

# In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union\*

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## Abstract

Concern about the EU’s ‘democratic deficit’ is misplaced. Judged against existing advanced industrial democracies, rather than an ideal plebiscitary or parliamentary democracy, the EU is legitimate. Its institutions are tightly constrained by constitutional checks and balances: narrow mandates, fiscal limits, super-majoritarian and concurrent voting requirements and separation of powers. The EU’s appearance of exceptional insulation reflects the subset of functions it performs – central banking, constitutional adjudication, civil prosecution, economic diplomacy and technical administration. These are matters of low electoral salience commonly delegated in national systems, for normatively justifiable reasons. On balance, the EU redresses rather than creates biases in political representation, deliberation and output.

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## Introduction

Is the European Union democratically legitimate? It is an appropriate moment to pose this question. The last decade has witnessed the emergence of a stable institutional equilibrium – let us call it the ‘European Constitutional Settlement’ – that serves as a *de facto* constitution for Europe. The Treaties of Amsterdam and Nice failed to alter its structure significantly. Deliberations now underway, despite being turbo-charged with constitutional rhetoric, are unlikely to achieve much more. The most ambitious proposals still under serious discussion – incremental expansion of qualified majority voting or flexibility, the creation of a forum for national parliamentarians, restructuring the European Council and its Presidency, for example – consolidate decade-long

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trends rather than launch new ones. Incremental moves to deepen foreign policy, justice and monetary policy co-operation appear to require only minor centralizing reforms, and few other functional issues of significance are visible on the horizon. None of this will alter the essential trajectory of European integration. Thus we may now be glimpsing the constitutional order that will govern Europe, barring a severe crisis, for the foreseeable future.

The question of legitimacy is timely also because the last decade has witnessed nearly continuous debate over the proper constitutional structure for Europe. In a much-lauded book, Larry Siedentop asks, 'Where are the Madisons for Europe?' (Siedentop, 2000). Yet the more appropriate question for those who have followed European thinking is: 'Why are there so many Madisons?' (Moravcsik, 2001a). Hundreds, perhaps even thousands, of scholars, commentators, lawyers and politicians have analysed this problem. They have canvassed every conceivable proposal from the construction of a centralized European social welfare state to a federal commitment to English, Christianity and juridical localism. Advocates and opponents of each have mustered constitutional theories, social scientific hypotheses, everyday political anecdotes and good old-fashioned political rhetoric. Never before in history have such rich and varied intellectual resources been brought to bear on an international political process – a discourse from which we can learn much.

Both political negotiations and intellectual debates have focused, perhaps above all, on the question of whether the EU is democratically legitimate. Most politicians, scholarly commentators and members of the European public appear to agree that the EU suffers from a severe 'democratic deficit'. There are many reasons why this perception is so widespread. An organization of continental scope will, of course, appear rather distant from the individual European citizen. As a multinational body, moreover, it lacks the grounding in a common history, culture, discourse and symbolism on which most individual polities can draw. Neither of these reasons, however, need necessarily disqualify the EU from being treated as a democratically legitimate body.

Rather, when analysts criticize the lack of democratic legitimacy in the EU, they generally point to the mode of political representation and the nature of policy outputs. Only one branch of the EU is directly elected: the European Parliament (EP). Though stronger than it once was, the EP remains only one of four major actors in the EU policy-making process. Its elections are decentralized, apathetic affairs, in which a relatively small number of voters select among national parties on the basis of national issues. Little discussion of European issues, let alone ideal transnational deliberation, takes place. For its part, the European Commission, which enjoys a powerful role as an agenda-

setter and regulatory co-ordinator, is widely perceived as a technocracy. The European Court of Justice, comprising 15 appointed judges, is unusually powerful. Most powerful of all, the Council of Ministers brings together national ministers, diplomatic representatives and administrative officials from the Member States, who often deliberate in secret. While indirectly accountable to voters, the link is too tenuous and the mode of interaction too diplomatic or technocratic to satisfy many observers.

These procedural qualms might be tolerable were it not for the perceived bias in the outputs of European policy-making. Many view the EU as a throw-back to the nineteenth century – a fiscally weak, neo-liberal state. EU directives and regulations promote wider and deeper markets, while providing only a truncated range of compensating and counterbalancing policies of regulatory protection or social welfare guarantees. If – as Karl Polanyi and Joseph Schumpeter asserted – the legitimacy of democratic capitalism rests on an explicit compromise between markets and social protection, then the EU appears a dangerous exception (Polanyi, 1944; Schumpeter, 1942). The most salient task of the modern state is to equalize life chances and socialize the risk faced by individual citizens, a goal to which the EU appears indifferent or even hostile. No wonder, then, that many Europeans – and disproportionately the poor, female, economically peripheral and recipients of public sector support – view the EU with scepticism.

For these reasons, many believe it is self-evident that the EU is not democratically legitimate. Yet my central contention here is that, if we adopt reasonable criteria for judging democratic governance, then the widespread criticism of the EU as democratically illegitimate is unsupported by the existing empirical evidence. At the very least, this critique must be heavily qualified. Constitutional checks and balances, indirect democratic control via national governments, and the increasing powers of the European Parliament are sufficient to ensure that EU policy-making is, in nearly all cases, clean, transparent, effective and politically responsive to the demands of European citizens.

Mostly critics overlook the relatively optimistic conclusion to be drawn from the evidence because they analyse the EU in ideal and isolated terms. Comparisons are drawn between the EU and an ancient, Westminster-style, or frankly utopian form of deliberative democracy. While perhaps useful for philosophical purposes, the use of idealistic standards no modern government can meet obscures the social context of contemporary European policy-making – the real-world practices of existing governments and the multi-level political system in which they act. This leads many analysts to overlook the extent to which delegation and insulation are widespread trends in modern democracies, which must be acknowledged on their own terms. The fact

that governments delegate to bodies such as constitutional courts, central banks, regulatory agencies, criminal prosecutors, and insulated executive negotiators is a fact of life, one with a great deal of normative and pragmatic justification. In this regard, moreover, most analysts view the EU in isolation, and thus fail to appreciate fully the symbiotic relationship between national and EU policy-making – a division of labour in which commonly delegated functions tend to be carried out by the EU, while those functions that inspire and induce popular participation remain largely national. This gives observers the *impression* that the EU is undemocratic, whereas it is simply specializing in those functions of modern democratic governance that tend to involve less direct political participation. We might, of course, choose to criticize the broader trend toward professional administration, judicial enforcement of rights and strong executive leadership, but it is unrealistic to expect the EU to bear the brunt of such a critique – a point to which I return in the conclusion.

I proceed as follows. In successive sections, I analyse the constraints inherent in the European constitutional settlement that guarantee that the EU will not become a despotic ‘superstate’; the democratic procedures that prevent the EU from becoming an arbitrary and unaccountable technocracy; the legitimate reasons for shielding certain EU decision-makers from direct democratic contestation; the underlying social reasons why political participation in the EU cannot be radically expanded; and the extent to which EU policy-making suffers from an excessive neo-liberal bias. Final sections consider whether these assessments are likely to change with enlargement of the EU, and how the analysis might be generalized.

## **I. Constitutional Constraints: Why the EU is not a ‘Superstate’**

The classic justification for democracy is to check and channel the arbitrary and potentially corrupt power of the state. Accordingly, arbitrary rule by national and supranational technocrats – ‘bureaucratic despotism’ by a ‘superstate’ in Brussels, as one formulation has it – is a widespread concern in contemporary EU politics (Siedentop, 2000; cf. Moravcsik, 2001a). This is the stuff of British tabloid articles, often fuelled by ignorance of what the EU actually does, but it underlies much legitimate concern, particularly among those on the libertarian right of the political spectrum. This concern gains plausibility from the overtly technocratic nature of much EU regulation, the open role played by non-elected officials in Brussels, and the geographical and cultural distance between those regulators and the average European ‘person in the street’.

Yet the threat of a European superstate is a myth. The European constitutional settlement imposes tight constraints on EU policy. These combine and

exceed the most extreme constraints imposed in national systems by consociational or consensus democracy (beyond, say, the Netherlands or Austria of years past), federalism (e.g. Switzerland or Canada), separation of powers (e.g. the United States), and reduced fiscal competences (e.g. the United States or Switzerland). The result is as much confederal as federal (Moravcsik, 2001b; Elazar, 2001), and almost eliminates any threat of a European superstate. A set of substantive, fiscal, administrative, legal and procedural constraints on EU policy-making are embedded in treaty and legislative provisions that have the force of constitutional law – to which we now turn.

### *Substantive Constraints and the Focus on Cross-Border Economic Activity*

The EU's current activities are restricted by treaty and practice to a modest subset of the substantive activities pursued by modern states. Its mandate focuses primarily on the regulation of policy externalities resulting from cross-border economic activity. The core of EU activity and its strongest constitutional prerogatives still lie almost exclusively in the area of trade in goods and services, the movement of factors of production, the production of and trade in agricultural commodities, exchange rates and monetary policy, foreign aid and trade-related environmental, consumer and competition policy. To be sure, there are exceptions, including a modest level of regional and structural funding of infrastructure, but even these exist primarily as side-payments for the creation of core policies. In some areas regulatory controls exceed narrow market-making functions, and immigration and foreign policies are emergent areas of action. But these tend often to be treated in more intergovernmental procedures, whereas the strongest constitutional prerogatives of the EU remain primarily economic.

Much is thereby excluded from the EU policy agenda. Absent concerns include taxation and the setting of fiscal priorities, social welfare provision, defence and police powers, education policy, cultural policy, non-economic civil litigation, direct cultural promotion and regulation, the funding of civilian infrastructure, and most other regulatory policies unrelated to cross-border economic activity. Certainly the EU has made modest inroads into many of these areas, but only in limited areas directly related to cross-border flows.<sup>1</sup> Even within the core functions of the EU, governments are allowed to exempt themselves to maintain high regulatory protection (e.g. environmental and social policy), or to act unilaterally where the EU has not effectively legislated (e.g. air transport).

<sup>1</sup> The scholarly literature on European integration seems to pay disproportionate attention to exceptional cases of 'spillover' in cases such as gender discrimination, the initial experience with environmental policy and structural funding, the jurisprudence of supremacy and direct effect, the Commission's use of Article 90, and the possible, but as yet undocumented, effects of the open method of co-ordination (OMC). These are important trends, but atypical of the EU as a whole.

### *Fiscal Constraints and the Emergence of a 'Regulatory Polity'*

One might object at this point that this analysis treats the *status quo* as a 'snapshot' and thereby overlooks the future trajectory of integration. Yet the EU's institutional capacity to act in new areas and new ways is constrained by a severe lack of fiscal, administrative and legal authority, thereby partially mitigating the imperative to maintain close and constant legislative scrutiny. At a first approximation, the EU does not tax, spend, implement or coerce and, in many areas, it does not hold a legal monopoly of public authority.

It is not coincidental that the policies absent from the EU's policy portfolio – notably social welfare provision, defence, education, culture and infrastructure – require high government expenditure. The ability to tax and spend is what most strikingly distinguishes the modern European state from its predecessors, yet the EU's ability to tax is capped at about 2–3 per cent of national and local government spending (1.3 per cent of GDP) and is unlikely to change soon. The disbursement of these funds, moreover, is explicitly directed to a small range of policies – the common agricultural policy, structural funding and development aid – that must periodically be renewed by unanimous consent of the Member States. The EU is thereby rendered a 'regulatory polity' – a polity with legal instruments but little fiscal capacity (Majone, 1996, 1998).

These fiscal constraints have important consequences. They leave little room for discretionary funding by Brussels technocrats. Funding levels in agriculture and structural funding are set by strict unanimous intergovernmental agreement. Moreover, even in areas of the EU's greatest fiscal activity, much (generally most) public funding remains national. There is considerable evidence from the two largest areas of EU spending – the common agricultural policy and structural funds – that national governments possess the resources to counteract broad fiscal priorities set by authorities in Brussels (e.g. Pollack, 2000).

### *Administrative Constraints and the Decentralized Politics of Implementation*

Analysts often observe that the essential politics of regulation lies in implementation, yet the EU implements very few of its own regulations. With the exceptions of monetary policy, competition policy and the conduct of, though not the ultimate control over, external trade negotiations, the powers of the EU to administer and implement are, in fact, exceptionally weak. How could it be otherwise, given the extraordinarily small size of the Brussels bureaucracy? The EU employs fewer people than a modest European city. They total about *one-fortieth* of the number of comparable civilian federal employees even in the United States, a jurisdiction of comparable size but noted in cross-

national perspective for the small size of its national government workforce. Except in a few areas, the task of legally or administratively implementing EU regulations falls instead to national parliaments and administrations.

Were this not enough, the EU has no police, military force or significant investigatory capacity – and no realistic prospect of obtaining any of these. Take the military. Even if the most ambitious plans currently on the table in European defence were fully realized, the EU would control only 2 per cent of European Nato forces – and these forces could be employed only for a narrow range of regional peace-keeping and peace-making tasks. Similarly, whereas the EU is co-ordinating efforts to combat international crime, the decentralized structure of national police, criminal justice and punishment systems, while externally constrained, remains in essence unchanged.

### *Procedural Constraints and the Politics of Checks and Balances*

Of course the lack of administrative clout, and even perhaps of fiscal discretion, would be of less consequence if the EU technocracy could act unhampered by procedural constraints. Yet the EU's ability to act, even in those areas where it enjoys clear competence, is constrained by institutional checks and balances, notably the separation of powers, a multi-level structure of decision-making and a plural executive. This makes arbitrary action (indeed, any action) difficult and tends to empower veto groups that can capture a subset of national governments. Such institutional procedures are the conventional tool for protecting the interests of vital minorities – a design feature generally thought to be most appropriate to polities, like the EU, that must accommodate heterogeneous cultural and substantive interests (Lijphart, 1990).

The most fundamental constraint lies in the requirement of unanimity, followed by electoral, parliamentary or administrative ratification, to amend the Treaty of Rome – an exceptionally high standard for any fundamental act of substantive redirection or institutional delegation. Accordingly, the EU has developed over the past two decades only by focusing on core areas of exceptionally broad consensus, backed by large financial side-payments to persuade recalcitrant Member States. Whereas judicial decisions like the celebrated *Cassis de Dijon* case may have helped set the agenda for initiatives like the single market, monetary union or enlargement, there is now agreement in the scholarly literature that they could not do so without nearly consensual support from the Member States (Alter, 2001). Even 'everyday' EU directives must be promulgated under rules that require the concurrent support of between 74 and 100 per cent of the weighted votes of territorial representatives in the Council of Ministers – a level of support higher than required for legislation in any existing national polity or, indeed, to amend nearly any national constitution in the world today.

Surmounting super-majoritarian and unanimous voting requirements is not enough, however, to pass legislation. The EU is not a system of parliamentary sovereignty but one of separation of powers. Power is divided vertically among the Commission, Council, Parliament and Court, and horizontally among local, national and transnational levels – requiring concurrent majorities for action. For legislation, the Commission must propose; the Parliament must consent; if the result is then challenged, the Court must approve; national parliaments or officials must transpose into national law; and national bureaucracies must implement. Even *within* each branch and level of EU governance, we encounter extraordinary pluralism. The Commission itself is a plural executive – so much so that experts disagree whether it is an executive at all. The EP requires unusually high majorities to act. As a result, consistent and effective EU policy-making tends to be possible only where there exists not just a supermajority of national representatives, but a supermajority of European technocrats, judges and parliamentarians as well. Current proposals to represent more groups, for example through another chamber representing national parliamentarians, can only exacerbate this tendency.

### *Legal Constraints and the Politics of Competences*

If, after such widespread consent, legislation is nonetheless unacceptable to EU Member States, they have real alternatives to strict reliance on EU norms. This is so to a far greater extent than even the most decentralized of national federations. In core areas of trade and factor flows, to be sure, EU rules remain relatively strict and are enforced as such. Yet there are also a number of areas, even in economic affairs, in which governments can act ‘minilaterally’ – inside or outside the EU. These include issues in which a subset of EU governments can work through other international organizations (e.g. human rights, defence, border controls and some environmental policy, the UN Security Council), areas where a ‘core’ of governments can move ahead collectively inside the institutions (e.g. ‘flexibility’, ‘enhanced co-operation’ or ‘coalitions of the willing’ in social, monetary, defence and immigration policies, and areas with long transition periods, e.g. for new members in agriculture). In still other areas, such as environmental policy, governments may opt out of EU regulations to provide higher regulatory protection. The number of such mechanisms has increased over the past decade, and their important role distinguishes the EU from national federations.<sup>2</sup>

<sup>2</sup> There are, of course, isolated examples in other jurisdictions, such as the proliferation of ‘interstate compacts’ among states of the United States.

## II. Democratic Control: Why the EU is not an Unaccountable Technocracy

We have just seen that the EU is more constrained than any national polity, in part by its own plural structure of checks and balances, and in part by its need to co-exist within a multi-level system of governance with fiscally, administratively and legally more powerful nation-states. This renders the spectre of a 'European superstate' absurd. Most analysts doubt the EU is a state at all; they prefer to speak of a diffuse 'governance system'.

Still, no matter how constrained its substantive and institutional authority, there remain important areas – notably important matters of market regulation, monetary policy and other related regulation – in which EU legislation and regulation are dominant. In these areas, policy-making remains rather centralized in Brussels, Luxembourg or Frankfurt, albeit with constant Member State and interest group input. In the cases of European Court of Justice jurisprudence, the European Central Bank's setting of monetary policy and the Commission's handling of competition policy, moreover, such powers are wielded by semi-autonomous supranational authorities. Even where legislation and regulation remain subject, as they are generally, to super-majoritarian consent, it might be objected that the EU policy process favours national bureaucrats and ministers at the expense of national parliaments and publics. The EU, from this perspective, is an insulated cartel of supranational and national technocrats.

As a description of EU policy-making, there is some truth in this (Moravcsik, 1994). But what is the implication for democratic legitimacy? I argue in this section that the insulation of the EU from mechanisms to assure democratic accountability is easily exaggerated, particularly by those who tend to overlook the multi-level constraints embedded in the European constitutional settlement arising from democratic control over national governments. Moreover, the mode of EU delegation to its constitutional court, central bank and other semi-autonomous authorities, is consistent with the late twentieth-century practice of most advanced industrial democracies. Even if we were to reject outright the modern trend towards delegated policy-making, it would surely be normatively arbitrary as well as politically futile to expect the EU to bear the brunt of such opposition.

### *Direct and Indirect Democratic Accountability*

Given the vehemence of the critique levelled against it, one might assume that the EU lacks any form of democratic participation and accountability at all. Yet in fact the EU employs two robust mechanisms: direct accountability via the EP and indirect accountability via elected national officials.

For over a decade, the EP has been progressively usurping the role of the Commission as the primary agenda-setter *vis-à-vis* the Council in the EU legislative process. It is now the EP that, late in the legislative process, accepts, rejects or amends legislation in a manner more difficult for the Council to reject than to accept – a prerogative traditionally accorded the Commission. The EP is directly elected by proportional representation within nation-states, and often acts independently of ruling national parties. Whereas one might criticize the absence of clear programmatic elections, the EP nonetheless has an effective system of party co-operation. Votes most often split along party lines and recognizable ideological cleavages shape voting patterns. Among the most relevant differences between the European Parliament and national parliaments appears to be the tendency of the EP to reach decisions by large majorities. Yet this tendency underscores the propensity of the EU to reach decisions by consensus – unsurprising given the high level of support required in the Council of Ministers – and should give us reason for confidence that it is legislating in the ‘European’ interest (Hix *et al.*, 2002).

Still, if European elections were the only form of democratic accountability to which the EU were subject, scepticism would surely be warranted. Yet a more important channel lies in the democratically elected governments of the Member States, which dominate the still largely territorial and intergovernmental structure of the EU. In the European Council, which is consolidating its position as the EU’s dominant institution, elected heads of state and government wield power directly (Ludlow, 2002). In the Council of Ministers, which imposes the most important constraint on everyday EU legislation, permanent representatives, ministerial officials and the ministers themselves from each country act under constant instruction from national executives, just as they would at home. Here the bonds of accountability are tight: these representatives can be re-instructed or recalled at will, often more easily than parliamentarians in national systems. In addition, national parliaments consider and comment on many EU policies, though their *de facto* ability to influence policy fluctuates greatly by country.

Broad representation also encourages transparent policy-making. In contrast to the widespread impression of a cadre of secretive gnomes of Brussels, supranational officials in fact work under intense public scrutiny. The legislative process works slowly, with no equivalent to ruling by executive decree or pushing legislation swiftly through a friendly parliament, and information appears more plentiful about the EU political and regulatory process, at least at the Brussels level, than about similar processes in nearly all of its Member States. With 20 Commissioners and their staffs, 15 national delegations, over 600 parliamentarians, hundreds of national ministers and thousands of national officials, *ex ante* parliamentary scrutiny in some countries and *ex post*

parliamentary scrutiny in nearly all, and finally the need for domestic administrative implementation, there can be no such thing as a monopoly of information in the EU. And whereas it is true that certain aspects of the system, such as early discussions in the lower levels of Coreper, tend to take place in relative secret, the same might be said of the *de facto* preparation of legislation in national systems. Recent research seems to reveal that the EU regulatory processes are as open to input from civil society, and as constrained by the need to give reasons, as the (relatively open) systems of Switzerland and the US (Zweifel, 2001). Discussions within comitology appear to take due account of public interest considerations, though the precise reasons for this – socialization, insulated expert discussion, external pressure by Member States, structured deliberation, anticipated non-compliance – remain to be fully analysed (Joerges and Vos, 1999; Majone, 1998).

### *The Legitimacy of Semi-Autonomous Judges and Technocrats*

It might be objected that the EU sometimes bypasses comitology and relies overly on autonomous technocrats in the Commission or constitutional court judges to resolve essentially political questions involving the apportionment of cost, benefit and risk. Yet there is little that is distinctively ‘European’ about the pattern of delegation we observe in the EU. The late twentieth century has been a period of the ‘decline of parliaments’ and the rise of courts, public administrations and the ‘core executive’. Increasingly, accountability is imposed not through direct participation in majoritarian decision-making, but instead through complex systems of indirect representation, selection of representatives, professional socialization, *ex post* review, and balances between branches of government (Majone, 1996).

The critical point for the study of the EU is this: within the multi-level governance system prevailing in Europe, EU officials (or insulated national representatives) enjoy the greatest autonomy *in precisely those areas* – central banking, constitutional adjudication, criminal and civil prosecution, technical administration and economic diplomacy – in which many advanced industrial democracies, including most Member States of the EU, insulate themselves from direct political contestation. The apparently ‘undemocratic’ nature of the EU as a whole is largely a function of this selection effect.

Insulation is not simply an empirical fact; it has normative weight. To understand why, we must address the justifications for the apparently ‘counter-majoritarian’ tendency of political institutions that are insulated from direct democratic contestation. Most such insulated institutions arise out of the logic of commitment; that is, as efforts to enforce or embed the impartial implementation of prior bargains. Three normative justifications, often found in combination, are most common.

First is *the need for greater attention, efficiency and expertise in areas where most citizens remain 'rationally ignorant' or non-participatory*. Universal involvement in government policy would impose costs beyond the willingness of any modern citizen to bear. Insulated institutions reduce decision-making costs by encouraging specialization. They thus permit efficient and consistent decisions to occur in areas of weak or intermittent citizen involvement and interest, most importantly where scientific, legal or administrative expertise is expensive to acquire, yet expert, informed decision-making is desired. As such expertise has come to play a greater role in policy-making, delegation to specialized authorities in areas from environmental policy to food and drug authorization has become more common.

Second is *the need impartially to dispense justice, equality and rights for individuals and minority groups*. It is common to delegate to insulated authorities, such as constitutional courts, responsibility for the enforcement of individual or minority prerogatives against the immediate 'tyranny of the majority'. Such delegation is often justified where citizens seek to reduce the risk of contracting into an uncertain future. This tendency has spread in recent years as increasing numbers of governmental functions have been recognized as basic or human rights that are judicially or administratively enforced, often at the international level, against political authorities.

Third is *the need to provide majorities with unbiased representation*. Insulated institutions offer one the means of redressing underlying biases in national democratic representation. The most common distortion is the capture of open political processes, and thus government policy, by powerful particularistic minorities with powerful and immediate interests, who oppose the interests of majorities (often treated as 'the median voter') with diffuse, longer-term or less self-conscious concerns. The classic understanding of trade policy, for example, sees the broadly liberal interests of consumers and firms trumped by pressure from powerful, self-conscious sectorally-organized protectionists. To the extent that this is so, the EU may be more 'representative' precisely because it is, in a narrow sense, less 'democratic'.

Given these *prima facie* justifications, the burden of proof rests on critics of the EU. We may debate whether the EU's central bank, constitutional court, or competition authorities are properly constructed, but any such criticism must first concede the legitimacy and general acceptability of a greater measure of insulation and autonomy in precisely these areas than elsewhere in modern political life.

### III. Democratic Deliberation: Why the EU Cannot Expand Participation

Radical democrats might nonetheless be tempted to reject the entire trend toward insulated decision-making, domestic and international, because the cost in terms of political participation is too high. Such critics might observe that the European constitutional settlement has failed to promote the transnational political parties, identities and discourses that might help render European political participation meaningful and effective for citizens. A number of analysts propose to employ European institutions to induce social co-operation in pursuit of common interests. This in turn, they expect, will generate legitimacy.

Unless entirely grounded in an ideal preference for participation, however, these criticisms and proposals rest on the questionable premise that greater participation in European political institutions will generate a deeper sense of political community in Europe or, at the very least, greater popular support for the EU. There are at least three reasons to doubt that this is the case.

First, insulated institutions – constitutional courts and administrative bureaucracies, for example – are often more popular with the public than legislatures. Internationally, institutions like the European Court of Human Rights (ECHR) in Strasbourg command great legitimacy, despite their near total lack of direct democratic legitimacy. The EU's position in the institutional division of labour involves such political functions, as we have just seen, and it is unclear whether more participation in such functions would legitimate them. Whereas a greater sense of common identity might indeed increase support for the EU, this does not bear on the case for democratic reform but on the question of how extensive European integration should be (Gibson and Caldeira, 1993).

Second, EU legislative and regulatory activity is inversely correlated with the salience of issues in the minds of European voters, so any effort to expand participation is unlikely to overcome apathy. Among the most significant consequences of the limitation of the substantive scope of the EU, discussed above, is that the issues handled by the EU – and even more so second-order institutional choices about how to manage them – lack salience in the minds of European voters. Of the five most salient issues in most west European democracies – health care provision, education, law and order, pension and social security policy, and taxation – none is primarily an EU competence. Among the next ten, only a few (managing the economy, the environment, alongside the anomalous issue of Europe itself) could be considered major EU concerns, none exclusively so.<sup>3</sup> In contrast, the issues in which the EU special-

<sup>3</sup> I am indebted to Bonnie Meguid for access to her systematic data on issue salience in European countries.

izes – trade liberalization, the removal of non-tariff barriers, technical regulation in environmental and other areas, foreign aid and general foreign policy co-ordination – tend to be of low salience in most European polities. Lack of salience, not lack of opportunity, may impose the binding constraint on European political participation. This would explain why European citizens fail to exploit even the limited opportunities they have to participate. Monetary policy lies somewhere in the middle: whereas citizens in advanced industrial democracies focus on macroeconomic performance, its link to the institutional design of a central bank remains unclear in the minds of many, thereby depoliticizing the issue.

It follows that reforms, referendums, parliamentary elections, or constitutional conventions based on EU issues encourage informationally 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. The typical result is a debacle like the 2001 Irish referendum on the Nice Treaty. Not only does this demonstrate the existence of significant substantive constraints on EU policy-making, but it implies – as we shall see below – that even if a common European ‘identity’ and the full panoply of democratic procedures existed, it would be very difficult to induce meaningful citizen participation.

Of course this could change in the future. But the proposals to construct greater citizen involvement in EU politics that are most plausible in theory are patently implausible in practice. In order to give individuals a reason to care about EU politics, it is necessary to give them a stake in it – a fact that many discussions of a *demos*, ‘we-feeling’, ‘community’, and ‘constitutional patriotism’ elide.<sup>4</sup> The most compelling (and historically grounded) schemes for doing so rest not on the creation of new political opportunities, but the emergence of entirely new political cleavages based on interest. Philippe Schmitter proposes, for example, that agricultural support and the structural funds be replaced by a guaranteed minimum income for the poorest one-third of Europeans, national welfare systems be rebalanced so as not to favour the elderly, and immigrants and aliens be granted full rights (Schmitter, 2000). With the EU acting as a massive engine of redistribution, individuals and groups would reorient their political behaviour on whether they benefit or lose from the system. This is a coherent scheme targeted at precisely those groups most dissatisfied with European integration today – broadly speaking, the poorer, less well-educated, female, and public sector populations – but it is utterly infeasible. In search of legitimacy, Schmitter breaks with the European constitutional settlement, divorcing the EU entirely from its ostensible purpose of regulating cross-border social behaviour, which would thereby

<sup>4</sup> For an exception, see Weiler (1999).

undermine the legitimacy of almost everyone currently involved with it. The result would almost certainly be a higher level of political dissatisfaction, domestic and interstate, than Europe has seen in several generations.

#### **IV. Social Democracy: Why EU Governance is not Substantively Biased**

Some, finally, maintain that the EU lacks democratic legitimacy not so much because it stifles political participation, but because its policies are biased against particular interests consensually recognized as legitimate. Such accounts tend to be social democratic, that is, they tend to argue that the EU systematically biases policy-making in a neo-liberal direction.<sup>5</sup> It does this, so the argument goes, by excluding from the agenda particular issues, notably social welfare and some public interest regulation, while facilitating common liberalization of trade and factor flows. The entire arrangement is locked in by the European legal order. Opposition does not form because it is kept off the agenda by the 'European constitutional settlement', which leaves social welfare provision to the national governments, and by the ignorance of less fortunate individuals and groups about their own interests.

Fritz Scharpf offers just such a critique.<sup>6</sup> Following Karl Polanyi and other social democratic theorists, Scharpf argues that the most important element in a democratic polity is to maintain the balance between market liberalization and social protection. Most Europeans favour maintaining current levels of welfare spending, as demonstrated by the decentralized tendency of Member States to spend increasing percentages of GNP on welfare as per capita income increases. Yet the *status quo* cannot be maintained today because of the tendency of decentralized market competition to generate an interstate 'race to the bottom' in regulatory protection. Trade, immigration and especially foreign investment and capital flows create strong incentives for countries to reduce welfare expenditure. The EU cannot respond effectively to this tendency, despite overwhelming support for the maintenance of welfare systems, because of a neo-liberal bias in the constitutional structure of the EU and the rhetoric that surrounds it, which favours market liberalization ('negative integration') over social protection ('positive integration'). This argument is outlined elsewhere in this issue, so I need not explain it further.

Scharpf's argument is without a doubt the most empirically and theoretically nuanced criticism of the EU democratic deficit that currently exists. Yet

<sup>5</sup> Yet they need not be so. Many libertarians believe that policy in the EU, as well as in Europe as a whole, is biased in a social democratic direction (see, e.g., Rabkin, 2001).

<sup>6</sup> Scharpf (1999). For a more detailed critique, from both positive and normative perspectives, see Moravcsik and Sangiovanni (2002).

there is good reason to qualify his formulation of the argument, above all since these qualifications are acknowledged in Scharpf's own empirical analysis.

There is little evidence of a race to the bottom. Scharpf himself concludes ultimately that there can be such a race in only a few areas, there is relatively little evidence that it has yet occurred, and the effects have been limited. The level of social welfare provision in Europe remains relatively stable. National welfare systems are no longer moving strongly in the direction of greater redistribution, but neither are they imploding. Recent OECD analyses report that fiscal consolidation over the past 20 years has almost always led to increases in government revenues as a percentage of GNP, and in most cases the burden of consolidation is placed primarily on revenue increases. Much recent research, moreover, suggests that the adverse impact of globalization on standards in the major areas of social spending in Europe (pensions, medical care and labour market policy) is easily exaggerated. The most important factors behind increasing social spending are instead domestic: the shift to a post-industrial economy, lower productivity growth, shifting demand for less skilled workers, and rising costs of health care, pensions and employment policies, exacerbated by increasingly unfavourable demographic trends. These factors fuel welfare deficits and fiscal strains, yet any reform is opposed by entrenched constituencies (the elderly, medical care consumers and the full-time unemployed) well placed to resist it. No responsible analyst believes that current individual social welfare entitlements can be maintained in the face of these structural shifts. In this context, the neo-liberal bias of the EU, if it exists, is justified by the social welfarist bias of current national policies (Pierson and Leibfried, 1995; Rhodes *et al.*, 2001; Iversen *et al.*, 1999).

Nor is there much evidence that the EU is driving social protection downward. By contrast, the EU has often permitted high standards and supportive institutional reform, and thus has tended to reregulate at a high level (Vogel, 1995; Joerges and Vos, 2000). Anecdotal evidence and poll data suggest that the EU is responsive to public and interest group concerns in a way quite similar to national polities.<sup>7</sup> For reasons set out in Scharpf's article in this issue, there is far less reason for a social democrat to fear the piecemeal evolution of European law than might have been the case five years ago (see also Scharpf, 1999). Whatever consequences there may be lie largely in the future. The major difference between apparently intractable issues of EU discussion such as social and tax harmonization, and similar issues where European regulation is effective, such as worker health and safety, appears not to lie in con-

<sup>7</sup> The life-cycle of an issue like mad cow disease is just as it would be in any western democracy: some bureaucracies are captured; a crisis emerges; and reforms are put in place that place greater emphasis on the broader public interest (Joerges and Vos, 1999).

stitutional structure but in the precise nature of conflicts of interest among national governments. In the case of taxation, some governments remain deeply opposed to the harmonization of taxation and social welfare, whereas there are few die-hard defenders of unilateralism in matters of worker health and safety or pollution abatement. In this sense, the EU reflects patterns of consensus and contestation within European publics.

From the perspective of democratic theory, finally, it is important to note that Scharpf's proposals are concerned primarily with maintaining social protection in richer Member States. They are quite conservative in that they favour domestic redistribution over transnational redistribution; the defence of German welfare standards takes precedence over schemes for transnational redistribution. Scharpf's justification lies in the subjective perceptions of identity of national citizens in countries like Germany, which do not support a heavy commitment to redistribution. Yet this is likely to be perceived very differently in poorer Member States, and in particular among the new members from central and eastern Europe. This leads us to the most significant challenge facing the EU over the next decade: enlargement.

## **V. The Challenge of Enlargement: Why the EU is Likely to Remain Legitimate**

Will enlargement alter this generally optimistic assessment of democratic legitimacy in the EU? Given that expansion of such intensive international cooperation to include such a varied group of countries is unprecedented, any assessment must remain more speculative than scientific. Yet there is good reason, nonetheless, to be hopeful.

The above analysis suggests that the most fundamental source of the EU's legitimacy lies in the democratic accountability of national governments. There is little reason to doubt that, on balance, the prospect of enlargement and the practice of membership of the EU bolsters domestic democratic institutions in applicant countries. The 'power of attraction' is perhaps the most powerful instrument of democratization that European governments possess, and indeed perhaps, next to trade policy, their most powerful foreign policy instrument overall. There is compelling evidence that the prospect of enlargement has significantly strengthened centrist democratic parties in central and east European countries (Vachudova, 2001). As long as the domestic governments of these countries remain liberal democracies, there is no reason to doubt that their interactions with the EU will remain as firmly subject to democratic accountability as national policies. To be sure, the EU runs the risk of admitting countries that could subsequently vote in anti-democratic parties. The recent debacle of EU pressure on Austria, which is widely perceived as hav-

ing been counterproductive, has demonstrated the difficulty (if not futility) of EU efforts to micromanage the domestic democratic practices of Member States. Still, a wholesale challenge to democracy, as opposed to an ideologically unattractive right-wing minority party, might generate a more credibly effective response. This is certainly the lesson many learned from the Spanish experience. In this sense, EU enlargement is almost certain to promote democracy in the region.

A more significant threat stems from the greater diversity and heterogeneity of interests within an EU of 20–25 (Moravcsik, 1998; Nello and Smith, 1997). The most common argument about this diversity is, however, not the most convincing. One often hears that the EU will become gridlocked as a result of the increase in the number of EU Member States. This folk wisdom is based on the rather primitive notion that the probability of gridlock is an exponential function of the number of potential national vetoes, which is itself a direct function of the number of members (Petite, 1998). Certainly the conclusion has a Cartesian clarity, but is it correct? Whereas individual vetoes may impose a binding constraint in a limited number of cases of unanimity voting, as with the role of Greece in foreign policy or Luxembourg in banking, there is little reason to believe that this is generally the essential concern. Most issues involve compromises between opposing coalitions, whereby the total number of countries matters less. In any case, there are relatively few remaining issues where co-operation is promising but unanimity is the norm. It is perhaps more likely that greater heterogeneity of interests would undermine the cohesion of parties within the EP, making effective legislation more difficult. Yet the most recent analyses suggest that, as long as countries have similar parties, cohesion is not narrowly dependent on the precise range of ideological differences (Hix *et al.*, 2002).

Decisive instead is whether conflicts of interest, particularly those involving the redistribution of resources, will place undue strain on EU governance. In particular, whose interests are to be represented by EU budgetary transfers? Nearly every country that has entered the EU – most notably Britain, Greece, and Spain – received a relatively unfavourable financial settlement, to which the response of each, once a member, has been to obstruct EU legislation until they received a financial side-payment. EU regional policy was a response to the British referendum of 1975. In the 1980s, structural funding was established and expanded as the result of pressure from Mediterranean countries. Financial transfers contributed to the legitimacy of the EU in a number of countries. This will be far more difficult a strategy for future entrants to pursue, due to the larger number of core members, the larger size of the *acquis communautaire*, the lack of major issues on the horizon, and the recent introduction of flexibility provisions that might well permit rich coun-

tries to react to such a situation by opting out and moving together as a subgroup. Structural and agricultural funding is unlikely to be extended at the same level as in the past (Nello and Smith, 1997, p. 28). Labour movement is likely to have some *de facto* transition period. This, in turn, may reduce the popularity, and thus the *perceived* democratic legitimacy, of the EU.<sup>8</sup> Yet even in this context, the current arrangement, in which small countries can block unanimity votes, may offer a better prospect of forcing continued redistribution than any type of decision-making reform.<sup>9</sup>

## Conclusion

When judged by the practices of existing nation-states and in the context of a multi-level system, there is little evidence that the EU suffers from a fundamental democratic deficit. That is not to say that there is no cause for concern. There are a few areas where the EU departs modestly from existing national practices with no compelling substantive justification. The most important is the structure of the European Central Bank, which is more independent of political pressure than any known national example (Herdegen, 1998). One need not draw an analogy with the 1930s to view overly independent central banks with caution. Another is the rights of immigrants, where EU standards are evolving but could move in a direction more restrictive than the European norm. Still another area is administrative procedure, where the formal rights enjoyed by residents of the US under the Administrative Procedures Act surpass those formally guaranteed in Europe. Finally, Scharpf is correct in drawing attention to the possibility that, in the future, European administrative and constitutional law might move in a direction inimical to social welfare provision. Yet up till now there is little evidence that these specific examples add up to a structural democratic deficit in the EU. Any mature polity could point to areas in which such democratic protections are stronger or weaker; in this regard the EU is hardly exceptional.

So, we might reasonably ask, why then is there such public and scholarly concern about the democratic deficit? Concern appears to result, above all, from a tendency to privilege the abstract over the concrete. Most critics compare the EU to an ideal plebiscitary or parliamentary democracy, standing alone, rather than to the actual functioning of national democracies adjusted for its multi-level context. When we conduct the latter sort of analysis, we see that EU decision-making procedures, including those that insulate or delegate certain decisions, are very much in line with the general practice of most

<sup>8</sup> Whether this in fact does so depends, of course, on which standard we adopt. A rise in nationalism and a decline in European feeling is also possible and, again, the democratic legitimacy of such an outcome is unclear (Nello and Smith, 1997, p. 47).

<sup>9</sup> For a more detailed analysis, see Moravcsik and Vachudova (forthcoming).

modern democracies in carrying out similar functions. This overall trend toward insulation of certain functions is in turn driven, most analysts believe, by considerations that should be given normative weight, such as the complexity of many policy issues, the rational ignorance and apathy of many publics, the desire to protect minority rights, and the power of certain special interests in situations of open political contestation. These constraints cannot be assumed away; they must be acknowledged on their own terms. As long as political procedures are consistent with existing national democratic practice and have a *prima facie* normative justification, I conclude, we cannot draw negative conclusions about the legitimacy of the EU from casual observation of the non-participatory nature of its institutions – a dictum that could usefully be applied in many contexts outside the EU.

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