.

5. *Id.* at 290.

6. *Id.*

represent a threat to the United States and I think that I would share some of Martin Feldstein's concerns when he said that it could even lead to a world war if it were to continue uncontrolled.<sup>7</sup> The critique of US multilateralism advanced by Rabkin and Cash while in some details idiosyncratic, reflects widespread sentiment among Anglo-American conservatives.<sup>8</sup> It therefore deserves our closer attention, and I shall focus here in particular on its intellectual foundations.

This argument against multilateralism is a form of what I term conservative idealism. True, both Rabkin and Cash flirt with realist rhetoric—the unsentimental language of “national interest”—but their position is not really based on pragmatic or realist considerations at all.<sup>9</sup> Neither seeks to calculate the concrete costs and benefits of multilateral commitments for the United States (or the United Kingdom), as conservative realists traditionally counsel. Instead they advocate that the US redirect its foreign policies, after a half-century of multilateral engagement, to the defense of national “independence” and “sovereignty” for their own sake—regardless of the concrete consequences. Neither Rabkin nor Cash concede any explicit limitation on the defense of sovereignty—though, as we shall see, a somewhat more nuanced libertarian agenda seems to covertly underlie this policy.

What immediately strikes the reader as encountering Rabkin's argument—to an even greater extent than that of Cash—is that he is so vague about the justification for privileging the defense of American sovereignty above all other policy goals. This is, after all, peculiar and rather extreme counsel for a country that has gone from success to success over the past half-century through strong commitments to European defense, global trade liberalization, and many forms of technical cooperation. One wonders whether Rabkin and Cash are simply exploiting rhetoric about “national independence” as a mask for a partisan program of opposition to international regulation in areas of primary interest to non-business interests, such as human rights, social welfare, environmental policy and labor standards. At the very least, does not the US national interest deserve a more pragmatic defense?

Rabkin and Cash's ideological understanding of the national interest leads them, furthermore, to confuse the sources of support for multilateral institutions by other governments, notably those of EU member states. Whereas most analysts view

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7. See Cash 1 Chi J Intl L at 323 (cited in note 2). Also Martin Feldstein, *EMU and International Conflict* 76 For Aff 60 (Nov/Dec 1997).
  8. The approving remarks for former United Nations Ambassador Jeanne Kirkpatrick and AEI Senior Vice President John Bolton illustrate the conservative position.
  9. For statements of the realist position, see Hans Joachim Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Knopf 3d ed 1960); Edward Hallett Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations* (Macmillan 1940); George Frost Kennan, *American Diplomacy, 1900–1950* (Chicago 1951); Charles Krauthammer, *Peacekeeping is for Chumps*, *Saturday Night* 72 (Nov 1995); Kenneth Waltz, *Structural Realism after the Cold War*, 25 Intl Sec 5 (2000).

multilateralism in Europe and elsewhere as a pragmatic adaptation to high levels of socioeconomic interdependence—in other words, as a response to globalization—Rabkin and Cash attribute it to idiosyncratic political ideals held by proponents of a European superstate. Rabkin and Cash, here joined by Jeanne Kirkpatrick, criticize the spread of supranational institutions in part because they believe that the EU—with qualified majority voting, a relatively large and influential supranational bureaucracy, and limited opportunities for participation by individual citizens or national parliaments—redistributes power from elected governments and their citizens to a cabal of international technocrats. The US should stand together with Britain and its former colonies to stop the global spread of multilateralism before national democracy is subverted. Its anachronistic and alarmist policy recommendation aside, this understanding of the EU misrepresents the historical record of European integration, severely underestimates the extent of bureaucratic control of EU institutions, and misstates what is really at stake in the current transatlantic policy issues. Dubious history makes for dubious policy.

In the first section of this essay, I present a pragmatic view of the challenges posed by global multilateralism—the view traditionally held by a bipartisan consensus in the US. In the second section, I compare such a view to the “conservative idealist” belief that the US should mount an uncompromising defense of its independence and sovereignty. In the third section, I close by examining, and dismissing, the claim that the EU is becoming an undemocratic superstate that poses a direct threat to US sovereignty.

## I. THE CONVENTIONAL VIEW: A PRAGMATIC ASSESSMENT OF MULTILATERALISM

Any evaluation of Rabkin’s argument should begin by acknowledging the kernel of truth in it. There is a pragmatic sense in which his basic assessment of the dominant trend in contemporary US foreign policy is obviously correct: The United States is indeed moving toward multilateralism. The United States and other advanced industrial democracies live in an increasingly interdependent world—a world in which it is increasingly less expensive for goods, capital, immigrants, pollutants, and terrorists to cross borders. The central consequence of interdependence is that the realization of one country’s policy objectives—military defense, the promotion of international trade, or environmental and labor protection—depends in part on the policies adopted by other countries. If the citizens of any country want to set an effective environmental standard, export their goods, defend themselves against enemies, or protect human rights at home or abroad, they must increasingly do so in cooperation with other governments. In other words, in an interdependent world, governments must increasingly trade away a certain amount of unilateral policy discretion in order to achieve the domestic policy objectives to which they collectively aspire. To be sure, the threat to domestic policy autonomy is greater

for small, highly interdependent countries, such as the member states of the EU, than for large, relatively isolated countries, notably the United States. But it is a concern for all. Few today would deny that the American national interest is well served by trade liberalization under the General Agreement on Trade and Tariffs ("GATT") and the WTO, military alliances like the North Atlantic Treaty Organization ("NATO"), and a host of other treaties and agreements of interest to American citizens.

What institutional form should such agreements take? When governments make policy cooperatively, collective action problems of coordination, compliance, monitoring and enforcement often arise. In order more efficiently to identify, reach decisions, and monitor compliance, governments construct international institutions. Some institutions mandate majority voting, as in the International Monetary Fund ("IMF") and the EU; some establish extensive monitoring and compliance machinery, as in some arms control and environmental treaties; some erect strong international dispute resolution tribunals, such as the WTO and the EU; some structure expensive and complex pre-commitments to action, as in NATO. In any such circumstance, governments contract to exchange a measure of institutional and legal sovereignty for a part of the increase in welfare generated by more effective policy coordination. In short, governments surrender *de jure* sovereignty in order to increase their *de facto* autonomy—just as individuals do in a domestic social contract. In this view, national sovereignty is not an end in itself; it is a means to promoting national welfare. And when the national welfare is more efficiently pursued by pooling sovereignty this is increasingly what governments do.

In this context, as well as in more general foreign policy writings, the tendency of the US to exploit its superpower status to carve out unilateral exceptions and reciprocal arrangements has been widely discussed by both critics and defenders. They carefully weigh the costs and benefits of such policies—both for the US "national interest" and for other countries.<sup>10</sup> All other things being equal, the more intense the patterns of underlying interdependence, the greater the number of governments involved, and the less hierarchical their relationship, the more complex and sophisticated the institutions they tend to construct. The average European country, which trades 50% of Gross Domestic Product ("GDP") or more, is thus more likely to enter into multilateral commitments than a country like the US, for which foreign trade is barely a quarter as important to the national economy. The EU, which coordinates a large number of similarly sized countries, is more likely to develop a more extensive institutional structure than, say, the North American Free Trade Agreement ("NAFTA"), which coordinates only three countries. The great relative bargaining power of the US means that it prefers to create unilateral exceptions, which leads to a characteristic American ambivalence toward multilateralism—

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10. Joseph S. Nye, Jr., *Bound to Lead: The Changing Nature of American Power* (Basic 1990); Henry R. Nau, *The Myth of America's Decline: Leading the World Economy into the 1990s* (Oxford 1990).

another reason why NAFTA is less developed than the EU. US unilateralism undermined Bretton Woods exchange-rate arrangements, permeates the US relationship to GATT and the WTO, and fuels US skepticism toward domestic application of international human rights norms. In sum, because the United States (like Japan and Europe as a whole) is not particularly interdependent, because it is large enough to benefit disproportionately from bilateral bargaining, and because it has little experience with regional integration schemes—as well as for more idiosyncratic reasons—the US government tends to be more hesitant to pool sovereignty in intensive multilateral cooperation than most other advanced industrial countries. Like most powerful and isolated countries, the United States tends to favor unilateralism somewhat more than others.<sup>11</sup>

This pragmatic analysis of interdependence and multilateralism is hardly novel. The recognition of the necessity for international cooperation has long since become a commonplace of modern international relations theory, and contemporary writing on US foreign policy. Richard Cooper pointed out a generation ago in his classic study, *The Economics of Interdependence*, that welfare-maximization under conditions of global interdependence often requires policy coordination.<sup>12</sup> Unilateral hegemony, Robert Keohane convincingly argued almost two decades ago in his path-breaking book, *After Hegemony*, cannot be counted on to provide such coordination. Keohane, Stephen Krasner and others argued in a seminal volume on *International Regimes* that a measure of institutionalization may be required to resolve efficiently the collective action problems of international cooperation.<sup>13</sup> These works have spawned a generation of detailed theoretical and empirical inquiry into the benefits international organizations provide for their member governments. In recent years, scholars have extended this analysis to the EU. These foundational insights form the basis of the modern study of international political economy and international regimes.<sup>14</sup>

Since the presidency of Woodrow Wilson and the debate over the Treaty of Versailles, American conservatives (and not a few liberals) have issued pragmatic warnings against sacrificing the unilateral option. From Henry Cabot Lodge through Henry Kissinger, realists inveighed against liberal “idealism,” “utopianism,” “legalism,”

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11. For a more detailed argument in the context of US human rights policy, see Andrew Moravcsik, *Why is US Human Rights Policy so Unilateralist?* (Paper presented at the Conference on “Unilateralism, Multilateralism, and US Foreign Policy,” Center on International Cooperation, New York University, June 2000).
  12. Richard N. Cooper, *The Economics of Interdependence: Economic Policy in the Atlantic Community* (Columbia 1968).
  13. Kenneth A. Oye, ed, *Cooperation Under Anarchy* (Princeton 1986); Stephen D. Krasner, *International Regimes* (Cornell 1983); Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton 1984).
  14. Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell 1998); Helen V. Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* (Princeton 1997).

and “moralism.” These conservative realists criticize what they view as ideological rather than pragmatic support for multilateralism. They call on those who favor multilateral institutions to attend to the “national interest” within the enduring constraints imposed by an anarchic world system. The US is a great power and great powers must be prepared to act unilaterally—a theme present in contemporary conservative critics like Samuel Huntington, Charles Krauthammer and George Will.<sup>15</sup> Such criticism has traditionally served as a healthy corrective to unguarded optimism about multilateral institutions. On pragmatic “national interest” grounds, a plausible case can certainly be made for more qualified US participation in the ICC, certain environmental accords, and particular human rights treaties.

## II. CONSERVATIVE IDEALISM AND US MULTILATERALISM

If the tension between welfare and sovereignty in a globalizing world system is a commonplace, and if the pragmatic arguments for and against such commitments have continuously been weighed over the past century, why is Rabkin suddenly so concerned about a threat to American sovereignty? Is it really so surprising that the United States, like other advanced industrial democracies, contemplates the surrender of a measure of sovereignty in order to increase national welfare—as it has done consistently since World War II? What is Rabkin’s concrete, pragmatic criticism of the tendency of US liberals and Europeans to support global multilateralism?

Rabkin’s answers to these critical questions are often frustratingly vague, as we shall see, but one thing is clear. He offers no pragmatic critique. Like Cash, Rabkin is, in fact, utterly unconcerned with the broad US “national interest” or the balance of costs and benefits. To be sure, he occasionally bolsters his argument by pointing out where the Europeans pursue their distinctive national interests through supranational institutions, but he makes no attempt to offer an even-handed assessment of whether cooperation in particular areas is, on balance, beneficial to the United States. A balanced policy analysis would surely take into account the fact that US and EU interests often converge. US exporters and US consumers both benefit from effective enforcement of free trade norms; many would argue they benefit from global cooperation in human rights, environmental policy, and defense.<sup>16</sup> Indeed, the US often gets the better of it, as in areas like controls on subsidization of the aerospace industry or the use of chlorofluorocarbons. Many institutions, such as the IMF or NAFTA, have been crafted in many ways to suit US interests. Yet this sort of

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15. See, for example, Gideon Rose on Conservatism and US Foreign Policy Gideon Rose, *Present Laughter or Utopian Bliss?*, 58 *National Interest* 41 (Winter 1999/2000).

16. Rabkin mentions only the controversial case of transatlantic agricultural trade, but ignores extensive cooperation between the United States and EU in industrial trade, which has powered the successive GATT rounds since 1947 and resulted in the reduction of average tariffs among industrial nations to under 5 percent.

pragmatic interest-based reasoning is entirely foreign to Rabkin's approach. Nowhere in his treatment of US multilateralism in general, or in his discussion of specific cases, do we find an evaluation of the concrete costs and benefits of multilateral cooperation for the United States.

Pragmatic concerns are irrelevant to conservative idealists because they are concerned with the procedural ideal of sovereignty, rather than its substantive consequences. Rabkin is no proponent of a traditional foreign policy dedicated to the "national interest." He is instead an idealist, for whom the promotion of US "independence" and "sovereignty" is an end in itself, regardless of the concrete consequences. Americans should maintain the legal right and practical ability to act unilaterally, no matter what. At times Rabkin really seems to argue that "independence" and "sovereignty" are noble ends in themselves. Anything else, he argues, "is likely to have diminishing appeal for Americans who care about American independence."<sup>17</sup>

Surely such an extreme notion requires some intellectual defense. In a liberal society, existing political institutions are not self-justifying—they are means to promote the welfare of the citizenry. Why should American citizens pay any price and bear any burden to assure that no treaty commits the United States to international cooperation—even when, as we have just seen, there may be large economic, social and political benefits from deeper involvement? Rabkin's 18th century image of a virgin republic in the New World, unhampered by any entangling alliance, has a certain quaint charm, but it is surely a curious doctrine for the 21st century. Surprisingly, given its essential role in Rabkin's argument, Rabkin's justification for the absolutist commitment to national sovereignty is incomplete, leaving us to speculate as to his real purposes. What really motivates this conservative idealist policy recommendation? Two broad possibilities present themselves.

### III. A PARTISAN AGENDA?

One possibility is that the conservative idealist defense of US "independence" and "sovereignty" simply masks a narrow and essentially partisan domestic agenda favored by conservatives. For this there is much evidence. It seems that Rabkin does not really oppose multilateralism, *just multilateral cooperation around certain emerging policies he opposes*. Is it just coincidence that each of Rabkin's three examples of multilateralism—environmental accords, human rights, and social and labor standards in the WTO—involves a policy generally favored by US Democratic liberals (and social democrats in Europe) rather than Republican conservatives (and British Conservative Euroskeptics like Cash)? In criticizing multilateralism, why does

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17. Rabkin, 1 Chi J Intl L 273 (cited in note 1).



Rabkin all but ignore the primary task of WTO, EU and NAFTA institutions, namely to enforce free trade in goods and services?

Rabkin obscures this bias by focusing in his article published here only on labor, social policy, and human rights. Yet in his oral presentation of the same paper at the AEI conference, he speaks more frankly:

The European Union is dominated by social democrats, and in earlier years by Christian democratic parties which were very sympathetic to, let's say, the management of markets. . . . The program of the European Union . . . has been basically this.

He goes on to describe the EU as follows:

[EU proposals for Trade liberalization are] accompanied by social regulation, environmental regulation, non-discrimination standards, [and] other things which will make unions and activists and socialists of various kinds feel that there's something important in there for them, too, and in particular will reassure the countries that have the most ambitious environmental and labor and social standards that it will not be dangerous to be in an open market with countries that have less of that because we will force them to adopt our standards. . . . And what they are doing domestically, they try to now do internationally for the same reason. They. . . are having more and more open trade with the rest of the world and so they want the rest of the world to be like Europe in its labor standards and its environmental standards and so on. What can the US do about this?<sup>18</sup>

The only conclusion to draw is that Rabkin feels that the "national interest" of the United States is to oppose labor, environmental and social regulation—and that this is the reason to defend US sovereignty.

Another striking example, drawn from Rabkin's book entitled *Why Sovereignty Matters*, is his analysis of the NAFTA agreement. Regarding the side accords concerning labor and environmental standards, he writes:

Both labor leaders and environmentalists have urged that international free trade be tied to more ambitious international standards in those areas. . . . Certainly the net effect of such measures (if successfully implemented) would be to suppress the choices that individual nations might otherwise make for themselves regarding proper levels of environmental protection and labor market controls.<sup>19</sup>

This is strangely one-sided. It is true that some environmental agreements seek to "suppress the choices that individual nations would make," but so do provisions relating to the major purpose of NAFTA, namely to liberalize trade. Both the trade agreements themselves and the "fast track" provisions that permit their ratification in the United States are quite deliberately designed to "suppress the choices nations might otherwise make"—for example, the choice to engage in outright protectionism or to attach Congressional amendments. Indeed, such commitments and procedures constrain US sovereignty and distort US constitutional procedures to a far greater

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18. Jeremy Rabkin, Transcript of AEI Conference Proceedings, on file with the *Chicago Journal of International Law*.

19. Jeremy Rabkin, *Why Sovereignty Matters* 6 (AEI Press 1998).

extent than the relatively ineffective side accords. Many argue, further, that the primary purpose of the NAFTA treaty was to promote economic reform in Canada and, above all, Mexico. It would be reasonable to criticize NAFTA on substantive grounds—and it is striking that left-wing critics are generally those who do so—but it is inconsistent to proclaim “national independence” as an ideal, then arbitrarily target certain aspects of international agreements for criticism.

Rabkin passes over other international organizations more favorably viewed by conservatives as well. I could find no mention in any of his writings about the strongest obligation the United States has: its commitment to the NATO alliance. NATO, initially opposed by conservatives for precisely the reasons Rabkin invokes, has helped keep the peace in Europe for a half century by pre-committing the United States to European defense as effectively as any majority voting system to military involvement. And what of the growing body of transatlantic regulatory arrangements, which have expanded recently in response to business pressure; and many other multilateral accords, from international copyright protection and coordination of pharmaceutical regulation to the placement of satellites and the provision of export credits? Arguably all of these multilateral agreements greatly benefit US consumers and businessmen. Does Rabkin really oppose all of these multilateral arrangements, as his principled defense of US sovereignty and independence seems to dictate? On this central tension he, like other conservative idealists, remains silent.

Rabkin’s recent book, *Why Sovereignty Matters*, permits us to take the full measure of Rabkin’s true domestic agenda. The real purpose of defending US sovereignty, he argues, is to “maintain constitutional integrity.”<sup>20</sup> By this, it is important to recognize, Rabkin does not mean a defense of the *current* constitutional order in the United States. Instead, he wants to turn the clock back fifty years or more to the proper constitutional order that, he believes, prevailed in the United States from 1789 through the mid-20th century. He rejects much of the federal legislation and jurisprudence over the past fifty years. “Before the political upheavals wrought by the New Deal in the 1930s,” he observes nostalgically, “established constitutional doctrine sought to limit the reach of federal power to matters of genuinely national concern.”<sup>21</sup> Two of the mid-20th century’s international crises, the Great Depression and the Cold War, increased the power of the federal government, and in particular the national executive, vis-à-vis the states and the Congress. These new opportunities co-opted domestic interest groups, which today “focus their energies on influencing policy details rather than hold the line of principle”<sup>22</sup> against federal power. We need, Rabkin counsels, “to retake our bearings by the constitutional principles of safer and

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20. I summarize the argument in Chapter Two (“Constitutional Integrity: The Core of Sovereignty”) of Rabkin, *Why Sovereignty Matters* (cited in note 19).

21. *Id.* at 7.

22. *Id.*

saner times."<sup>23</sup> The purpose of the Constitution, in Rabkin's understanding, is "to give force to such lines of principle"—understood in this libertarian sense.

What is at stake for Rabkin, then, is not simply a particular conservative agenda on regulatory issues, but the entire structure of the post-New Deal federal government in the United States. Trade agreements are permissible, but not efforts by liberals to use international agreements to entrench any other policies against an increasingly conservative Supreme Court and Congress. The former are legitimate, while the latter generate "distorted results" and "unhappy policy outcomes."<sup>24</sup> Since the only legitimate interpretation of the US Constitution, in Rabkin's view, is an originalist one, this cannot change. The United States must remain now and forever more a libertarian nation. Any international commitment with a country that does not share this understanding—like any expansion of federal power—is a presumptive threat to the US system of government. "The Constitution necessarily requires that sovereignty be safeguarded," he concludes in near circular terms, "so that the Constitution itself can be secure."<sup>25</sup> After a half-century of multilateral involvement, conservative idealists now realize that the newer multilateral agreements now facing the United States tend to be in areas of interest to consumers, workers, and environmentally conscious citizens, and raise the symbols of US "independence" and "sovereignty."

Rabkin is, of course, aware of the pragmatic objection that interdependence undermines policy autonomy, requiring international cooperation. What good is it, as we have seen, to exercise national sovereignty if the resulting policies are ineffective? Yet he consistently evades the concrete, pragmatic issues raised by this trade-off with blanket professions of libertarian faith. There is no contradiction between interdependence and sovereignty, he asserts, because unilateral policies are optimal. He dismisses the argument that economic policy management might require cooperation with a short paragraph concluding: "The truth, now acknowledged by virtually all reputable economists, is quite the reverse: the complexity of the modern world makes it all the more necessary to leave owners to determine how their resources and efforts can best be deployed."<sup>26</sup> Similarly with human rights: "A world where international obligations are kept within proper bounds may also be a world that offers more encouragement for accountable government and individual rights."<sup>27</sup> And with environmental policy: "A world with reduced pretensions for international law should also be a world that makes it easier and more likely for people in each

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23. *Id.* at xi.

24. *Id.* at ix.

25. *Id.* at 9.

26. *Id.* at 95.

27. *Id.* at 101.

country to achieve the level of environmental protection they desire and can afford."<sup>28</sup> In each case, Rabkin simply asserts the compatibility of the promotion of domestic democracy, the pursuit of the US national interest, and the defense of American sovereignty. It follows that "America's first duty must be to protect its own democracy and the rights and resources of its own people—by safeguarding its own sovereignty."<sup>29</sup> These claims are either tautological—unilateralism means every country chooses the policy it wants—or require some serious substantive defense. None is forthcoming. Therein lies the idealism in Rabkin's conservative agenda.

Bill Cash's presentation illustrates a similar conservative idealist tendency to cloak partisan arguments in principled claims—albeit one tailored to British constitutional circumstances and concerns. And Cash is no less willing to permit ad hoc exceptions to his principles. Like Rabkin he privileges free trade. It is striking that, despite much rhetoric about the restoration of national independence and democratic control in the face of a threat from Brussels, Cash does not in fact favor British withdrawal from the EU. He does not even oppose strong EU institutions. He favors, for example, strong enforcement of free trade within a European single market. (As a Conservative Party politician, he has little choice, given the unambiguous position of British business on this issue.) He favors stronger cooperation to enforce free trade, reduce national subsidies, promote law and order, and to advance many other matters of concern to the Tory electorate.<sup>30</sup> And let us not forget what an indefatigable and effective advocate he has been of rigorous enforcement of EU rules that might favor the interests of British beef producers.<sup>31</sup> On defense issues, he is of course a staunch defender of the NATO alliance. Overall, like Rabkin, Cash does not oppose multilateralism per se. He opposes multilateralism *only in those issues of interest to the broader non-business citizenry*, including policies on social welfare, the environment, and human rights.<sup>32</sup> This is clearest, perhaps, when he singles out for criticism recent EU efforts to enforce classical civil and political rights more effectively to balance existing rights of free movement of goods and capital.

In their conservative opposition to cooperation for any purpose other than free trade and NATO-based military defense, Rabkin and Cash are natural allies.<sup>33</sup>

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28. Id.

29. Id.

30. In addition to the text of the AEI conference, see for example, Bill Cash, *The Tories are Rumoured to be on the Verge of a Two-tier Europe*, *The Times* (London) (Mar 2, 2000). To his great credit, moreover, Cash has been a staunch, bipartisan defender of domestic civil liberties, notably on the subject of gay rights.

31. See, for example, *Cattlemen's Downing Street Delivery*, *Western Daily Press* 2 (Dec 16, 1997).

32. Cash's objections to monetary union are here an exception, though it is striking that they play little role in his argument about Europe.

33. On defense issues, for example, Cash appears to oppose European defense cooperation not because it is managed by an international organization—so is NATO, of which Cash approves—but because it is European rather than Anglo-American.

This runs so strongly against the trends of our times that it compels support for anachronistic policies. For example, Cash is no exception to the tendency of some British Tories to dream of Churchillian vision of solidarity among “English-speaking peoples.” In his AEI remarks, he is openly supportive of Rabkin’s recommendation that:

The US should try to rally non-EU states to a more skeptical stance against Europe. We’ve done this in some important negotiations. The United States has closely cooperated with other agricultural exporters, Canada, Australia, New Zealand, Chile, and Argentina in a number of international environmental negotiations. We should do more of that.<sup>34</sup>

Though the alliance described by Rabkin is in fact a transparently self-interested pact among agricultural producers, Cash dispels any doubt as to the ultimate purpose of such an expanded Commonwealth alliance in his view. It is to combat global socialism. He rails against the “unwieldy, failing, sclerotic, high unemployment Europe.” In a passage nostalgically evocative of Cold War rhetoric, he attributes EU views on international affairs to “the *acquis communautaire* and attitudes of the French . . . driven by a very powerful socialist dynamic.”<sup>35</sup>

So what appears at first glance to be a principled defense of sovereignty and independence on the part of conservative idealists is in fact compromised in two critical ways: the first because it is so idealist and second because it is so conservative. Rabkin and Cash are idealist in their evasion of serious discussion about the practical benefits of policy coordination, in particular the ways in which a sacrifice of sovereignty can increase the real policy autonomy countries enjoy. They acknowledge such effects in the area of trade and ignore them elsewhere. When they discuss the issue, they simply assert the consistency of sovereignty, democracy, and substantive benefits. Rabkin and Cash are conservative (radically so) in their tendency to interpret “sovereignty” in a peculiarly partisan way. The defense of sovereignty is limited in practice to policies conservatives currently oppose, whereas elsewhere *de facto* infringements of US sovereignty are tacitly condoned. For Rabkin, the defense of national sovereignty disguises a radical agenda for turning the US constitutional clock back a half-century to a period before civil rights, social welfare, and regulatory protection were protected by the federal judiciary. Stripped of its patina of nationalist rhetoric, the conservative idealist program surely fails to command a majority in American politics, just as Cash’s anti-EU platform fails to command a majority in Britain. Rabkin and Cash are within their rights to advocate a redirection of US foreign policy toward the formation of an Anglo-American-Commonwealth alliance against the specter of global socialism, but we should be absolutely clear that such a policy has nothing to do with the ideal of national independence and sovereignty.

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34. Bill Cash, Transcript of AEI Conference Proceedings, on file with the *Chicago Journal of International Law*.

35. *Id.*

#### IV. A DEFENSE OF DEMOCRACY?

For the moment, however, let us give conservative idealists the benefit of the doubt. Before dismissing Rabkin and Cash's position as motivated by nothing more than a reactionary effort to roll back popular environmental, social, labor and human rights policies, it is only fair to consider more seriously the possibility that there is indeed a deeper normative ideal at stake. What is the normative ideal to which Rabkin and Cash most often make reference? It is the ideal of democracy.

It is of course ironic that conservative idealists should invoke democracy. As we have just seen, the concrete goal of their policy is to deny arbitrarily multilateral backing to policies that favor the immediate interests of broad, diffuse groups in a clean environment, human rights protection, social welfare, and labor standards, while retaining multilateral backing for policies arguably of immediate interest to narrower groups, such as free trade and NATO defense. Opposition to international human rights enforcement seems a particularly odd position for self-proclaimed liberal democrats to adopt. Even if the constituencies were identical, it is a strange concept of democracy that would propose limiting strong international institutions to those functions that happen to interest the constituents of conservative parties.

Rabkin's defense for this curious notion of democracy rests on an explicitly nationalist conception of politics, whereby there can be no legitimate obligation to people outside of one's own nation-state. Only a "distinct people" can form political obligations.

To feel obligated by the decision of the requisite majority in the framing of a constitution, one must already accept the necessity or appropriateness of living under the same system with those others who make that majority. When we speak of America as a democracy, we imply that government is accountable to the majority—but the majority of our own people. For there to be a democracy, there must first be a demos—a distinct people.<sup>36</sup>

It follows that no individual can trust state authorities outside of his or her country of citizenship.

The point is . . . one's own government can be, at least to some degree and in some sense, accountable. What is outside is not even accountable. So the premise of distrust of authority, if it is at odds with extreme forms of nationalism or with unlimited domestic authority, remains even more at odds with an internationalism that breaks with constitutional forms.<sup>37</sup>

Conservative idealism thereby takes traditional realist views of international politics one step further. Not only are interstate relations assumed to be anarchic, but so are relations between an individual and any foreign state. Innocents abroad are invariably subject to arbitrary rule.

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36. Rabkin, *Why Sovereignty Matters* at 95 (cited in note 19).

37. *Id.* at 156.

Here the anachronism of the conservative idealist position becomes apparent. The rights of foreigners may have been unprotected in 1789, but to claim that the same is true two hundred years later is to overlook the most important international trend of the 20th century—the spread of liberal democracy. To understand the implications of democratic rule, Rabkin might have done well to draw inspiration less from John Locke and William Blackstone, and more from Immanuel Kant. In a prescient series of essays written in the 1780s and 1790s, Kant predicted that liberal republics would be extremely unlikely to wage war against one another and, it is often forgotten, that they would tend to offer cosmopolitan hospitality to individuals from other societies.<sup>38</sup>

This is precisely what has occurred over the past half-century, in part due to the domestic enforcement of international norms. The “democratic peace”—the unwillingness of liberal states to wage war against one another—is an established regularity in world politics.<sup>39</sup> More importantly for our purposes here, domestic procedures, backed by international institutions, increasingly assure the transnational flow of goods, services, people, and information. Individuals traveling from the United States to the EU, or the reverse, need not fear arbitrary rule, as Rabkin claims. Security, liberty and property are protected to a substantial extent. In this context, the role of international institutions is not to permit non-democratic governments to override protections in democratic states, as Rabkin seems to imply. The role of international institutions is increasingly, with the spread of liberal democracy, to help coordinate the policies of democratic states to promote common goals, free trade, including the full protection of human rights, within a context of substantial underlying agreement. Today we can afford a broader, more flexible understanding of sovereignty—one that permits us to profit from interdependence—precisely because domestic purposes and practices are more uniform than they ever have been before, with substantial protections for individual citizens.

The EU provides an appropriate test case for the conservative idealist position. Here we observe a set of fifteen developed, democratic countries engaged in intensive international cooperation involving the pooling of sovereignty in joint decision-making institutions. Like many Anglo-American conservatives, Rabkin and Cash perceive the EU as a nascent superstate that illegitimately circumvents the democratic control of national citizens by giving power to technocrats, judges, and other un-elected officials. Were this claim correct, it might justify US opposition to

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38. Immanuel Kant, “Idea for a Universal History with a Cosmopolitan Purpose and Perpetual Peace” in Hans Reiss, ed, *Kant's Political Writings* 93–130 (Cambridge 1970).

39. See generally Michael Doyle, *Liberalism and World Politics*, 80 *Am Pol Sci Rev* 1151 (Dec 1986); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 *Intl Org* 513 (1997); and Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *Eur J Intl L* 503 (1995).

proposals for multilateral solutions to global problems. Yet a closer look demonstrates that the EU does not confirm conservative idealist propositions.

## V. CONSERVATIVE IDEALISM AND EUROPEAN INTEGRATION

Why, precisely, do conservative idealists believe the EU to be undemocratic and illegitimate? Rabkin and Cash seem to believe that the EU is increasingly in the hands of supranational officials who lack any legitimate democratic mandate. The EU is not simply an international organization; it is, as Cash puts it, a nascent "superstate." Officials in Brussels exploit control over agendas and finance to circumvent national governments and manipulate NGO support. National governments, domestic parliaments, and publics fail to oppose such efforts effectively because the directly elected European Parliament is weak and because decisions are taken by qualified majority vote among national representatives in the Council of Ministers, which permits the organization to bind individual governments without their consent. Rabkin and Cash believe that Brussels bureaucrats and other supporters of European integration are motivated by a distinctive ideology of supranationalism, which they seek to externalize throughout the globe, in large part—Rabkin asserts—to disguise their own regional faults and failures.

Again Rabkin speaks more frankly in his oral remarks than in his paper. He asks whether "it is a good idea to create an entity on this scale which is systemically undemocratic." EU officials, he speculates, seek to export their supranational model in part to legitimate it:

There's a lot of dissatisfaction in Europe, or at least there's a lot of skepticism and challenge and alienation . . . with the democratic deficit. People within the countries of Europe are uneasy about this, and I think the European Union, therefore, in its foreign policy has a real stake in saying, no, no, this is how the world works. There's nothing strange about this. . . . What you see in Brussels is what you're starting to see in the Hague and Geneva, in New York. This is how the world works.<sup>40</sup>

Cash is even blunter.

The problem which lies at the heart of this is that, fundamentally, the European Union is driven by undemocratic institutional arrangements. The great advantage in the United States is that, as with the United Kingdom, there is accountability and democracy in the sense in which I would understand it to be effective. There are questions that could be asked. There are people who are accountable. And at no point in the European Union is this delivered in any real sense. The European parliament will never be able to achieve that, and if it did, it would be ineffective. . . . The real problem is that there is no forum for holding the European Commission to account. You may remember it collapsed in ignominy and disgrace last year. That is because, as I said in the letter to the national newspapers, of its systemic corruption. It is systemically corrupt because it is systematically undemocratic. It

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40. Jeremy Rabkin, Transcript of AEI Conference Proceedings (cited in note 18).



was intended to be undemocratic and that is a very dangerous position for a potential political union [and] superstate to acquire.<sup>41</sup>

Kirkpatrick echoes the same criticism.

What strikes me as . . . most disturbing about the EU, and I want to associate myself with Mr. Cash here, is the undemocratic character of its functions and its operation. . . . The capacity of the EU . . . to act without accountability is disturbing because. . . positions are taken by persons who are elected by no one and accountable to no one. . . . This is . . . what Mrs. Thatcher called a democratic deficit. . . . The representatives are not, in fact, with the single exception of the Strasbourg parliament, . . . elected . . . and so they violate fundamental principles of . . . democratic governance.<sup>42</sup>

In sum, conservative idealists hold up the United States and United Kingdom as models of democracy, pass over the democratic pedigree of other EU member states in silence, and present the EU as an institution fully in the hands of technocrats. Hence, the EU appears presumptively illegitimate. It could be legitimate, so the argument runs, only if citizens had a greater formal role in selecting its policies—or, at the very least, in selecting those who select its policies. The more direct the representation and the more numerous the citizens involved, the more democratically legitimate the institution.

This conservative idealist critique of the EU's "democratic deficit" is based, I argue below, on an inaccurate view of the contemporary EU and a dubious understanding of the normative foundations of constitutional democracy.<sup>43</sup> It misstates the historical record and current practice of European integration. The EU is no superstate, but a tiny bureaucracy under national government control constrained by precisely the separation of powers mechanisms Rabkin lauds. Some of its leaders recite the idealistic formulas of supranationalism, but the actual pooling of sovereignty is extremely carefully controlled and is best understood as a pragmatic adaptation to high levels of socioeconomic interdependence, not a response to a peculiar European ideology or the machinations of autonomous European

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41. Cash, Transcript of AEI Conference Proceedings (cited in note 34).

42. Jeanne Kirkpatrick, Transcript of AEI Conference Proceedings, on file with the *Chicago Journal of International Law*.

43. As the presence of Cash on the panel to discuss Rabkin's paper suggests, Americans disproportionately take their view of what Europe is about from members of the Euroskeptical wing of the Conservative Party of the United Kingdom. We must remember that such individuals represent the minority wing of a minority party in a country that, when that minority party was in government, generally took a minority (even isolated) position within Europe. These views do not reflect median European opinion. Indeed, in EU debates, few things de-legitimize an otherwise respectable argument more thoroughly than an explicit link to British Euroskeptics. Hence the writings of such critics are an exceptionally misleading guide for US policy-makers. The identity of the precise counterparts of Cash's brand of Euroskepticism in most Continental polities is unclear. I tend to view this brand of conservative idealism as a quintessentially British concern. But for troubling links between Cash's European Foundation and Italian neo-fascists, see *A Foundation Course in Irony*, *The Guardian* 4 (Feb 16, 2000).

technocrats.<sup>44</sup> In many different ways, the EU enjoys democratic legitimacy. Let us consider each of these claims in more detail.

## VI. THE EU IS NOT A "SUPERSTATE" IN THE MAKING

Euroskeptical fears of a corrupt and arbitrary superstate run by an all-powerful Brussels-based technocracy are strikingly at odds with a simple factual description of the organization. Save perhaps in the minds of a few remaining true federalist believers and their conservative idealist critics, the dream of a European state supplanting the nation-state is finished, if indeed it ever existed.

The EU has few of the attributes of a sovereign state. It has no police powers, no army, and no prospect of obtaining either one.<sup>45</sup> It has little power to tax and spend. Its exceptionally small tax base, about 2-3 percent of national government budgets and less than 1.5 percent of GDP, has little prospect of expansion. Fiscal spending is minimally discretionary, since its parameters are tightly controlled by national governments acting by multiple unanimous votes. Spending remains tied to enduring priorities, notably agricultural policy, structural funding, and international development aid. The most fundamental reason for democratic controls, namely to constrain the arbitrary behavior of the sovereign, is all but irrelevant in this case. To restate this issue in Rabkin's 18th century terms, the American revolutionaries believed that taxation without representation, in particular to support the military and the British imperial bureaucracy, is tyranny. If a political body lacks, to a first approximation, an army, a bureaucracy, and the power to tax, then the concern about arbitrary rule is surely much diminished. So it is hard to argue that Europe is somehow poised on the edge of trampling on citizens' rights. And it is unclear what relevance the intentions of the American founders have to evaluations of the EU.

It is hard to see why conservative idealists speak of a rampant Commission running amuck. EU officials enjoy relatively little formal autonomy in policy implementation—a generalization with few exceptions. For one thing, the EU bureaucracy is too small. Leaving clerical, logistical and translation services aside, European officials number only around 5,000—no more than the size of the local administration of a small European city. This total is unlikely to increase in the near future; indeed, the next round of EU reforms may well reduce the size of the Commission. To be sure, the Commission's power of proposal grants it a critical role as a legislative agenda setter—only the Commission can propose new legislation—but

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44. Moravcsik, *Choice for Europe* (cited in note 14); For empirical evidence as to the weakness of supranational officials see generally Moravcsik, *A New Statecraft? Supranational Entrepreneurs and International Cooperation*, 53 *Intl Org* 267 (1999).

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

any decision must still be vetted by a 70 percent supermajority of weighted votes in the firmly intergovernmental Council of Ministers *and* often by a majority in the directly elected European Parliament. Passing legislation in the EU is thus, mathematically speaking, more difficult than passing a constitutional amendment in the US system. Extraordinary international consensus is required. All in all, the EU is a very good example of an international institution whose prerogatives are held in check by decentralization of administration and a radical separation of powers—an arrangement one would have expected Rabkin, at least, to applaud.

In contrast to national governments, the EU also functions under strict substantive constraints. Its capacity in many areas—notably budget, defense, police, cultural, educational and social policies—are extremely weak, sometimes non-existent. Institutionally, its actions in these areas, if there are any at all, are hardly different from those of a classic international organization. Majority voting, judicial oversight, and Commission agenda control are all but absent. Recent developments, in particular, the development of separate “pillars” within the EU and flexible systems of concentric circles. Cash recognizes this and, in fact, his criticism of EU defense policy is not that it will be that of a “superstate,” but that it will be ineffective. He fears “it’ll be difficult for Europe actually to act as a military force, and therefore it has a particular stake in a view of the world which says, that isn’t really necessary.”<sup>46</sup>

Here is yet another example of the contradictions at the heart of the conservative idealist notions of sovereignty and democracy. In principle, Cash favors looser, more flexible arrangements without the possibility for some governments to impose solutions on others—since this permits each state to choose whether to participate in a given venture. Yet he is nonetheless critical of any arrangement, like those emerging in defense and monetary affairs, that permits a subset of EU governments to move ahead on its own in a particular policy area, leaving behind (and not committing) those who choose not to participate. Why? Such non-binding arrangements permit other governments to move ahead without the British, potentially to the disadvantage of the latter. In such cases, he would like Britain to hold a veto over the activities of other states—thereby infringing *their* sovereignty. Under conditions of interdependence, no appeal to idealism can evade the tension between sovereignty and effective policy.<sup>47</sup>

## VII. EU INSTITUTIONS ARE UNDER DEMOCRATIC CONTROL

Here Rabkin and Cash are at their most fanciful. Their vision of the EU managed by Commission manipulation and NGO activism and devoted to Socialist

46. Cash, 1 Chi J Intl L at 315 (cited in note 2).

47. William Cash, *Hague was Right to Sack Maples*, The Times (London) (Feb 16, 2000). For a critique of this contradiction by the editors of Cash’s normal journalistic venue, see *Flexibility is All*, The Times (London) (Feb 17, 2000).

and Green causes has no basis in reality. The EU is overwhelmingly about the promotion of free markets. Its primary interest group support comes—as Rabkin concedes in passing—from multinational firms, not least US ones. Insofar as there is a policy bias, it is surely not in the direction of socialism; it is the left that has mounted the most plausible critique of EU policy. Since the start, the EU has had the neo-liberal, pro-free trade bias that its Member States have deliberately and transparently given it. Indeed, we now know from the primary documents that this was even the view of President Charles de Gaulle. The paper of record in the EU is not the *International Herald Tribune* or the *Times*. It is the *Financial Times*. The EU is basically about business.

The notion that the EU functions, or could function, without broad-based democratic support is incorrect. The major legislative body in the EU, the Council of Ministers, is a forum of national governments, represented by ministers and diplomatic officials. The former are elected officials; the latter receive instructions directly from elected officials. Under super-majoritarian voting rules, each of ten to twelve Member States must approve most EU legislation. Any directive favored by such a broad coalition has a strong claim to a democratic imprimatur. The European Parliament (“EP”), composed of directly elected representatives, is increasingly usurping the role of the Commission as the primary interlocutor to the intergovernmental Council of Ministers in the EU legislative process. While the Commission still initiates legislation, it is now the EP that, in the final instance, controls the agenda.

Even Commissioners and the judges of the European Court of Justice (“ECJ”), though clearly more insulated, are named by directly elected national governments. As we have seen, Commission officials are so few in number that they can have little to do with the actual implementation of most EU policies. This is done instead by national officials, acting under normal democratic constraints. Supranational officials devote most of their time to setting broad guidelines (under the watchful eye of committees of national officials), monitoring state behavior, and developing new proposals. As we have seen, the Commission and even the Court are subsidiary bodies. The history of the EU is the history of one defeat after the next for the Commission—the only major exception being the one recent policy of which Cash (and Margaret Thatcher) whole-heartedly approve, namely the single market initiative.<sup>48</sup>

Even in the judicial arena, the EU’s area of greatest institutional autonomy, it should never be forgotten that the ECJ does little more—formally speaking—than

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48. For empirical evidence of the power of the Commission in the context of major reforms, see Moravcsik, *A New Statecraft?* (cited in note 44); Moravcsik, *The Choice for Europe* (cited in note 14).

advise national courts.<sup>49</sup> Its power stems not from any supremacy clause in the Treaty of Rome, let alone from the police powers of Brussels officials. Neither exists. It stems from the acceptance of its jurisprudence in a series of decentralized national settings. And let us not forget that successive British Conservative governments have consistently favored stronger judicial enforcement of EU law, because it serves primarily to enforce liberal trading rules.

In direct contrast to Cash's vision of a cadre of secretive gnomes in Brussels, supranational officials in fact work under public scrutiny far more intense than that prevailing under most national governments. (Take it from me as an active scholar: It is far easier to get information from the Commission than the British government—the most secretive among the fifteen!) The recent scandal, cited by Cash as evidence of the lack of control over the corruption of Brussels bureaucrats, in fact proves the opposite. In this much-publicized scandal, parliamentary investigation uncovered only one case of corruption in the Commission, that involving the former French Prime Minister and then Commissioner, Edith Cresson, who had awarded a contract to her hometown dentist. During a long, successful and ongoing political career in France, Cresson—who, to put it charitably, did not have the reputation for particularly clean hands—had never been called to account for such activities. Shortly after her arrival in Brussels, the intense multinational and multi-institutional scrutiny characteristics of the EU led to her resignation. The press reports of these scandals, not to mention the use made of them in certain political circles in Europe, are quite misleading.

To be sure, the scope of the EU, as well as its distance from individual voters, serves to insulate national officials and executives, as well as supranational officials, from a certain measure of immediate accountability. It thereby “strengthens the state,” in the sense of increasing the domestic influence of national executives, ministers, and perhaps even ministerial officials.<sup>50</sup> The question is whether this sort of delegation, within a more broadly democratic context, is normatively justifiable—an issue to which I now turn.

### VIII. MODEST LIMITATIONS ON DIRECT DEMOCRACY ARE NORMATIVELY JUSTIFIED

Not all political decisions are, or should be, majoritarian or participatory. Many institutions in modern liberal democratic societies are insulated from the direct political influence of individuals and groups in civil society. Indeed, the essence of

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49. This is the Article 177 reference procedure, which accounts for nearly all major EU cases. See Anne-Marie Burley and Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 *Intl Org* 41 (1993); Joseph H. H. Weiler, *The Transformation of Europe*, 100 *Yale L J* 2403, 2413 (1991).

50. Andrew Moravcsik, *Why the European Community Strengthens the State: Domestic Politics and International Cooperation*, Center for European Studies Working Paper Series No 52 (Harvard 1994).

constitutional design lies in the designation of different processes of representation—some tighter, some looser—for different functions. Though all functions of government are *ultimately* controlled by voters or their immediate representatives, there is no expectation (in theory or in practice of democratic governance) that all such functions be immanently under such control. Constitutional architects regularly design strong non-participatory, non-majoritarian institutions, such as courts, independent technical agencies, diplomatic and military establishments, central banks, independent national executives, and complex arrangements for the separation of powers.

Such limitations on majoritarian decision-making may be normatively justifiable, broadly speaking, if they increase the efficiency and technical competence of decision-making, guarantee political, cultural or socio-economic rights against majority decisions, or offset imperfections in representative institutions. Is this the case in Europe?

There is good reason to believe so, because the most powerful and autonomous EU institutions—its constitutional court, central bank, technical administration, external trade negotiators, and competition authorities—all arise in areas where persistent imperfections in representative institutions create long-term threats to weak political groups. While we need not go so far as has Giandomenico Majone, who sees non-majoritarian institutions as legitimate where pure “efficiency” considerations dominate, we can safely say that these are all areas in which insulated national executives and supranational officials act in the interest of diffuse majorities of consumers, citizens, and victims of uncompetitive behavior and environmental degradation to overturn policies set to the advantage of powerful, particularistic interest groups.<sup>51</sup> On this reading, non-majoritarian decision-making is justified in democratic theory not simply because it may be efficient, but because, ironically, it may better represent the long-term interests of the median voter than does a more participatory system—in distributive conflicts as well as matters of efficiency.<sup>52</sup>

One strong piece of evidence for this interpretation is the striking parallel between the use of non-majoritarian institutions at the EU level and their use within the member states themselves. The most autonomous EU institutions are found precisely in those areas—constitutional adjudication, trade diplomacy, technical administration, central banking, and prosecution—where non-majoritarian decision-making is most legitimate in the domestic polities of the member states. There is, after all, a large literature on the “decline of parliaments” in European domestic polities, most of which has nothing to do with European integration. By contrast, the EU is

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51. Giandomenico Majone, *Regulating Europe* (Routledge 1996).

52. Andrew Moravcsik, *Democracy and Constitutionalism in the European Union*, 13 *Eur Cmty Stud Assn Rev* 2 (Spring 2000). See also contributions by Giandomenico Majone and Philippe Schmitter in 13 *Eur Cmty Stud Assn Rev*.

hardly present in those areas about which voters care most, such as policies on taxation, social protection and pensions, education, and defense and foreign affairs—areas in which EU policies do little more than police secondary markets. This suggests that the non-majoritarian character of EU decision-making is the result not so much of the particularities of transnational governance but of general functional imperatives unique to the issue-areas where the EU is active. In this regard, the EU performs much the same political function for European governments as a strong executive and “fast-track” legislation has for the postwar United States—a function that could be argued to have a democratic result (i.e. one favorable to the median citizen) precisely because it is non-majoritarian.

Agriculture, of course, constitutes a major exception. The Common Agricultural Policy has long been a policy almost entirely captured by special interests—in this case, farmers producing major commodities—to the detriment of US, UK, and Commonwealth trading interests. Rabkin and Cash are right to point this out, but they miss its true implications. First, this policy is exceptional. Industrial trade comprises 80–90 percent of internal and external EU trade, and there the impact of the EU is clearly in a liberalizing direction. Second, it has little to do with the EU, which simply supported policies already in place in all member states except Britain—a function of its exceptional 19th century economic history. Indeed, in developed European non-member states like Switzerland or (formerly) Sweden, agricultural subsidies were even higher. Third, the Commission was, at the time of its formation, and remains today an enemy of high agricultural subsidies. Like any good technocratic body, it opposed a policy so obviously designed to generate surpluses. It was overruled, even humiliated, by the elected governments of the member states, intent on defending the interests of a major constituency. This consistent support for free trade, not the failure of nerve attributed to US business by Rabkin, explains why the American business community has long been perhaps the most consistent supporter of greater centralization of power in Brussels. In sum, the EU would be even more favorable to the average consumer, and to the policy concerns of Rabkin and Cash, if Brussels officials wielded more power.

## IX. CONCLUSION

Throughout this article, I have stressed pragmatic concerns and the complexities of real, everyday politics. International institutions that pool sovereignty are a pragmatic response to the need to manage global interdependence. Where it is less intense and involves fewer countries, as in US relations with most countries, institutions tend to be less developed. Where such interdependence is most intense and complex, as in Europe, such institutions are more developed. Pooling of sovereignty, even in the limited sense in which it is practiced in the EU, is never easy, but over the last half-century European governments of all different ideological persuasions have consistently decided that the benefits outweigh the costs. Above all,

the EU reflects underlying trends in the interests and ideals of the citizens of advanced industrial countries—trends toward the effective enforcement of civil rights, toward international trade and travel, toward a more cosmopolitan conception of individual responsibility.

In the pragmatic world of European politics, the EU has been a force for freer trade and more uniform protection of individual civil and property rights. Far from being a superstate designed by ideologues in Brussels, it is a constitutionally balanced and substantively constrained institution designed and incrementally reformed by elected national governments to achieve realistic ends. It is as democratically legitimate—in the sense of being transparent and sensitive to changes in public demands—as national governments, perhaps more so. Direct participation is sometimes constrained, but in much the same way as in national polities; individuals do not vote directly on constitutional court decisions, central banking policy, or technical regulation, but elect political parties that reflect their interests. In the complex world of everyday politics, such institutions—independent courts, central banks, and administrators—often generate more representative outcomes than more politicized ones.

Yet—and here I conclude—these pragmatic concerns, the stuff of everyday politics, are lost on conservative idealists like Rabkin and Cash. They inhabit an abstract anachronistic realm far from the careful balancing of costs and benefits, the trade-offs among objectives imposed by globalization, and the ironies and subtleties of institutional construction. In their ideal world, Western governments are unconstrained by external circumstances—or would be unconstrained, if only policy-makers could be freed from the false belief in multilateralism. In this view, the 20th century response to depression and global war was an unfortunate aberration. Western publics can have it all—national independence, optimal policies, and consistency with national ideals—if they would just turn back the clock to the middle of the last century, to an era without full constitutional protections or state policies to promote environmental protection, health and safety, or social welfare. Citizens could be wealthier, the environment cleaner, human rights more secure, and national ideals vindicated if governments would just pursue a libertarian vision.

Neither politicians nor publics accept this vision. They refuse to do so not because they are venal, ignorant, or under the sway of socialist ideology, but because they understand that in the complex globalizing world of the 21st century, you cannot get something for nothing. They rightly perceive that Rabkin, Cash, and other right-wing critics of multilateralism are both too conservative and too idealist to offer a viable alternative to modern global governance.