

THE NATURE OF THE EUROPEAN UNION

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ABSTRACT

The European Union (EU) is not a state, though it has some statelike attributes; it is not an empire, though it includes many former European imperial powers; and it is not a federation, though Euro-federalists seek to make it one. There is, however, no need to argue that the Union is a singularity, nor to invent novel terminology, such as that deployed by “neo-functionalists” and “intergovernmentalists” to capture its legal and political form. The EU is a confederation, but with consociational characteristics in its decision-making styles. This conceptualization facilitates understanding and helps explain the patterns of crises within the Union.

Keywords: European Union; state, theories of; empire, theories of; federation; confederation; consociation

Teaching the European Union (EU) successfully requires avoiding several initial mind-blockers. EU specialists tend to insist on the novelty of their subject, to focus on its allegedly unprecedented attributes, and to use, understandably, an in-bred terminology.¹ Frequently, and with atypical lightheartedness, they quote the quip of former Commission President Jacques Delors that the Union is an UPO – an unidentified political object. This elegant phrasing, even more impressive in French, conforms with the insistence that the Union is a unique *novum* – unique in its non-American meaning, i.e., a singularity, albeit not foreseen in the science fiction of artificial intelligence. We are also told that the EU displays innovative “variable geometry,” but, “what, pray, is constant geometry?” Some EU specialists come close to suggesting that their subject is incomparable. Impliedly, the EU’s nature can only be understood through deep

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immersion in its treaties, institutions, and policies, accompanied by long sojourns in the European Quarter of Brussels, preferably interrupted by a Master's degree at the College of Europe, and provisionally capped through completing a joint PhD and JD dissertation at the European University Institute in Florence, composed in three major world-languages, namely, English, law, and economics. For them the EU is a big N of 1.

Other guides, by contrast, employ very broad but less valuable abstractions to encapsulate the EU. For example, Gary Marks and Liesbet Hooghe, describe the EU as “a system of multi-level governance.” Yet most polities, with the exception of some city-states and numerous micro-states, have had multiple levels of administration or government, as the authors illustrate in their excellent study of regional governments (Hooghe, Marks, & Schakel, 2010). “Governance,” by contrast, is among the vaguest of expressions in widespread usage, the blame for which, perhaps mistakenly, may be assigned to the former Labour Prime Minister Harold Wilson, who published *The Governance of Britain* shortly after leaving office. Both components of his title misled: it was about the Government of the United Kingdom (Wilson, 1976). Similarly, we are instructed that the EU is “a political system” in the best political science textbook in English on the European Union, initially written by my former colleague Simon Hix – later editions are coauthored. That hardly helps the neophyte, however. The reference invokes David Easton's framework, replete with inputs, outputs, and feedback loops, and implicit black boxes surrounded by demands and supports (Easton, 1965/1979). The political system tag, I suspect, is used by Hix to avoid immediate immersion in debates between so-called “inter-governmentalists” and “neo-functionalists,” because his goal, accomplished with skill, is to transfer rational choice analytical politics from its original site of application (the United States) across the Atlantic (Hix, 1999).

While Marks, Hooghe, and Hix cannot be accused of conceptualizations that are obviously wrong, precisely because they go for the vague, the same cannot be said of more popular if not populist intellectuals. Mark Leonard, for example, was sufficiently premature to describe the EU as “the ruler of the 21st century,” which makes the Union sound like a collective time-lord from *Dr Who*. He compounded his metaphors by declaring that the EU resembles VISA, the credit agency, though presumably not because of VISA's propensity to encourage debt addiction (Leonard, 2005). Less popular, and more typical of the academy is Stefan Bartolini's description of the Union as “post-sovereign, polycentric, incongruent and neo-medieval” (Bartolini, 2005). That is not going to help initiate the average Millennial in understanding the Union. Let us therefore go through several negations – not in any Hegelian sense – to provide, if we can, a clearer and more useful conceptualization.

THE EU'S MEMBERS ARE STATES, BUT THE EU IS NOT A STATE, OR IS IT?

This author once cowrote an account of theories of the state (Dunleavy & O'Leary, 1987), so should be equipped to answer the question just posed. Point

one: a state for our purposes is an independent sovereign entity, i.e., not to be confused with states in the US federation, or the Indian union, or provinces in Canada, or Länder in Germany and Austria. The United States is a state, though that title used to be pluralized (sentences beginning “The United States are...” may be found in pre-Civil War literature). Point two: a state is not a nation. Apologies to US high-school teachers, journalists, and political scientists, but what most Americans describe as nations are independent sovereign states, a high proportion of which are not nations, or at least not mono-national. The United Nations, it has been well said, is founded on a double-lie; it is neither united, nor comprised of “nations;” it is a club of currently recognized states. Point three: there are nation-states, nationalizing states that want to be nation-states, bi-national states, and multinational states; and some non-national states (such as the Vatican), and pre-national dynastic kingdoms survive (e.g., the Sultanate of Brunei). By these standards, the EU is multinational, because it contains multiple nations, and comprises numerous member-states that define themselves as nation-states – though it has bi-national members, e.g., the Flemings and Walloons of Belgium, and some multinational imperial rumps, e.g., the Kingdom of the Spains, and until January 31, 2020, the United Kingdom of Great Britain and Northern Ireland.

Just when things are getting clearer, however, the EU specialist will insist that the EU is not multinational, but rather “post-national,” and the very same person may use the expression “supra-national” to describe some EU institutions or policies. Each of these terms, however, may mislead. The expression “post-national” is descriptively false if it suggests that any significant number of the member-states have ceased to be *nation*-states. None have abandoned their “national characters” – though they update them constantly. Moreover, the EU has not, at least not yet, created a pan-European identity that has significantly superseded the national identities of the citizens of the Union, a fact noted before recent xenophobic and ethno-populist resurgences (Checkel & Katzenstein, 2009; Fligstein, 2008). Small numbers of EU citizens have a self-styled cosmopolitan European identity as their primary political identity, and perhaps allegiance, but they do not rule the EU – at least not all of its institutions, yet. For most EU citizens their “national” identity and citizenship are primary, though for many a European identity and their national citizenship are complementary. Even if the European identity became more important than member-state identity across the majority of the Union’s citizens, it would not be clear that this “Euro-identity” would be “non-national.” It might well be a new continental-scale national identity, one that conceivably may resemble many extant national identities, such as China’s, replete with its own mythologies, including a story of Europe’s emergence, distinctiveness, and shared Christian (or post-Christian) culture. Such constructions are already in the marketplace of ideas (Le Goff, 2007).

But what of the “supra-national,” when it is not a synonym for “post-national”? As far as I know this expression first emerged in widespread usage, in French, to define arrangements that allowed for law and policy to be made “above” the national states that formed the European Coal and Steel Community (Haas, 1968). It would be futile to try to eliminate this usage, but such laws and policies emerge from the agreements of said member-states, who have made subsequent treaties

that *sometimes* permit laws and policies to be made on the basis of qualified majority voting. They do not then emanate from “above” the states, but from “within” and “through” them. In Euro-speak, they make “co-decisions,” even if the legislative initiatives formally hail from the allegedly supra-national Commission.² So, the EU is multinational, but certainly not yet “post-national.” And there may be better and older ways to describe so-called “supra-national” government.

The attributes of statehood now need to be briefly elaborated. Political scientists and sociologists invariably cite Max Weber, who told us that the state has an essence, namely,

[T]he modern state can only be defined sociologically in terms of a specific means which is peculiar to the state, as it is to all other political associations, namely physical violence. (*Gewaltsmakeit*)

He went on,

Every state is founded on force (*Gewalt*), as Trotsky once said at Brest-Litovsk. That is indeed correct... Violence is, of course, not the normal or sole means used by the state... But it is the means specific to the state. [A] state is that human community which (successfully) lays claim to the monopoly of legitimate physical violence within a certain territory, this ‘territory’ being another of the defining characteristics of the state. (*Weber, 1919/1994*)

This definition emphasizes domestic sovereignty. Weber’s formula has three components: monopoly of force; territory; and legitimacy. By these criteria, the EU is not a state. There is no EU-wide police force, no EU-wide gendarmerie, and no European army, to enforce Union authority. Policing the single market is a function of the Court of Justice of EU but requires the cooperation of the courts and police of the member-states. The EU’s territory is coextensive with those portions of its member-states that are within the EU, and its customs union, and single market; and the EU acts as the coguardian of two protectorates, Bosnia and Herzegovina, and Kosova, outside the boundaries of its member-states.³ Legitimacy, that conceptual morass from which no traveler returns, may be left aside, but let us agree that the EU’s is not ubiquitous. By contrast, all the member-states of the EU are states by Weber’s definition, even if their legitimacy varies.

We are not yet out of the statal woods, however, because other disciplines do not defer to Weber. International lawyers, generally better paid than political sociologists, insist that the Montevideo *Convention on the Rights and Duties of States* specifies the criteria that a State, which they always capitalize, must meet, namely

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States. (*Montevideo Convention, 1933*)

The EU has permanent residents and citizens. It has already been argued that it has a definite territory, even if it expands and contracts, so (a) and (b) are satisfied. The EU has a government, albeit multiheaded. Namely, the European Council (of heads of states and government), the Council of Ministers, and the Commission. The EU has other attributes of a government, a Council, a

Commission, a (bicameral) legislature, a court, and important independent public bodies, most famously the European Central Bank. Therefore criterion (c) is met. Last, but not least, the EU has the recognized capacity to enter into relations with other States, notably but not only in trade agreements. There are EU ambassadors to member-States and (non-member) States, and both the former and the latter send ambassadors to the EU. *Quod erat demonstrandum*. In (dated) international law the EU would seem to be a State, but in (dated) political science and sociology it is not. Can this contradiction be resolved? The answer, as we shall see, is yes, if a confederation is a State, and if the EU is a confederation constituted by its member-states. But further analytical steps are required to drive home this claim.

Additional “dimensionalizing” of the state helps. A synthetic neo-Weberian definition – not an original contribution to the annals of political thought – performs that expansion. Namely,

A modern state is (i) a differentiated and impersonal institution that is (ii) politically centralized though not necessarily unitary; that (iii) generally exercises an effective monopoly of publicly organized physical force and (iv) of authoritatively binding rule-making (or sovereignty) over persons, groups, and property; and that (v) is sufficiently recognized by a sufficient number of its subjects, and (vi) of other states, that it can (vii) maintain its organizational and policy-making powers within (viii) a potentially variable territory. (O’Leary, 2001)

The EU matches some of these eight dimensions. Its institutions are partly differentiated from its member-states and subjects. Impersonal office-holding is the norm: it is not familial, tribal, hereditary, feudal, or patrimonial. The EU is not unitary, but EU law, shepherded by the Court, seeks to be cohesive and appropriately uniform and predictable. The EU, except in some English imaginations, is strikingly difficult to describe as politically centralized. It has three cities in which capital functions are permanently exercised, in Brussels, Strasbourg, and Luxembourg. Other cities in the member-states are used for inter-governmental meetings, summits, and the signing of treaties. There are, however, mechanisms to coordinate law and policy, especially where the EU has exclusive competences. But the EU not only has no monopoly on publicly organized physical force but also has no monopoly on rule-making. Its institutions are an expression of shared rule-making. There is rule-enforcement by law, and fines, but not, so far, by EU security officials. Judging by social surveys and voting behavior, the EU is not recognized as “statelike” by most of its citizens. The EU’s organizational, fiscal, and policy-making powers are limited, largely “regulatory.” In short, the EU is partly state-like, but not as statal as its member-states, not least in its numbers of officials. One tempting conclusion, proposed by Bartolini, is that the EU is “a state-formation” in-progress, characterized by limited administrative competence, strong regulatory powers in some policy fields, very weak fiscal capabilities, and strong juridical capacities. These descriptive components should not be controversial, but why assume that the EU has the telos of full statehood, particularly one that would subsume and supersede the sovereignty of its member-states, and de-nationalize them? Differently put, why assume, that the self-styled “Brexiters” are right, namely that the EU is becoming a superstate, or should that be a supra-state?

“Ever closer union” is not logically the same as predicting either a federal or a unitary union; one can after all get asymptotically closer to a boundary without crossing it.

THOUGH SITUATED WHERE MANY EMPIRES WERE, THE EU IS NOT AN EMPIRE

After 1989, it became fashionable to classify the EU as an empire. Perhaps it is the successor to Charlemagne's empire: his territory was close to that of the founding Six. Or, to the empire of the Habsburgs, whether that of Charles V, or his solely Austrian successors, or to the overlapping jurisdiction of the Holy Roman Empire of the German Nation (Wilson, 1999, 2016). Or, perhaps the EU is the successor of all the European empires, bar that of those that bled into Asia and North Africa, i.e., some of the lands of the Czars, and the Ottomans. So far, I have yet to read any serious comparison of the EU to Napoleon's empire, but after UKEXIT is complete the EU's spatial scope, barring sovereign Ireland, will resemble that of the grand empire in 1811.⁴ There is a Brexiteer literature in which the EU is compared with Hitler's empire; one lengthy indictment insinuates that “the European project” has its ideological origins among Nazis (Laughland, 1997). One might add Napoleon, Charles V, and the Caesars if one follows this author's method, which forgets the origins of the European Coal and Steel Community (Treaty of Paris) and the European Economy Community (Treaty of Rome) – and the failed European Defense Community (EDC). These initiatives were partly intended as power-sharing peace projects. A key goal was to inhibit the recurrence of wars between Germany and France.

In Iberia, site of two faded imperiums, the portrait of the EU as an empire became especially popular in the 2000s. Tasked by a Dutch journalist to describe what the EU would be after the Lisbon Treaty entered into force, José Manuel Barroso, the Portuguese President of the European Commission (2004–2014) caused minor embarrassment. The ex-Maoist first tried to refuse the question, but then chose to elaborate the usual talking points about uniqueness, the UPO, and the pooling of sovereignty, before he went off-message. He concluded that the EU resembles an empire, in its scale and diversity, while insisting it is not coercive, or organized through the diktat of an imperial center.⁵ Barroso's characterization may have been inspired by his fellow Iberian, the Catalan political scientist Josep Colomer. In *Great Empires, Small Nations*, and *The European Empire*, Colomer maintains that the mid-scale sovereign nation-state is now subject to supersession by cooperative coordination on a larger, imperial scale, and by the revitalization of smaller nations, whether organized in formally sovereign states or autonomous regions. The claim is that the latter may be able to express their cultures, and to develop their political economies, much better inside an empire (Colomer, 2007, 2016). Combining the literature on globalization with the idea of different efficiencies of scale for the delivery of different public goods, Colomer argues that large empires are more efficient for trade, defense, and communication systems. He makes a critical conceptual deviation, however, by inventing *non-imperialistic*

empires. He names two, the Holy Roman Empire and the EU. For him the concept of empire, without qualifying adjectives, should be confined to very large-scale entities (in territory and population), with relatively fluctuating boundaries, and diverse populations, ruled by compound multilayered government with overlapping jurisdictions (2007, p. 3). Colomer's reasoning is closely paralleled in the work of the Polish but UK-resident political scientist Jan Zielonka who treats the EU's eastward expansion as that of a benign empire, replete with the polycentric, multijurisdictional traits emphasized by Bartolini and Colomer (Zielonka, 2006). The Catalan and Pole were anticipated by Englishman Robert Cooper, successively special adviser on foreign affairs to the UK's Tony Blair and director general of "external and politico-military affairs" for the Council of the EU. In his vision, the EU is a postmodern cooperative empire (Cooper, 2003), and a source of order. Beyond its frontiers lie benighted lands of chaos, kleptocracies, and the ungoverned spaces of failed states. In what seems increasingly a period piece, Cooper defended a benign humanitarian imperial role for the EU, compatible with human rights and cosmopolitan values.

Large-scale cross-time comparisons should be encouraged. But these portraits of the EU as an empire are not conceptually convincing. Barroso, Colomer, Zielonka, and Cooper jointly suggest a coreless empire. Empire begins, however, with a core that rules peripheries, including provinces, protectorates, and colonies, i.e., dependent territories that are neither sovereign nor co-sovereign autonomous states (Doyle, 1986). An empire prohibits coordination among its peripheries (Finer, 1997), a description that does not apply to the EU. The EU "pentangle" of institutions – the Council, the Council of Ministers, Commission, Parliament, Court – cannot and does not prevent the coordination of subsets of member-states. Indeed, subsets of member-states meet regularly, sometimes to coordinate on EU policy. Restrictive rules govern "enhanced cooperation," but these too have been agreed by treaty. With the highly debatable exception of Rome (Sherwin-White, 1939/1973), an empire cannot abide the universal and equal citizenship of its subjects; if it can, it may reasonably be suggested it is becoming an integrated state (Siedentop, 1983). Visually, empires are "star-shaped," or hubs with spikes. Where is the EU's core, hub, or the center of the starfish? In France and Germany? In the six founders? In the western fifteen member-states that preceded the twenty first century expansion to twenty eight – now twenty seven?

In short, an empire is not merely large and diverse, but has hierarchically subordinated provinces, protectorates, and colonies. "Nation" became a standard antonym of "empire" precisely with those who sought a state of equal nationals and rejected hierarchically ordered agro-literate imperial polities (Gellner, 1983). Conversely, there is an intricate relationship between conservative hierarchical thought and the logic of empire (O'Leary, 2002; O'Neill, 2016). No coercive or exploitative EU center oppresses or abuses member-states. During accession, potential member-states, screened for their democratic caliber, are obliged to legislate the entirety of current EU law, the *acquis communautaire*. That process may be experienced in certain economic sectors and workforces as exploitative, oppressive, or coercive, but the state in question freely accedes to the

acquis to become a formally equal member-state, and a future rule-maker. The restrictions on freedom of movement placed on the citizens of some newly enrolled Eastern member-states were examples of unequal citizenship, *but* they were time-limited. Member-states in general “delegate” powers to the pentangle through treaties between themselves, to which each member-state must consent. *Ergo*, the member-states are not provinces, peripheries, or colonies. Rather, they are the masters of the treaties, though their domestic constitutions cannot unilaterally control the uses the EU’s pentangle makes of its authorized powers. To revise EU laws, they must muster a coalition with a qualified majority in the Council and the Parliament or make a new treaty with unanimous agreement.

Metaphorically, on the right and the left, the functioning of the Eurozone, especially since 2007–2008, is exhibit A in indictments of German “imperial exploitation” of the rest of the Europe (for right and left perspectives see [Connolly, 1995](#); [Varoufakis, 2016, 2017](#)). The Euro was negotiated, however, as a *quid pro quo* to create a Europeanized Germany and to prevent a German Europe after German reunification – though the details remain under historiographical litigation.⁶ The unfolding of the Euro certainly gave Germany a highly competitive exchange rate for its export industries, and the way in which the Eurozone has been managed, in conjunction with Germany’s determinedly non-Keynesian fiscal management, has compressed demand and produced unnecessary deflation elsewhere – and in Germany. But these outcomes flowed from joint decisions by the member-states, not by decrees from Berlin. Banking and sovereign bailouts, administered by the troika of the Commission, the European Central Bank (ECB), and the (partly non-European) IMF, have likewise been narrated as the imposition of German political economy on member-states who temporarily lost their economic sovereignty – this language, in less polite forms, was widely used in the cases of Cyprus, Greece, Ireland, and Portugal. Yet in each of these member-states, albeit with variations in attendant popular pressure and anger, the state officials who prevailed backed staying in the Eurozone. Very painful austerity programs were accepted in preference to exiting the Eurozone – and, conceivably by law, the EU. No German or EU armies, police, or prisons enforced these programs. Auditors monitored compliance, not soldiers in jack-boots. Greek referendums were ignored, but Greece did not follow through on its threat to exit. In short, the Eurozone, modeled on the Bundesbank and the hard DM, was negotiated, including its known minimal or nonexistent democratic accountability, and it was opted into, by the relevant EU member-states, and it still has voluntary candidate-members.⁷ Wonder may be expressed at the choices of particular member-states, and no one need assume German policymakers have been benign or altruistic, but the actions of the bailed-out governments were not, in general, submissions to imperial diktats from the German government. The functionary who crushed the hopes of Ireland’s Fianna Fáil government and compelled it to absorb the debts of its insolvent banks through (perhaps unlawfully) threatening to cut Ireland off from its supply of Euros, was a Frenchman, Jean-Claude Trichet.⁸ Moreover, throughout the crises of the Eurozone, Germany has made concessions, albeit begrudgingly and belatedly, to its fellow Europeans. And, whether mean and myopic, or otherwise, German

governments have never lacked for policy allies, notably among the Dutch and the Finns, but also within each member-state.

The notion of the EU as a zone of benign imperial civilization surrounded by chaotic or violent entities in its near abroad accords with the self-conceptions, and sometimes the public statements, of some of the political elites in the Council and Commission. Russian and Ukrainian Mafiosi, Turkish Islamists, the peoples of the Levant and North Africa, are impliedly or explicitly “othered.” These places are seen temporarily to house, or are paid to warehouse, illegal economic migrants, refugees, asylum seekers, criminals, and yes, terrorists, by anyone’s definition. But the battered Schengen zone is the result of member-state agreements on how to manage their joint exterior borders, at land and sea. Mediterranean and Balkan border policy notoriously depend on each frontline member-state’s security and legal institutions. The Dublin Convention badly needs updating to distribute the benefits and burdens of granting asylum and integrating refugees much more fairly, efficiently, and humanely, but, as its name suggests, its provisions are in a treaty.

Has the EU become a “deputy empire,” America’s Number Two, as suggested in vibrant passages in Perry Anderson’s *New Old World* (Anderson, 2009)? The Union, however, has no significant forces of its own to play such a role, if that is defined militarily. But its largest member-states do. In 2017, taking SIPRI’s data as authoritative, among the top fifteen states that expend most on their militaries were Italy (12th), Germany (9th), the United Kingdom (7th), and France (6th). These states individually ranked behind the top five spenders – in ascending order India, Russia, Saudi Arabia, China, and the United States. But, together the top four EU-spenders, all NATO members, outspent Russia by 2.8:1, India by the same, and Saudi Arabia by 2.5:1. The four top EU member-state big spenders therefore account for over 10% of the world’s outlay on arms, and that is before adding the budgets of other significant European spenders by global standards, e.g., Spain, the Netherlands, Poland, Sweden, and Greece (Tian, Fleurant, Kuimova, Wezeman, & Wezeman, 2018). The UK’s exit from the EU will, however, reduce the combined weight of the top three, France, Germany, and Italy, to 7.5% of the global total. This excursion suggests that it is the big member-states, not the EU per se, that provide the muscle behind European geopolitical capabilities. The EU’s capacities are economic, where its soft power is significant; to modify an old and racist cliché the EU is a military not a political “pygmy,” but jointly its member-states lie third behind China and the United States in military capacities.⁹

In sum, the EU contains former European empires, some of which retain dependent territories, but internally it is not an empire. Externally, the EU per se has no significant forces deployed in bases beyond its boundaries as is typical with imperial powers. The EU’s big member-states are more accurately portrayed, or may represent themselves, as security deputies with special relationships with the United States. True, most of the EU’s member-states are participants in NATO, but the EU contains neutrals, and NATO is an alliance in which the vanguard role is palpably American. During the EU’s expansion into the post-communist world, as Anderson correctly emphasizes, NATO membership has so far always preceded EU membership. Ukraine’s pro-Europeans learned to their chagrin the consequences of seeming to try to go the other way around (Mearsheimer, 2014).

Ukraine's fate reminds us that EU foreign policy implementation is a work-in-progress. Coordinating 28 states is an exceptionally difficult challenge – soon to be 27, but perhaps 28 again after the future accession of North Macedonia. Arguably, the EU's most successful display of geopolitical collective solidarity has been its united front in negotiations with a member-state intent on departure (O'Leary, 2019).

THE EU IS NOT A FEDERATION, THOUGH MANY WANT IT TO BE

The EU has federalist devotees, but is it a federation? A United States of Europe was Jean Monnet's identifiable political object (Duchêne, 1994), and that of his disciples (Wistrich, 1994), but has it been realized? Federations usually have express lists of exclusive powers for the federal level; statements on shared powers; and powers that are the ultimate jurisdiction of the states that comprise the federation. After the Lisbon Treaty, the Union has such codifications (Phinnemore, 2013), distinguishing exclusive Union powers, and powers shared by the Union with member-states, and it provides principles (proportionality and subsidiarity) to guide their development. The Union exclusively regulates the single market (standards and competition), the customs union and external commerce, agriculture (production, prices, and standards), and a common fisheries policy. Within the Eurozone, monetary policy is the exclusive power of the European Central Bank, and the elements of a banking union are in formation. Numerous other powers are shared and coordinated, especially when they have a regulatory character – employment, energy, and environmental regulation, public health, consumer protection, cohesion funds, transport, the movement of persons, especially within the Schengen zone, and aspects of policing and criminal justice, and of higher education, including research funding. There is, however, no meaningful Union macroeconomic government, aside from the straitjacket of the fiscal compact: in the Eurozone member-state budgets are subject to Commission oversight. Coordination and shared powers in the EU are at their weakest in defense and foreign affairs. By contrast, in most federations, the exclusive powers of the federal government usually include foreign affairs, defense, security and the intelligence services, and federation-wide taxation.

Federations, with the partial exception of the Swiss, have federal supreme courts or constitutional courts that adjudicate disputes over powers, claim powers over constitutional interpretation, and develop doctrines regarding whether federal/union law or state/provincial law prevails when there is a clash of competences. The Court of Justice of the European Union looks like such courts, claims powers of final interpretation of the treaties, and has had a record since the 1960s of upholding the supremacy of Union law over member-state law when clashes exist in zones of shared competence, and a less prominent record of extending the Union's (and previously the Community's) implied powers, exclusive or shared (Craig & de Búrca, 2011; de Búrca & Weiler, 2012; Weiler, 1999), but that does not make it a federal court.

Federations may “come together” as negotiated unions of constituent states; they may be established to “hold together” a previously unitary state; they may be “put together” by external or colonial force (Stepan, 2001); or they may arise from some permutation of these processes (O’Leary, 2005b). The EU definitively emerged from coming-together agreements between its member-states. Though the United States initially encouraged the formation of the EU’s predecessors, they were not put together in or by DC. But federations are not the sole entities that bring states together.

Federations are associated with the big. One in eight of the world’s states have belonged to the Canadian inspired *Forum of Federations*; four in ten of the world’s population live in federations; and seven of the top 10 of the world’s states in population size and in territorial extent are federations. Therefore, given the EU’s continental scope, and its population of over 500 million before the UK’s intended departure, it would be no geographic or demographic surprise to assert that the EU is an emergent federation, though it is not a member of the Forum.

Federations have been typologized on three dimensions (O’Leary, 2005b). Integrated federations are mono-national, have majoritarian decision-making at the federal level, and are centralized. Their polar opposites are pluralist federations, which are multinational, have consensual decision-making at the federal level, and are decentralized. Real-world permutations, of course, exist between these polar types. The EU is obviously not a mono-national or national federation, though two of its member-states are (Austria and Germany).¹⁰ The EU is plainly not majoritarian: decisions within the Council and the Parliament are typically by unanimity or by qualified majority voting. The European Parliament, elected by proportional representation, is invariably governed by a coalition of party families, each composed of numerous member-state parties. The European Council, de facto, represents presidents and prime ministers from numerous governing party families, in an obligatory grand coalition, and shifts its alignments depending on the issues before it. In the security domain, as seen, the EU is extraordinarily decentralized; security is overwhelmingly organized by the member-states.¹¹ Natural and fiscal resources too are jealously guarded by the member-states. The member-states have ensured that the residual (unspecified) powers articulated in their joint treaties are with them.¹² In short, if the EU is a federation, it is a very weak one and belongs to the species of pluralist federations.¹³

The foregoing attempts a fair précis of propositions that suggest that the EU is or is becoming a federation. The counter-arguments, however, remain compelling. Legally, federations are based on constitutions, usually mandated by constituent assemblies, in which both citizens of the federal demos and the states are partners. The EU is a treaty-based order, marked in its origins by international law. The Union’s curiously named constitutional treaty, itself a legal hybrid, went down to defeat at the hands of French and Dutch voters, even though much of the substance later went into the Treaty on European Union (Norman, 2005; Phinnemore, 2013; Treaty of Lisbon, 2007).

The EU, like federations, has citizens, though their rights are largely derivative of their citizenship of their member-states, despite some interesting legal cases. EU

citizens who move to another member-state have no privileged status through the Union in obtaining naturalization in their new residence. Strikingly, the EU's famous mauve passports have the emblems and names of the member-states displayed with greater prominence than the name of the Union. EU citizens do not jointly or directly elect the executive of the EU (the Council and Commission).

Institutionally, the EU differs significantly from typical federations. Federal executives are autonomous and preside over bureaucracies with enforcement capacities. The EU, however, has no President directly elected by the federal demos, with executive enforcement powers; the "permanent" President of the European Council is elected by his or her peers among the heads of state and government, for a two-and-a-half year term, renewable once, but is a coordinator more than an enforcer. The EU has no Prime Minister nominated by the governing coalition in the House of the People, though intermittent efforts are made to make the President of the Commission exhibit these traits. S/he has strict limitations in composing the college of commissioners (one from each member-state), and is nominated by the European Council, and approved by the Parliament. The Council, be it noted, has just rejected the idea that its nomination for President of the Commission should be confined to accepting the "leading candidate" of the plurality party family in the Parliament. The college of commissioners is collectively endorsed by the Parliament, though ways have been found to block individually unwelcome nominees. Each member-state nominates one commissioner, however, thanks to the Irish electorate's refusal of the first draft of the Lisbon Treaty (Quinlan, 2009). The Commission's leadership has regularly been federalist in disposition but has never had a significant democratic mandate across the Union to uphold this tendency.

Federal agencies work in parallel with state-level bureaucracies throughout federations, but, by contrast, within the EU most law and policy depend upon the member-states' bureaucracies and capacities for implementation. The EU has few powers of direct application or enforcement. The ECB is the most notable exception, but usually works through each of the member-state central banks, and other regulatory bodies, all of which are deliberately depoliticized. Those who work directly for the EU's agencies and directorates-general, within and without the Commission, are formally loyal to the Union, and include genuine technocrats, but no one is surprised if they exhibit the interests, ideologies, and ideas of their member-state of origin.

The legislature in most federations derives at least part of its mandate from a federal demos. It usually functions with two chambers, one a federation-wide house of the people the other a chamber of states. Certainly, the EU's Parliament looks its most federal institution because its mandate derives from citizens voting in their respective member-states. Infamously, however, the limited numbers of voters who turn out where is no compulsory voting treat these elections as "second-order" events, akin to referendums on the popularity of incumbent member-state governments. Voters have so far not been very responsive to Union-wide issues; turnout fell as the Parliament's powers grew – until the elections of 2019. Some sardonically observe that participation is rising fastest among those who would leave or weaken the Union. The EU's second chamber

has no autonomous mandate from the citizens of the member-states. It is not comprised of senators, but of the Council of Ministers, usually organized by functional portfolio, rather than meeting as a plenary body. Through the Council of Ministers, the executives of the member-states, and their civil servants, exercise control over law-making and policy development in the Union. The degree to which they are accountable to their own member-state legislatures varies significantly. The Commission retains its nominal power of initiating legislation, and has expert agencies and officials who matter, but these experts are often matched in caliber by seconded member-state officials who participate in the arcane processes that go under the rubric of “comitology.”

The Union has an international personality, but according to its own treaties, it is not sovereign, whereas a federation is; and, as we shall shortly claim, the Court that adjudicates these treaties may reasonably be classified as confederal.

THE EU IS A NEW ENTITY, BUT DOES NOT REQUIRE CONCEPTUAL NOVELTY

EU studies have not lacked terminological innovation. Two distinguished scholars in the vanguard of different classifications of the Union may be taken as recent leaders of their respective “schools”; one, a leading representative of “neo-functionalism,” the other of rational choice applied to international relations, namely, “liberal-intergovernmentalism.” Should we follow these decades-long students of the Union and their respective apostles? Not, I think, if we are to be proper comparativists.

Philippe Schmitter, a doyen of comparative politics, and acknowledged successor of the founding father of “neo-functionalism,” Ernest Haas, has explored several different wordings to classify the Euro-polity, and its possible futures (Schmitter, 2000). Rejecting the idea that the Euro-polity is a *stato* (state), or a *confederatio* (confederation), albeit with no significant justification for the latter’s damnation, Schmitter proposed two different Latinate neologisms to describe the EU, especially its future. In the first, a *consortio*, a fixed number of states collaborate, but with varying policy responsibilities, i.e., different subsets of member-states cooperate in different functional domains. Differently put, the EU’s territory is fixed, but its domains of functional cooperation are not. Schmitter maintains consortium captures what is intended by the over-used expression “variable geometry.” Consortium, however, is an unnecessary innovation. Confederations, after all, are entirely compatible with opt-outs. In federations, by contrast, the deliberate insistence on symmetry, meaning symmetry in the powers of states, is a recurring demand, one that can destabilize the accommodation of smaller nationalities, ethnicities, and cultures. But there are nonetheless asymmetrical federations in which some states are able to exercise opt-outs. Moreover, there are good grounds for believing that all federations display at least some conjunction of asymmetries – in the formal legal competences of states, in their decision-making power within the federal government, in the resources states possess, in the symbolic recognition of states, or in their

internal structures of government (O'Leary, 2010). In short, the notions of symmetrical and asymmetrical confederations and federations already exist, so Occam's razor can be exercised on consortium, which sounds too much like a shopping mall or a corrupt conspiracy. The already overflowing lexicon of political sociology and law should not be needlessly expanded.

Schmitter's second proposal, *condominio* (condominium), is arguably even worse. He defines it as a political entity in which there is both territorial and functional fluidity. He claims that the concept absorbs and usefully summarizes the fact that the Eurozone is not coextensive with the EU, and that the Schengen zone extends beyond the EU – as well as not encompassing all the member-states within. But in – *correct* – classical usage a condominium refers to shared sovereignty over a territory, and its people, that are not themselves sovereign (O'Leary, 1993); it involves, minimally, two outside powers exercising sovereignty and power over another place. The usual illustrations have been Andorra, Anglo-Egyptian Sudan, and the New Hebrides. Arguably, the EU, NATO, and UN field organizations have exercised delegated condominium-like powers over Bosnia and Herzegovina and Kosova, but the EU itself is no condominium because the Union has been, and is, the creature of its member-states. The Union is their building, or dominion. Condominium is therefore just not appropriate to describe the Union. Moreover, it is impossible to read Schmitter's "modest proposals" for reforming the Union, expanding its role in redistribution, and for deepening its democratization, as other than strongly federalizing proposals, which casts further doubt on the merit of his wording novelties.

Andrew Moravcsik's work of the 1990s, elegantly structured, empirically rich, and fluent, relentlessly sought to demonstrate that the member-states have thoroughly controlled the development of the Union, whence "inter-governmentalism." He sought to demonstrate that the policy preferences of the relevant member-states flow from the economic interests of their respective domestic constituencies, whence "liberal" – though "pluralist" might seem a better designation (Moravcsik, 1993, 1998). The Union's institutions, on this telling, reflect the credible commitments the member-states have made to one another to enforce contracts that reflect their domestic economic interests. Treaties, grand bargains, and laws, in brief, display the relative bargaining power of member-states. The gravamen of Moravcsik's detailed excursus from Messina to Maastricht is the primacy of the member-states in the establishment, dynamics, and functioning of the Union. That may, and indeed should, be accepted if stated at a sufficient level of generality. However, embracing his extirpation from explanatory significance of all autonomous policy influences, or institutional innovations, that have flowed from the Union institutions, laws, personnel, and policies, is quite another matter.¹⁴ Moravcsik's member-states are too rationalist, too capable of economic calculation, too controlling, and indeed just too capable. For instance, accounting for the UK's exit from the Union will pose an extraordinary challenge for this species of rationalism, while Germany's policy toward the UK's secession has not been driven by the interests of its automobile industry.

The EU is more than a set of credible commitments by economically rational states, partly because it is more than an economic regime. Indeed, even its economic regimes have changed. The ECSC began under the auspices of a French hegemon that favored both command and indicative planning. Its EU grandchild has veered radically toward a neo-liberal, Ordo-liberal, or neo-Hayekian focus on “mere” regulation. Understanding the EU as a confederation, in which the confederal institutions, particularly the Parliament, Court, and Commission, have developed some minimal autonomy, including the propensity to innovate law, policy, or institutional functioning, seems a more sensible summary than Moravcsik’s portrait of the Union’s institutions as mere mirrors of the instrumental economic interests of the member-states as reflected by their governments. In short, the EU is not just an international economic organization; it is more than a free trade agreement with a customs union; and it is not just the sum of its powerful governments. The foundations of its precursors, and its current evolution, all require a focus on geopolitics. The EU confederation, after all, may have become a federation had NATO failed, or had the European Defense Community materialized: it was defeated at the hands of a curious coalition of Gaullists and Communists. So far, NATO has helped freeze the EU within its confederal form, but the revival of Russia and renewed US isolationism, in the form of Trump’s chaotic unilateralism, may yet change that.

THE EU IS A CONFEDERATION, WITH CONSOCIATIONAL DECISION-MAKING

Let us stipulate, but follow a long historiographical consensus in doing so, that a confederation is a union of sovereign states which retain their sovereignty, founded on voluntary treaties.¹⁵ Confederations preserve the international legal personality of their member-states, while permitting the limited “pooling” of delegated sovereignty. Confederations are flexible, enabling opting-in, and opting-out of specific legal or policy domains. They may begin with unanimity requirements among their member-states (in the EU unanimity is still required for changes to the treaties). That is, the most fundamental reshaping of the confederal legal order requires each state to ratify the changes according to its own domestic requirements. Confederal institutions generally lack direct enforcement capacities within their member-states; the latter, however, delegate authority to confederal institutions. The executive of the confederation comprises delegates of the member-states; its legislature, if there is one, comprises delegations from the member-states; and the highest judiciary, if there is one, adjudicates according to the terms of the treaties, and comprises judges appointed by the respective member-states. The public officials of the confederation are expected (in practice) to be agents of their member-states of origin. Rights of opt-out, powers to nullify confederal laws or decrees, and rights of generalized amendment are normal for member-states in confederations. So, vitally, is the right of secession entirely consistent with the member-states’ retention of their sovereignty. In confederations the right of secession is presumed; in federations it

is usually moot or denied, unless specifically provided for in the constitution. Confederations are pacts among states; confederation-wide citizens are not normally parties to the foundational covenant. Lastly, unlike federations, most confederations have had a *de facto* and sometimes a *de jure* hegemon, or leading state.¹⁶

Accepting this conceptual conspectus as a fair account of the characteristic traits of confederations, how does the EU match up? The EU is based on treaties – and on the enormous derivative legislation, the *acquis*, that flows from the institutions established by these treaties. The EU's double-headed executive is strongly confederal. The European Council comprises the heads of state and government who oversee what flows from the interactions of Commission, the Council of Ministers, and the Parliament. The Council nominates a designate President of the Commission, while electing its own President from a college of former or soon-to-be former prime ministers and presidents. The President, however, is not formally, or informally, the nominee of any hegemon. The College of Commissioners contains one nominee from each member-state, though the college is jointly ratified by the Parliament. The member-states, despite the existence of the relatively new Permanent President of the Council, retain a collective and rotating presidency, in which each state, without exception, takes its turn organizing the Union's business. The EU's legislature, minimally, is half confederal. The Council of Ministers comprises member-state ministers empowered to commit their governments. At its foundation, the predecessor to the current Parliament was equally unambiguously confederal: its parliamentarians were delegations from the elected members of the member-state parliaments. Direct elections after 1979 obviously changed the Parliament's standing, and has encouraged it, successfully, to enhance its powers – nominally it now has equal status with the Council of Ministers in the making of laws. However, after 40 years, though there has been convergence, there is still no uniform electoral administration or electoral law at Union level; Members of the European Parliament (MEPs) consistently break from their European party families if the relevant questions affect the vital interests of their member-states; and some MEPs may be strongly guided by the Ministers from their member-states especially when they share the same party affiliation. Union-wide election campaigns are minimal; in effect, twenty-eight second-order elections have been taking place at member-state level. There are no true “federation-wide” parties.

What of the judiciary? Strong claims have been made for the “federal” power and conduct of the Court of Justice of the European Union, and its precursor. Famous cases confirming direct effect, supremacy, state liability, and indirect effect have been taught to cohorts of students to illustrate how the Court created a system of law, “similar to that of constitutional federal states” (Bartolini, 2005, p. 141).¹⁷ Related cases and arguments have been shown to include the development of the doctrine of implied powers, and those of exclusivity and pre-emption. Legal scholars have composed accounts of the erosion of member-state powers, and of piecemeal “juridification,” including the incremental softening of the original three-pillar distinction of the Maastricht Treaty, which appeared to create, in Pillars 2 and 3, zones of intergovernmental policymaking over which the Court had no jurisdiction. Just before Maastricht, the current President of the

Court of Justice, author of the best known text on EU law in English, then a professor, had claimed that, “[t]here is simply no nucleus of sovereignty that the Member States can invoke, as such, against the Community” (Lenaerts, 1990, p. 220; Lenaerts & Van Nuffel, 2011).

Yet most of the very same data can be invoked to argue that the Court, despite its expansive interpretation of the Community/Union’s powers, and the influence of its judgments, remains fundamentally confederal.¹⁸ The principal Court contains one judge from each territorial member-state, a feature found in *no* current federation aside from Belgium (which has but three territories). No equivalent to a senatorial or second-chamber confirmation process applies. Dismissal or impeachment relies on the judges themselves, as does the election of the President of the Court, and judicial independence is further underpinned by the announcement of decisions without the publication of dissenting opinions. Many other procedures prevent member-state governments or MEPs from influencing judicial decision-making. There is therefore no doubting the Court’s independence, but that does not mean that it is a federal court. Through the treaties, if necessary, the states can combine to restructure the Court, and to overturn Court judgments, though that is not an easy process if one member-states agrees with the Court. Arguably, however, the Court has to conduct itself under the shadow of a potential treaty over-ride. In Protocol (25) of the Lisbon Treaty, the states qualified Article 2A on the Functioning of the European Union. Where shared competences apply, the Protocol decrees that the scope of the Union’s competence “only covers those elements governed by the Union act in question and therefore does not cover the whole area,” (Foster, 2018, pp. 147–148). This protocol sought to bind the court, and the rest of the pentangle, to prevent jurisdictional drift away from the member-states. The Court adjudicates according to the treaties, and in enforcing Union law, it claims, almost invariably correctly, that it is holding the states to the pledges they have already or impliedly made. Even the development of the idea of requests for “a preliminary ruling” – when member-state courts ask the CJEU to interpret EU law – can be understood as a superbly nonconfrontational confederal device. It enables the Court of Justice, which contains judges from all the member-states, to receive a request from the relevant member-state court, and to provide a “preliminary” rule on the point at issue. The member-states then apply this interpretation consistent with their own jurisprudence. This procedure facilitates coordination and coherence across the Union and allows the development of a nonhierarchical relationship between member-state courts and the Union court, as befits a confederal order. The Court, like its cousin the European Court of Human Rights and Fundamental Freedoms (ECtHR), is also careful to allow states “margins of appreciation.”

So far, the case has been advanced that the EU is a recognizable confederation.¹⁹ Its historical distinctiveness lies in the economic and commercial focus of its policymaking, by comparison with the security-focused confederations of history, its legal intensiveness (obligated by the regulation of the single market), in its exclusively democratic membership, and in its recognition of a common citizenship with full mobility rights. Its common citizenship is not,

however, federal. It might be described as granting equal metric status to all citizens of member-states in other member-states. They have a right to move, reside, and work in other member-states without discrimination. But if outside their member-state of origin, unless they naturalize in the host state, they cannot vote in the sovereign parliamentary or presidential elections of that host state. What is unique is their right to vote in local government elections and in EU elections when resident outside their member state of origin.

The EU also displays many of the turbulent attributes of confederations. Members may come and go, opt-in and opt-out, and vary in their lawful compliance with their pledges. Free-riding is possible because of the weak enforcement capacities of the pentangle. Thus far, it is easier to become a member-state than to be subsequently gravely sanctioned for noncompliance with the values and laws of the Union. There is frequent if not constant incoherence in common security and foreign policy because of the clashing interests and historic identifications of the member-states, and their respective geographical locations.

The Union has no formal hegemon, however. There is no consistent consensus on whether there is an informal hegemon. Certainly, there has not been a constant one. France once played a driving role in European integration, then a limit-setting role under de Gaulle, though it has since returned to the fray to exercise leadership (Parsons, 2003). Today, revealingly, Germany is often called, and with good reasons, a reluctant hegemon (Bulmer & Paterson, 2013). Are there (nonidentical) twin hegemons? French *and* German leadership was unquestionably salient from the late 1960s, beginning with Giscard d'Estaing and Schmidt through until the late 1980s under Mitterrand and Kohl, with the British and Italians widely judged to be less influential – though the British were in the vanguard both of the completion of the single market, and of expansion to the east. No one today, however, thinks that Berlin and Paris can dictate whatever they propose, because there are, contra-hegemonic features to the EU. The Union's expanded size, and voting rules and representation, in the Council of Ministers, and the Parliament, have reallocated decision-making power toward the small- and medium-sized states. One might make the same claim about the formal government of the ECB. And the small- and medium-sized states regard the Court and the Commission as trustees of the treaties, and as their guardians.

Confederations survive because no dynamics provoke wholesale secession by the member-states, and, conversely, none oblige a federation (or a unitary state) – that might materialize through security fears, or through a powerful hegemon.²⁰ Arguably too, the greater the cultural diversity within a union, the lower the impetus to shift toward federal or unitarist political forms. So far, the United States, NATO's hegemon, has borne the costs of military leadership while protesting about European free-riding – though the sincerity of these protests may be disputed. The economic benefits and cooperation that can be achieved within a confederation with a credible court – a customs union, single market, and common currency – may not require a shift toward federation, provided no major redistributive goals are sought widely throughout the Union.

The adjectival descriptor that may usefully be attached to the EU confederation is “consociational” (Lijphart, 1969, 1975, 1977; O'Leary, 2005a). It

provides a suitable supplementary characterization of the Union's decision-making, quicker and easier to understand than thick descriptions of how the five institutions of the pentangle interact.²¹ In a consociation there is

- *parity*, inclusiveness, and joint decision-making in the executive and the legislature that deliberately have a strongly cross-community character;
- *proportionality* by number in representation and in the distribution of benefits and burdens;
- *autonomy* especially in cultural, religious, and linguistic domains, and in the recognition of territorial self-government; and, in a strong consociation;
- conjoint partners enjoy *veto-rights* over constitutional legislation and sometimes over ordinary legislation.

Decision-making within the EU pentangle fits these traits (O'Leary, 2013a, 2013b). The European Council is a grand coalition of all the member-states' incumbent chief executives. The Council of Ministers is another grand coalition, structured functionally. The rotating collective presidency is distinctly consociational. The Parliament, elected by PR, has multiple party families, and usually functions without a minimum winning coalition. Tacit pacts between the center-left, the center, and the center-right, operate, with a mild pattern of alternation in the comparative dominance of the center-right and the center-left. Principles of proportionality apply in EU voting rules, generally weighted in favor of the small or medium states, and tacitly in the allocation of distributive programs across member-states – though the older insiders have sometimes benefitted more than the newcomers—and in the allocation of the headquarters of EU public agencies (sited across the Union rather than concentrated in one capital). Respect for autonomy is evident in the treaties' recognition of member-state sovereignty, and for all the official languages of the member-states. The EU's language practices conform to “the 3 +/- 1 language game” in which the coexistence of languages may function peacefully (Laitin, 1992). English is increasingly the EU's *lingua franca* and will remain so even if its originators go into self-imposed exile. French retains its vitality in the courts, though the Court is required to observe multilingualism in full, because of the need to communicate with the parties in the language of the proceedings, and to ensure that its case-law is disseminated accurately. The avoidance of cultural majoritarianism is evident in the courts and other EU bodies which provide some margin of appreciation to member-states in how they apply EU law, and in the formal granting of opt-outs. Veto-rights are embedded in the unanimity requirements for changing the treaties, the custom of unanimity in the European Council, and in the qualified majority voting rules in the Council of Ministers and the Parliament. Consociation, however, has usually described political arrangements within sovereign states, or regions of those states; its partners have been communities or political parties. In the confederation of the EU, however, the member-states abide by recognizably consociational practices for their joint decision-making; that underpins the Union's power-sharing character, and helps sustain its multinational, multiethnic, multilingual, and multireligious peoples in peaceful coexistence.

IMPLICATIONS²²

Classifying the EU as consociational confederation has clear implications. Territorially, the EU may be expected to fluctuate in its jurisdiction. There remain European states intent on accession or which periodically reconsider it (from Iceland through the Balkans to Ukraine and Turkey). Conversely, existing member-states have the right to secede, one has done so. At least at accession, states remarkably have the right to determine that parts of their territory may function partly or wholly outside the *acquis*, or be brought in later. Lastly, member-states may unify with other territories and subsequently become fully part of the EU (as happened with East Germany, and as may happen with Northern Ireland, and in the unresolved imbroglio of Northern Cyprus). The part, not the whole, of a sovereign state sometimes determines the scale of the EU's territory.

Functionally, as long as the EU remains confederal, we should expect some pressure to allow opt-outs in the course of fresh policy development, especially where functional responsibilities are shared (Adler-Nissen, 2014). We should not expect a unidirectional flow of functional responsibilities, i.e., from the member-states to the Union. The neo-functional tale of spillovers promoting deeper integration may have its counterpart in tales of spillbacks, in which member-states reverse experiments they judge to have gone wrong. The most consequential domestic sectoral question ahead will be whether the Eurozone goes beyond unified monetary policy to develop a full banking union, at least in the regulation of systemic banks, and whether it deepens its counter-cyclical macroeconomic coordination capacity through the development of Union-wide fiscal powers to match those of the ECB. In the alternative, the question may become whether one or more states are permitted to leave the Eurozone but without having to leave the Union. Externally, the major sectoral question will be whether the combination of a US retreat from Europe, a reassertive Russia, the rise of China, and the completion of the UK's exit, will jointly push this commercial confederation to reconsider its security policy. That is, to develop a properly confederal military capacity, with a Union army, navy, and air force, either inside or outside NATO (Simms, 2013).

Institutionally, two patterns of crisis may be expected to flow from the diagnosis of the Union as a consociational confederation. Consociational crises may flow from judgments of loss of parity among partners (e.g., Italian populists may resist what they may deem a Berlin–Paris axis; or medium-sized member-states may resist qualified majority voting). They may also follow from disproportional outcomes (e.g., in the management of asylum seekers and economic migrants, or in the impact from the costs of membership of the Eurozone). They may occur after losses of autonomy (e.g., if member-states start to lose significant fiscal freedom). Lastly, they may occur from the over-use of member-state veto powers.

The other pattern of potential institutional crisis may emanate from the European Parliament, especially if it uses its powers without enhancing its legitimacy. In the confederal vision each member-state should regulate the conduct of its representatives in European institutions, who should be accountable to member-state parties and citizens, and function as their “mandatable” delegates. In

the strongest version, in the conduct of EU law-making and policy, MEPs should have less powers and status than the ministers of member-states, and their delegated authorities (e.g., the ambassadors in COREPER, or functionally specialized civil servants), and should be indirectly elected from and accountable to their home parliaments, as in the world before 1979.

In the confederal understanding, the “democratic deficits,” *pace* David Marquand and Jürgen Habermas, are only EU-level problems if one is a federalist (Habermas, 2012). The deficits in the confederal view are caused not by the weakness of the European Parliament but by the member-state governments’ evisceration of their own parliaments, or their delegation of economic policy-making to independent bodies, or by their abandonment of some redistributive welfare or tax ambitions. The European Parliament, in the confederal perspective, is too federalist, and has had no constitutional baptism in a systematic, directly elected, and reflective pan-European constitutional convention, or conventions in member-states, or from ratification referendums. Treaties have ratified powers that the Parliament has acquired, or obtained through Court rulings, without having had previous pan-European constitutional mandates. These treaties have complex consequences to which member-state publics are not always alert or alerted, and on which they vote – *if* they vote – as a package deal; and most member-states do not ratify Union treaties through referendums, even when they affect the sovereign authority of their own parliaments.

In the confederal understanding, the low turnout for elections to the European Parliament is proof of its low legitimacy. Even when supermajorities of MEPs pass legislation or resolutions they usually jointly “represent” less than 40% of European citizens. In sum, the Parliament lacks either democratic or federal standing, because there is no genuine European demos. It is true that the 2019 elections, with their higher turnouts, reflect deeper politicization, but do they display a strong federalist impulse?

If the Parliament and its Constitutional Affairs Committee took the confederal understanding and criticism seriously it could consider some amendments. It could have a proportional quota of MEPs from each member-state parliament to serve as dual members alongside the directly elected MEPs; on average, MEPs would then have a higher level of electoral endorsement. The partial return to indirect elections might further encourage domestic parliaments to reorganize themselves so that Union matters are appropriately processed by committees composed of sitting MEPs, and some of these MEPs’ tasks could be performed in Brussels extramurally and reported back to their member-state parliaments. The Union’s acknowledged “democratic deficit” may, in the confederal vision, be better repaired by holding member-state executives more accountable to their local parliaments on Union matters.

CONCLUSION

The EU is history’s largest power-sharing peace project, but it has not resolved the internal or neighboring national questions of its member-states (Mabry,

McGarry, Moore, & O'Leary, 2013), though it has definitely not aggravated any of them. The crises triggered by the failure of the constitutional treaty; by the financial and banking crises; by the constitutionalizing of austerity and debt-reduction programs within the Eurozone; by the failure manifestly to coordinate foreign policy; and by the significant withdrawal of public support for traditional parties of government in many countries, are by no means over, and they may yet worsen. Complacency is a major danger across all the Union's institutions. The unfolding absurdities of UKEXIT, and its potential collateral damage, are addressed elsewhere (O'Leary, 2018a, 2018b, 2019). UKEXIT, however, may eventually perform aversion therapy among English enthusiasts for breaking up the European confederation. The EU-27 have displayed remarkable solidarity with Ireland, in preserving the Union, and in avoiding British efforts to divide and distract them. But that does not mean the EU is in fine shape. There is no strong call for "more Europe" across the zones of Europe the author knows well. There is a call for a "better Europe," the majority view, or "no Europe." Fortunately, the latter is still mostly a minority taste. The vice of full-blown Euroscepticism remains concentrated in provincial England. In thinking about making a better EU it may be wise to think prudently within confederal and consociational understandings rather than to strike out assertively in majority federalist or utopian democratic directions. This does not mean that Europeans have to think unimaginatively.

NOTES

1. My thanks to all the participants for vibrant comments in the conference at Montreal in March 2019 that preceded this special issue, especially to Francesco Duina, John A. Hall, and to Frédéric Mérand. I also benefitted from critical comments by Mark A Pollack, R. Daniel Keleman, Julie Lynch, and Mitchell Orenstein at the Penn-Temple Colloquium.

2. The adjective "supra-national" is widespread in international law where it seems to refer to organizations, authority, or dispute resolution systems that emanate from outside the relevant states but are not part of international law per se. Usage, however, does not seem to be stable. A German jurist writes for many in saying that states "are the source of supranational power and hold the majority of sovereign rights," and holding that to be so of the members of the EU (Grimm, 2015, p. 108). So, for him, the EU legal order is "supra-national" yet its source comes from the member-states.

3. Circa mid-2019 several member-states have portions of their territories outside of the EU, e.g., Greenland, the Isle of Man, Jersey, and Guernsey; for their potential significance see O'Leary (2016). "The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union" (*Consolidated version of the Treaty on the functioning of the European Union*, 2012, Article 52. 2), see Foster (2018, p. 20).

4. In 1811, the Grand Empire, saddled with Bonaparte's relatives as fake national monarchs, excluded much of the Balkans; Austria's reduced domains were technically a married-in alliance; while Sweden and Portugal were at war with the empire that was attempting to hold down Spain (Geyl, 1949/1976).

5. Euractiv (2007). His colleague, Commissioner Margot Wallstrom, sought to shift the subject, proposing as a "more useful" characterization the anodyne "Solutions United... like a football club." For Barroso's Maoist past see "Conservative lawyer an ex-Maoist Communist," Irish Times, June 30, 2004, and for an interview from 1976 see retrieved from <https://www.youtube.com/watch?v=wAHv3UnXvmM>.

6. Rivalrous accounts exist of the trade-off and its sequencing (McKay, 1996; Moravcsik, 1998; Parsons, 2003; Zelikow & Rice, 1995).

7. For a clear economic account of European monetary union and attendant controversies see de Grauwe (2016).

8. Charlemagne, “The Trichet Letter: Poison Pen,” *The Economist*, November 7, 2014; the full text of the November 2010 Jean-Claude Trichet letter to Brian Lenihan (Ireland’s Finance Minister) was published in the *Irish Times*, November 6, 2014.

9. The *Twa* is the correct name for the people of short stature in central Africa.

10. As of mid-2019 the EU had three obvious multinational polities. One is a federation, the Kingdom of Belgium; the other two, the Kingdom of the Spains, and the United Kingdom, are “union-states,” not federations. The Kingdom of Denmark is the rump of a multinational empire, and still sovereign over Greenland and the Faroe Islands.

11. The provisions on common security and defense are set out in Articles 42–46 of the Consolidated Version of the Treaty on European Union (Foster, 2018, pp. 16–18). The member-states are committed to aid and assist by all means in their power any of their number that are victims of armed aggression on their territory: Article 42 (7).

12. Article 4 of the Consolidated Version of the Treaty on European Union specifies that “competences not conferred upon the Union in the Treaties remain with the Member-States” (Foster, 2018, p. 3).

13. Domestic policymaking in a democratic federation may be typologized, following James Q. Wilson’s adaptation of Theodore Lowi, as threefold in character (Lowi, 1964; critically appraised in; Moran, 2015; Wilson, 1973). Distributive policies concentrate benefits and diffuse costs; redistributive policies take from one group or region and transfer resources to another; and regulatory policies, developed in the collective interests of all, typically have diffused benefits and concentrated costs. The EU’s distributive policies are found in agriculture and regional developmental funding. The Union’s role in redistribution is minimal aside perhaps from fishing, where all redistribute to the Spanish fleet. The incumbent member-states have sought to minimize the Union’s role in redistribution. The EU’s revenues, a tiny fraction of the revenues of EU member-states, severely limit its ability to redistribute; accordingly, the EU mostly performs regulatory and coordinating functions, embedded in the *acquis*, making it quite distinct from the world’s large federations. One distinguished Italian analyst argues that the Union should retrench and confine itself to the roles appropriate to a super-regulator (Majone, 1996, 2005, 2009, 2014). That perspective will do combat with the more widespread view that the EU must grow in fiscal capacity to match the ECB’s monetary duties.

14. Previous cohorts of “inter-governmentalists,” e.g., Stanley Hoffmann, Alan Milward, and Paul Taylor, plausibly explained European institutional developments as the outcomes of member-states’ interests and bargaining (Hoffmann, 1966; Milward, 1984, 1992, 2005; Taylor, 1991, 1993, 1995, 1996), but they did not display Moravcsik’s zeal to exterminate any explanatory importance for such matters as geopolitics, party ideologies, policy entrepreneurs – or for the potential initiating and coalition-building roles of medium and small-sized states.

15. A very good guide may be found in Forsyth (1981). Article II of the Articles of Confederation of the United States (1783) specified that, “Each state retains its sovereignty, freedom and independence.”

16. This summation is justified by the history of confederations, from ancient Greek leagues of city-states through to early post-independence America, the slaveholding secessionist Confederacy, and beyond (Elazar, 1994; Forsyth, 1981; Freeman, 1863, 1893; Hughes, 1993; Israel, 1995; Riker, 1957; Stein, 2000). This construction of confederation excludes entities that employed the confederate title but were not what they proclaimed. The Confederation of the Rhine, for example, was a dependency created by Napoleon. The *Confoederatio Helvetica* reflects a confederal heritage, but the Swiss constitution of 1848 is federal, albeit highly decentralized, unlike its immediate predecessor (Steinberg, 2015, p. 45). Canadian confederation, whenever judged to have begun, resulted in a federation, partly put together under British auspices, though its court rendered it progressively more

decentralized (Stanley, 1974; Zines, 1991). Confederations are formalized alliances of states, and therefore exclude tribal confederacies. The EEC was lucidly diagnosed as confederal (Taylor, 1975). The argument here is influenced by Majone (2005) but not identical. *Contra* Majone, a confederation meets the Montevideo criteria for statehood; Majone's claim that confederation extends Montesquieu's idea of mixed government to the international level is not easy to credit; and objectivity requires accepting that the development of the European Parliament, since 1979, is evidence of the partial success of Euro-federalists (Hix & Høyland, 2013). Majone was also too sanguine about the low likelihood of secession: he predicted it would occur "only if" the EU pursued policies that seriously violated the sovereign rights of a member or discriminated against its citizens and regions. No matter how UKEXIT ends, the EU has not violated the UK's sovereign rights or negatively discriminated against its citizens or regions.

17. *Van Gend en Loos* (1963), *Costa v ENEL* (1964), *Francovich* (1991), *Von Colson* (1984), and *Marleasing* (1990).

18. One of the Court's most distinguished scholars, Joseph Weiler, has maintained that from "the political, but not legal, point of view the Community is in fact a confederation" (1999, p. 83). The suggestion here, by contrast, is that it is both politically and legally a confederation. Weiler's brilliant account of how the Court's decisions pushed the member-states into taking full control of the Commission, creating the Council, and emphasizing their treaty powers, can also be read as confederal reaction to fears of run-away federalist dispositions in other institutions.

19. The suggestion that the EU is both confederal (intergovernmental) and federal (supranational) seems an easy compromise (Fabbrini, 2007; Hix & Høyland, 2011) but falls apart on inspection. The argument in the main text is that the sole unambiguously component of federation present in the EU is its Parliament, but so far it is run by confederal coalitions of parties, rooted in the respective states. The admirably fluent and instructive work of Luuk van Middelaar which distinguishes among confederation-states, federation-citizens, and functionalism-offices, effectively concedes the primacy of confederation in explaining the union (van Middelaar, 2013).

20. As William Riker famously argued in his influential, albeit oft-criticized military theory of the origins of federations (Dikshit, 1971; Riker, 1964, 1996).

21. Useful discussion of the EU and consociation began in the 1990s (Chrysochoou, 1994a, 1994b, 1997, 1998; Gabel, 1998; Hooghe, 1999; Taylor, 1991, 1995): I was a colleague and correspondent with Taylor.

22. This section draws on a Memorandum presented at a Hearing on Electoral Reform, before the Committee on Constitutional Affairs of the European Parliament (O'Leary, 2014).

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