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Paul Craig

Indiana University Maurer School of Law, pcraig@indiana.edu

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The EU, Democracy and Institutional Structure: Past, Present and Future*

Paul CRAIG**

1. Introduction

It is commonplace to bemoan the EU's democratic deficiencies, as attested to by the wealth of literature discussing the issue from a variety of perspectives. This chapter is not a literature review. To the contrary, it advances my own view on the issue, albeit one that is informed by existing scholarship. The ensuing analysis is predicated on the assumption that a principal, albeit not exclusive, cause for concern about EU democracy is the mismatch, or absence of fit, between voter power and political responsibility.

EU decision-making is structured such that voters cannot determine the shape or direction of EU policy in the manner that occurs to a greater extent within Member States. It is not, therefore, possible in the EU for the electorate to remove the incumbents from office, and replace them with a different political party that has a different set of policies. It is this malaise that underlies Weiler's critique of EU decision-making, captured in aphorismic terms by his affirmation of the centrality to democracy of the voters' ability to 'throw the scoundrels out'^[1]. It is the same malaise that informs Maduro's critique, to the effect that the 'real EU democratic deficit is the absence of European politics'^[2], manifest in the lack of democratic political contestation about the content and direction of EU policy. Properly understood these are but two sides of the same coin.

The ensuing discussion takes the same starting point as Weiler and Maduro. The direction of travel thereafter is, however, rather different, insofar as we are concerned with explanation and understanding of the status quo. The assumption, explicit or implicit, in much of the literature is that the fault for this malaise resides with the EU. The pattern of thought seems strikingly simple, shaped by the very cadence of language. This is most marked in the duality of meaning accorded to the phrase the 'EU's democratic deficit', which is used descriptively to capture the malaise adumbrated above, and deployed normatively to connote the fact that the fault resides with the EU, which is regarded as architect and author of present reality.

* Paul Craig, *The EU, Democracy and Institutional Structure: Past, Present and Future* (May 13, 2018). A Bakardijieva Engelbrekt and X Groussot (eds) *The Future of Europe*, 2018; Oxford Legal Studies Research Paper No. 3/2019. Available at SSRN: <https://ssrn.com/abstract=3177736> and republished with the author's agreement.

** Professor of English Law, St John's College, Oxford.

^[1] JHH Weiler, U Haltem and F Mayer, 'European Democracy and its Critique', in J Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass, 1995); JHH Weiler, 'Europe in Crisis – on "Political Messianism", "Legitimacy" and the "Rule of Law"' [2012] *Singapore Jnl of Legal Studies* 248.

^[2] M Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice', RSCAS Policy Paper 2012/11, 1.

The academic line of argument pursued thereafter flows naturally from the preceding duality of meaning. Given that the democratic shortcoming resides descriptively and normatively with the EU, democracy must therefore remain in the Member States, which are said to be the principal sites for democratic legitimation. Some of the literature on 'demoicracy' is grounded, in part at least, on such assumptions. The discussion that follows takes issue with this descriptive and normative linkage, and hence with the conclusions drawn therefrom.

It will be argued that the preceding linkage does not withstand examination. Insofar as there is a democratic deficit of the kind identified above, it flows from choices made expressly and repeatedly by the Member States over time as to the institutional structure for decision-making which they are willing to accept. These choices could have been different. There is no *a priori* block in this respect. There is, to the contrary, no especial difficulty in devising an EU decision-making regime that would meet the democratic shortcomings outlined above. The EU itself is not blameless with respect to the mode of decision-making, and nothing in the present chapter is predicated on that assumption. Improvements could doubtless be made in the manner in which the principal EU institutions operate. This does not alter the fact that that the Treaty architecture that frames their respective powers, and the way in which they inter-relate, is the result of Member State choice, made and re-made since the inception of the Community.

It will also be argued that there are, however, four constraints to a fit between the EU's institutional decision-making structure, and the precepts of democracy. The constraints are political, democratic, constitutional and substantive. The *political* constraint is predicated on the assumption that some form of parliamentary majoritarian regime would meet the democratic deficit articulated above, thereby ensuring a closer nexus between voter preferences and political responsibility. Change of the kind that would meet the democratic infirmity thus conceived is, however, very unlikely to occur, because the Member States will not accept it for the reasons explicated below. The *democratic* constraint is expressive of the fact that there is contestation as to whether such a parliamentary-type regime really is the most appropriate model for a polity such as the EU, or whether a different form of democratic ordering would be better suited. The *constitutional* constraint denotes the fact that EU decision-making is limited by the very nature of the constituent Treaties. National constitutions constrain political choice. It is inherent in their very nature. The EU is no different in this respect in principle, in the sense that the founding Treaties form the architecture to which legislation made thereunder must conform. The difference is one of degree, but it is significant nonetheless, since the EU Treaties are far more detailed than any national constitution, and hence the room for democratic policy choice is more circumscribed. The *substantive* constraint speaks to the democratic consequences of the imbalance between the economic and the social within the EU, as manifest in the original Treaties, and as a consequence of the EU's financial crisis.

2. Institutional Structure and Democracy: The Past

The Community may only be 60 years old, but it is nonetheless easy to forget its institutional origins, and the conception of democracy that existed, or not as the case maybe, at the outset. The reality was that the original disposition of power in the Rome Treaty saw little role for direct democratic input. The Assembly was accorded limited power, and its only role in the legislative process was a right to be consulted where a particular Treaty article so specified.

The principal institutional players were the Council and Commission, but in many respects the Rome Treaty placed the Commission in the driving seat in the development of Community policy. The Commission had the right of legislative initiative; it could alter a measure before the Council acted; its measures could only be amended by unanimity in the Council^[3]; it devised the overall legislative agenda; and it had a plethora of other executive, administrative and judicial functions. The message was that, while the Council had to consent to proposed legislation, it was not easy for it to alter the Commission's proposal. The Commission might therefore have become something akin to a 'government' for the emerging Community^[4].

This vision accorded with, and was influenced by, Monnet's vision of Europe and by neofunctionalism. Monnet's conception of Europe was strongly influenced by the role of technocrats trained in the French *Grands Ecoles*. It served to explain the structure of the ECSC, and the centrality of the High Authority therein, which embodied Monnet's technocratic approach. A corporatist style involving networks of interest groups was the other legacy of Monnet's experience with planning authority's in France^[5]. It was institutionalised in the ECSC in the form of the Consultative Committee. Integration was based on the combination of benevolent technocrats and economic interest groups, which would build transnational coalitions for European policy.^[6] Monnet's strategy was thus for what has been termed elite-led gradualism^[7]. The Assembly's powers within the ECSC were very limited.

The same general institutional structure was to be carried over to the EEC: 'enlightened administration on behalf of uninformed publics, in cooperation with affected interests and subject to the approval of national governments, was therefore the compromise again struck in the Treaties of Rome'^[8]. While Monnet favoured a democratic Community 'he saw the emergence of loyalties to the Community institutions developing as a *consequence* of elite agreements for the functional organization of Europe, not as an essential *prerequisite* to that organization.'^[9]

Neofunctionalism was to be the vehicle through which Community integration, conceived of as technocratic, elite-led gradualism, combined with corporatist style engagement of affected interests, was to be realised. Neofunctionalism fitted neatly with Monnet's perception of the Community. Monnet and neofunctionalists also shared the same sense of legitimacy and democracy. For Monnet, and like-minded followers, the legitimacy of the Community was to be secured through outcomes, peace and prosperity. The ECSC was established in part to prevent a third European war. The EEC was created in large part for the direct economic benefits of a common market. Peace and prosperity were potent benefits for the people in the 1950s. Democracy was, by way of contrast, a secondary consideration, since it was felt that the best way to secure peace and prosperity was by technocratic elite-led guidance.

^[3] Art 250(1) EC.

^[4] K Neunreither, 'Transformation of a Political Role: Reconsidering the Case of the Commission of the European Communities' (1971–2) 10 JCMS 233.

^[5] K Featherstone, 'Jean Monnet and the 'Democratic Deficit' in the European Union' (1994) 32 JCMS 149, 154–155.

^[6] H Wallace, 'European Governance in Turbulent Times' (1993) 31 JCMS 293, 300.

^[7] W Wallace and J Smith, 'Democracy or Technocracy? European Integration and the Problem of Popular Consent' in J Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass, 1995) 140.

^[8] *Ibid* 143.

^[9] M Holland, *European Community Integration* (St. Martin's Press, 1993) 16. Italics in the original.

3. Institutional Structure and Democracy: The Present

Prognostication as to the future is perilous at the best of times, more especially so in relation to an institution such as the EU. Exogenous shocks external to the EU, which are unforeseen and unforeseeable, can shatter the very best reasoned predictions. Endogenous change from within the EU can, in similar vein, disrupt future visions that would otherwise be plausibly grounded, as attested to by the Catalonia problem in Spain, and electoral change in the Czech Republic, Austria and Italy. While prediction is, therefore, fraught with difficulty, a necessary condition for any such exercise is to be cognizant of the rationale for the status quo. To forget the lessons of history is to invite repetition of past mistakes, or it is to predicate views as to future institutional change on assumptions that are unsustainable when viewed in historical perspective. The significance of this will be apparent in the ensuing discussion, which is premised on the institutional disposition of power that currently prevails.

Space precludes detailed analysis of the passage from the initial institutional division of power in the Rome Treaty, to the schema embodied in the Lisbon Treaty^[10]. Readers will be familiar with this, and reference will be made to it in the subsequent analysis. Suffice it to say for the present that the EP increased its power within the decision-making process. This occurred initially through the co-operation procedure, introduced by the Single European Act 1986, and then through the co-decision procedure in the Maastricht Treaty, as further strengthened by the Amsterdam Treaty. The EP attained something approximating to co-equal status in the legislative process with the Council, as later recognized by the Lisbon Treaty.^[11] The European Council, as the ultimate repository of Member State power, also came to exercise an ever-increasing role in the decision-making process, *de facto* and *de jure*, which was affirmed and strengthened in the Lisbon Treaty.^[12] The legal and political reality, as reflected in the Lisbon Treaty, was an institutional decision-making process in which state interests still predominated, and in which, notwithstanding the increase in the EP's power, the voters could not directly affect a change of policy direction in the EU by removing the incumbents and replacing them with those espousing different policies.

The Brexit discourse was conducted explicitly against the status quo, and implicitly against assumptions concerning ascription of responsibility for the existing schema. Thus the ills of the EU, whatsoever they might currently be, were conceived to be the responsibility of the EU, viewed in this respect primarily, but not solely, as the Commission, together with other 'powers' in Brussels. This is a great story, save for the fact that it bears little relation to reality. What is missing is considered discourse concerning the constitutional responsibility of the Member States for the status quo.

This is readily apparent in relation to the inter-institutional division of power within the EU. It is commonly acknowledged that the democratic deficit is a prominent feature of the EU's legitimacy problem, with the attendant implication, as noted in the introduction, that it is not just a problem that besets the EU, but is the EU's fault. It is the EU *qua* real and reified entity that suffers from this infirmity, the corollary being that blame is cast on it. The EU is not blameless

^[10] P Craig, 'Institutions, Power and Institutional Balance', in P Craig and G de Burca (eds) *The Evolution of EU Law* (Oxford University Press, 2nd edn, 2011) Ch 3. 7

^[11] Arts 14(1), 16(1) TEU.

^[12] Art 15 TEU.

in this respect, but nor are the Member States, viewed collectively and individually. This is not to deny the existence of problems in this regard, the disjunction between political power and electoral accountability being an important facet of the democracy deficit argument^[13].

It is to ask who bears responsibility for the status quo. This is all the more surprising given the sophisticated literature from international relations and political science concerning the relative influences of different players during periods of Treaty change, as well as in relation to the passage of EU legislation. The facts are not readily contestable, at least in relation to Treaty amendment. The stark reality is that the present disposition of EU institutional power is the result of successive Treaties in which the principal players have been the Member States. There may well be debate as to the relative degree of power wielded by Member States and the EU institutions in the shaping of EU legislation, but there is greater consensus on the fact that Member States have dominated at times of Treaty reform^[14].

Thus, insofar as the present arrangements divide EU policymaking de facto and de jure between the Commission, Council, European Parliament and European Council, this is reflective of power balances that the Member States were willing to accept. This is readily apparent when considering the initial Rome Treaty and any of the five major Treaty reforms since then. It is powerfully exemplified by the debates concerning institutional reforms in the Constitutional Treaty, which were taken over into the Lisbon Treaty^[15]. It was evident most notably in the battle as to whether the EU should have a single President who would be located in the Commission, or whether a reinforced European Council should also have a long-term President^[16]. It was apparent in the debates as to Council configurations, and who would chair them. It was the frame within which the discourse took place concerning the number of Commissioners and the method of choosing them.

If blame is to be cast for the institutional status quo, and for its democratic shortcomings, then it should principally be laid at the door of the creators of the scheme, the Member States, who must bear, individually and collectively, constitutional responsibility for the status quo. The EU institutional disposition of power was the Member States' choice, which was made and reaffirmed over half a century. It was not foisted on them, and it was not a *fait accompli* in relation to which they had no input. To the contrary, the Member States were, and remain, the institutional architects of the status quo.

[13] Weiler, Haltern and Mayer (n 1); A Follesdal and S Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS 533; K Nicolaidis, 'The Idea of European Democracy', in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press, 2012); K Nicolaidis, 'Our European Democracy: Is this Constitution a Third Way for Europe?', in K Nicolaidis and S Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (Oxford University Press, 2003).

[14] G Marks, L Hooghe and K Blank, 'European Integration from the 1980s: State-Centric v. Multiple-Level Governance' (1996) 34 JCMS 341, 342; T Risse-Kappen, 'Exploring the Nature of the Beast: International Relations Theory and Comparative policy Analysis Meet the European Union' (1996) 34 JCMS 53A Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 473; A Moravcsik, *National Preference Formation and Interstate Bargaining in the European Community, 1955-86* (Harvard University Press, 1992); A Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 International Organization 19; M Pollack, 'International Relations Theory and European Integration' EU Working Papers, RSC 2000/55.

[15] P Norman, *The Accidental Constitution, The Making of Europe's Constitutional Treaty* (EuroComment, 2nd ed, 2005).

[16] P Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010) Ch 3.

4. Institutional Structure and Democracy: The Future – Four Constraints

The preceding backdrop is a necessary condition for making plausible suggestions concerning the future disposition of inter-institutional power in the EU. It might be argued that reforms could alleviate the existing democratic disjunction between electoral power and political responsibility, and that the change whereby the Commission President was indirectly elected by reason of being the candidate of the party that secured most seats in the European Parliament is a natural pointer in this direction. This could provide the foundation for true democratic contestation, whereby voters would be offered alternative political agendas for the EU, and their votes would truly determine the policy path for the next five years.

This could in theory happen. There are a range of democratic solutions available. It does not require some new master-plan of arrangements hitherto unknown to the world of democratic political architecture. A pretty-detailed schema, premised on some form of parliamentary democratic regime, could be sketched out. Thus, to take one possible way forward, it would be possible to have a regime in which the people voted directly for two constituent parts of the legislature, the European Parliament and Council, and for the President of the Commission and the President of the European Council. It would be possible in theory to have the previous package, but only a single elected President for the EU as whole. It would be possible for the entire Commission to be reflective of the majority party in the EP, and not just the President of the Commission. It would be possible for the EP to have a right of legislative initiative in tandem with that of the Commission. It is possible to devise such a schema with conditions devised to protect against undesirable consequences of majoritarianism. The linkage between electoral power, substantive policy choice and accountability would be more visible and it would be strengthened. There are necessary qualifications to this type of model, which will be addressed in the section on democratic constraints below, but it provides a useful starting point for discussion.

(a) Political Constraints

(i) Member States

The principal reason why nothing akin to the preceding model is likely to occur is that Member States are the main architects of Treaty change and they have never been willing to accept such a disposition of power. We must, as noted above, remember the past when planning the future. It is true that the choice between two Presidents and a single President for the EU was debated during the negotiations leading to the Constitutional Treaty. It is equally true that discourse concerning the election of the Commission President began in the 1980s. The broader reforms adumbrated above were not, however, on the political agenda during the extensive negotiations concerning institutional power in 2003-4 that led to the Constitutional Treaty, nor in the subsequent discussions that culminated in the Lisbon Treaty.

The reason why nothing akin to the preceding model has ever appeared in formal discussion of Treaty reform is not hard to divine. The Member States would lose power in relative and absolute terms. They would no longer be masters of the treaty. The preceding model, or something akin thereto, would alleviate the democratic deficit as conceived in the preceding sense, but

in doing so it would endow the elected majority in the EP, and the duly elected Presidents of the Commission and European Council, with a mandate and an authority to discharge the promised electoral pledges. This would be a fortiori so if the members of the Council were also directly elected. Such a regime would inevitably significantly circumscribe Member State room for manoeuvre. It would create a substantive path dependency as to the direction of policy, and the priorities to be fulfilled.

It is, therefore, unsurprising that nothing akin to this has featured in serious political deliberations concerning the direction of institutional change within the EU. Viewed from this perspective, the democratic concession in the 2015 EP elections, known as the Spitzenkandidaten process, whereby the Commission President was imbued with greater legitimacy, because he was supported by the dominant political party, and canvassed as its candidate, could be accepted by the Member States because it did not fundamentally change the status quo ante. It did not create a path dependency towards a political agenda that committed the EU to a particular substantive set of reforms. It did not substantially undermine Member State power to set the pace and content of the EU agenda from within the European Council, and the Council. Moreover, the very fact that the other members of the Commission continued to be chosen by the Member States perforce limited the extent to which the Commission President, of whatever political persuasion, could shape the political agenda.

The preceding point is reinforced by the fact that the Member States have refused to confirm the continued application of the Spitzenkandidaten process in the 2019 elections^[17]. The formal legal reality is that the European Council is only obliged to take account of the result in the European elections, when it proposes its candidate for Commission President to the European Parliament^[18]. The European Parliament then votes on the candidate. The Commission and the EP, not surprisingly, pressed for the continuation of the Spitzenkandidaten process, arguing that it would increase public interest in EU affairs, and thereby augment the democratic legitimacy of the outcome. The Member States were, however, resistant to continuation of the schema, in part because the evidence indicated that only 5 per cent of voters went to the polls to influence the choice of Commission President, with little if anything to show in terms of increased voter turnout. They were also resistant to continuation of the 2015 regime on the ground that while it would strengthen the linkage between the Commission and the EP, this could damage the democratic legitimacy of the Commission President. The argument was that the Spitzenkandidaten system robbed the Commission president of the 'dual legitimacy' that would otherwise flow from approval by the democratically-elected national leaders in the European Council, followed by that of the EP. While the European Council cannot, in formal terms, prevent the EP from operating the Spitzenkandidaten process, they can refuse to accept the candidate of the winning party as automatic incumbent of the office of Commission President. This would, moreover, accord the Member States further leverage ex ante, in the sense that they could influence who is nominated as a candidate by the EP political parties.

The assertion of national control over the EU's inter-institutional architecture is further evident in Member State rejection of suggestions from Jean-Claude Juncker that the Commission President could be double-hatted, functioning also as Chair of European Council meetings. The Member

^[17] <http://cer.eu/publications/archive/bulletin-article/2018/member-states-and-eu-taking-back-control>

^[18] Article 17(7) TEU.

States showed no appetite for this suggestion in the deliberations leading to the Constitutional Treaty, and their position in this respect has not altered in the interim. Member State control is evident yet again in the reluctance to move towards a smaller Commission, which would mean that not every state would have a Commissioner all the time. While Commissioners do not formally represent their country, the Member States are, nonetheless, reluctant to give up their own national in the Commission decision-making process. It is paradoxical that these outcomes are occurring when the UK is set to leave the EU, since the UK would applaud the reaffirmation of Member State voice in EU decision-making.

Member State opposition to reforms of the kind being considered here would, moreover, not be confined to the executive branch of government. The same sentiment would be voiced by some national Parliaments, which would not view with equanimity such institutional architecture, since it would be regarded as increasing the EU's legitimacy at the expense, *inter alia*, of national parliaments. Thus, while it suits the agenda of some political groupings in national parliaments to critique the EU's democratic credentials, they would, nonetheless, be resistant to change that alleviated such concerns, if it thereby enhanced the EU's democratic legitimacy by providing the linkage between electoral power and political responsibility, with the consequence that the authority of national parliaments was thereby diminished.

The diminution of state power that would be entailed by change of the kind mooted above would, moreover, be constitutionally challenged in some countries, on the ground that the EU was truly becoming a super-state. Thus, while the German Federal Constitutional Court has repeatedly chided the EU in relation to its democratic credentials, it would likely be one of the national constitutional courts to decide that an institutional configuration of the kind set out above, which addressed the democratic deficit as presently understood, would not be compatible with German constitutional law. This was because such a change would mean that the EU was moving closer to a federal state, with the consequence that the Member States could no longer be regarded as the Masters of the Treaty in the manner hitherto.

The political constraints on alleviating the democratic deficit have been exacerbated by the rise in populism in some Member States. This is not the place to engage in discourse concerning the meaning, and causes of, populism^[19]. That would require a paper or book in itself, and it would not be possible to do justice to the complexities of the argument in the context of this chapter. Suffice it to say the following for the present. Whatsoever one's views concerning the meaning and causes of populism, the effect thereof has been to render states more suspicious of 'external' authority, and less inclined to accept choices that are not in accord with their own preferences. It is debatable whether this is an *a priori* consequence of populism, although it probably is. It is, however, certainly a contingent consequence, so far as concerns the effect of populism in EU Member States. Given that this is so, such Member States are less likely to accept changes to the institutional architecture of EU decision-making which would diminish their power over the direction of EU policy.

^[19] See, e.g., J Judis, *The Populist Explosion: How the Great Recession Transformed American and European Politics* (Columbia Global Reports, 2016); B Moffitt, *The Global Rise of Populism: Performance, Political Style, and Representation* (Stanford University Press, 2016); J-W Müller, *What Is Populism?* (University of Pennsylvania Press, 2016); G de Burca, 'Is EU Supranational Governance a Challenge to Liberal Constitutionalism?', SSRN 3105238.

(ii) The EU

The EP would naturally favour change that would alleviate the democratic deficit. The increased conjunction between electoral power and political responsibility would enhance its power, more especially so if it resulted in the entire Commission bearing the political stamp of the dominant party in the EP. The setting of a truly EU electoral agenda, translated into political action by a Commission charged with the task of fulfilling the electoral mandate, would transform the EP's role as compared to the status quo. This would be further enhanced if there were EU political parties, and if the EP were to gain a right of legislative initiative in addition to that of the Commission.

The Commission's perspective would likely be more equivocal, since such change would entail gains and losses when viewed from its institutional perspective. There would be gains, insofar as the EU would have greater legitimacy, which would reinforce its authority over existing categories of competence, and facilitate transfer of further power. The legitimacy of the Commission within such a schema would be augmented, by reason of its electoral credentials. There would, at the same time, be losses for the Commission, since change of the kind under consideration would reduce its room for setting the policy agenda, and would constrain, in relative terms, the technocratic autonomy that it presently enjoys.

The European Council would likely fall at the other end of the spectrum. Its President is currently ensured presumptive support from the heads of the Member State, by reason of the fact that they choose the incumbent after lengthy deliberation. There could be no such guarantee if the President of the European Council were to be directly elected. The relative importance of the President would, moreover, be likely to diminish if the current method of appointment were retained, but the Commission President were to be directly elected on a party political platform, more especially if other Commissioners were similarly elected. The President of the European Council would henceforth be on the back-foot, as compared to a Commission President invested with the authority to carry out the electoral programme. Furthermore, the heads of state within the European Council would be unlikely to view with equanimity an institutional regime in which the mode of inter-governmental adjustment were unduly constrained.

(b) Democratic Constraints

When articulating the preceding model for change that would alleviate the democratic deficit it was noted that the model would have to be qualified. It is now time to make good on that qualification.

The EU has always been grounded in two patterns of representation, the people being represented in the European Parliament, state interests in the Council and European Council. Reforms to alleviate the democratic deficit by increasing the connection between electoral power and political responsibility focus primarily on the first mode of representation, the connection between voter choice, the EP and the shaping of the EU policy agenda.

The reality is, however, that even if the broader package of reforms were adopted it could not ensure that the people would exercise electoral control over the direction of EU policy, since the European Council would still be populated by Heads of State, who would continue to have a

marked influence over the policy agenda. The second mode of representation, via state interests, would perforce constrain the first, and this would be so even if the President of the European Council were to be elected. This is especially so, given the centrality of the European Council to agenda setting and the choice of priorities, such that nothing significant happens in the EU without its imprimatur.

It might be argued that there is nothing unusual in this respect, since it is a standard feature of national federal systems that there is duality of representation, the normal pattern being that state interests and those of the people are dealt with in different parts of the legislature. The duality does not prevent the offering of a coherent package to the electors. The two modes of representation do not, therefore, hinder the foundational democratic precept, viz that the voters choose who should represent them and the direction of policy, with the consequence that if parties fail to satisfy voter choice they pay the price at the ballot box.

The national analogy is instructive, precisely because it does not replicate at EU level. There is similarity insofar as both the EU and the federal systems are premised on two modes of representation, the people, and the states. The similarity is, however, superficial, and conceals deeper differences. The reality is that there is a hierarchy between the two modes of representation, which do not naturally co-exist on an equal footing. In federal states, the paradigm is that representation of the people has primacy, or there is parity between such representation and that of the states. This does not hold true for the EU, where state representation through the Council and European Council is more powerful than that of the people in the EP.

Thus in federal parliamentary regimes there are two component parts of the legislature, with the political agenda commonly set by the house elected by the people, with state interests, as represented in the other house, able to exert influence on the legislation. In federal Presidential systems, such as the USA, the balance of power between the elected houses may be different. It does not, however, alter the point made here, because voters have voice in relation to both houses, given that the incumbents are directly elected on party political tickets, republican or democrat; and given also that substantive policy will be set to some degree by the President, who is directly elected. A connection between voter choice and policy direction is thereby preserved.

The converse pertains as to the hierarchy between the two modes of representation in the EU. It is representation of state interests that is accorded primacy, *de jure* and *de facto*, through the Council and the European Council, with representation of the people through the EP being secondary in this respect when viewed from an historical perspective. This is readily apparent in the Treaty provisions concerning the institutions^[20], which are reinforced by their practical *modus operandi*.

The reasons for the difference between the nation state and the EU in this respect are not hard to divine. Representation of state interests within a federal polity and within the EU are markedly different. Commonality of interest, shared identity and solidarity is considerably greater in the former, than in the latter, and that is so notwithstanding that there may be policy differences between regions within a federal state. Problems of domination of one state over another are, by way of contrast, considerably greater in the latter context than in the former, which serves

^[20] Arts 15-18 TEU.

to explain the attention given to voting rules and other mechanisms designed to alleviate this problem in the EU.

It is important, therefore, to view proposals to alleviate the EU's democratic deficit against the preceding backdrop. The reality is that such proposals entail a reordering of the hierarchy in the modes of representation as they pertain in the EU. Representation of the people is afforded elevated status, as manifest in the desire that voter choice be translated into political action, such that the gulf between electoral power and political responsibility is eradicated or significantly diminished. This necessarily involves reduction in the power wielded by the institutions that represent state interests.

It might be argued by way of response that this rebalancing is precisely what is intended, to which the counter is that the states are unlikely to accept the substantive path dependency and loss of power that would be attendant on this change. It might, alternatively, be argued that alleviation of the democratic deficit can be accomplished without the rebalancing adumbrated above, to which the answer is that such an argument must be fleshed out to test its institutional and substantive veracity.

Concerns of an analogous nature have been expressed by Scharpf^[21], who argues that an unqualified majoritarian system would be problematic in the EU. He points out that constitutional democracies, such as Switzerland, Belgium or Canada, in which there is societal division, combined with structural majorities and minorities, often resort to 'consociational' or 'consensus democracy' with bicameral legislatures, supermajoritarian decision rules and the like to protect the interests and of minority groups. While it is contestable whether the EU is characterized by the persistent, reinforcing cleavages that prevail in such countries, there is little doubt that some qualifications to majoritarianism would be required^[22].

Present decision rules could of course be modified in some ways, perhaps to relax the Commission's monopoly of legislative initiatives. But they could not be replaced by a regime of straightforward majority rule without provoking disruptive political conflicts and radical anti-European opposition in Member States whose national politico-economic and socioeconomic orders and values could be overridden by explicitly political decisions adopted by majorities of 'foreigners' in the European Parliament (EP) and in the Council. In other words, the explicit switch to majority rule would destroy the protection of persistent minorities that is presently ensured by the Community Method. And it could politicise European legislation in ways that might transform the largely dormant 'no-demos issue' of EU legitimacy into conflicts that could destroy the Union.

(c) Constitutional Constraints

(i) Constitutionalization: Vertical and Horizontal Dimensions

The discussion thus far has been concerned with political constraints to change that would alleviate the democratic deficit, these coming largely from Member State opposition for the reasons adumbrated above. There is, however, a further constraint as concerns reforms that

^[21] F Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 ELJ 384, 395.

^[22] Ibid 395.

would alleviate the democratic deficit, which would exist even if the Member States changed their view and were willing to embrace reform. The constraint flows from the constitutionalization that attaches to all Treaty provisions. There is a duality to this constraint, which operates both vertically and horizontally.

The vertical dimension captures the effect of such constitutionalization on relations between the Member States and the EU. It speaks to the limits placed on Member State action when subject matter falls within the sphere of EU law. Foundational EU constitutional doctrines such as supremacy, direct effect and pre-emption kick in to constrict Member State action. This is so in relation to the great majority of Treaty articles, and much of the legislation enacted pursuant to the Treaty. Disquiet as to the limits thereby placed on Member State action is exacerbated by what is perceived to be the imbalance between the economic and the social within the EU, with the consequence that constitutionalized EU law can place severe limits on this balance at Member State level.

The horizontal dimension of constitutionalization addresses the confines thereby placed on political choice at EU level. This dimension is especially important in relation to changes designed to alleviate the democratic deficit by increasing the connection between electoral power and political responsibility. All constitutions restrict choices that can be made via every day politics. It is integral to the very nature of constitutions that they entail some pre-commitment, which confines choices that can be made thereafter, subject to any constitutional amendment. The limits may be procedural, or substantive. The difference with respect to the EU is one of degree, not of kind, but it is significant nonetheless, since the constitutionalized EU Treaty is far more detailed than any national constitution. It still leaves room for some policy choice as concerns the direction of EU policy. The EU Treaty, nonetheless, limits the range of such choice that rival political parties can place before the electorate. There is much in the Treaty that constitutes substantive path dependency for the direction of EU policy, thereby limiting politicization.

Concerns as to the preceding vertical and horizontal constraints have been voiced by scholars such as Grimm, who has focused on what he terms the democratic costs of constitutionalization^[23]. His central thesis is that the EU Treaties are over-constitutionalized, with the consequence that they are thereby taken off the agenda of normal politics, notwithstanding the fact that many such issues that would be regarded as within the province of ordinary law in Member States: 'in the EU the crucial difference between the rules for political decisions and the decisions themselves is to a large extent levelled'^[24]. It is inherent in the nature of constitutions that they function as the framework for political decisions, with the consequence that elections 'do not matter as far as constitutional law extends'^[25]. There may be too little constitutionalism, but there may also be too much, with the consequence that the democratic process is fettered^[26]. While there are no universally applicable principles for determining the content of a Constitution, the 'function of constitutions is to legitimise and to limit political power, not to replace it'^[27], with

^[23] D Grimm, 'The Democratic Costs of Constitutionalization: The European Case' (2015) 21 ELJ 460.

^[24] Ibid 470.

^[25] Ibid 463.

^[26] Ibid 464.

^[27] Ibid 465.

the consequence that constitutions are a 'framework for politics, not the blueprint for all political decisions'^[28].

The EU Treaties fulfil many of the functions of national constitutions, specifying matters such as the inter-institutional distribution of power, the mode of law-making, and the respective competence of the EU and Member States. They also go significantly beyond the remit of national constitutions, with the consequence that a wide range of matters becomes constitutionalized and taken off the agenda of normal politics. The effect of this is further enhanced by the constitutional doctrines of direct effect and supremacy, which transformed the four economic freedoms from 'objective principles for legislation into subjective rights of the market participants who could claim them against the Member States before the national courts'^[29].

This in turn meant that there were two modes of EU integration. The Treaty precepts could be advanced through legislation enacted by the EU institutions, or they could be taken forward through judicial decisions, which were imbued with considerable force through direct effect and supremacy^[30]. Member States had limited influence over the latter, and this was particularly important since the lack of differentiation between the constitutional law level and the ordinary law level, meant that the 'constitutionalization of the treaties immunises the Commission and particularly the ECJ against any attempt by the democratically responsible institutions of the EU to react to the Court's jurisprudence by changing the law'^[31]. For Grimm, the remedy was to limit the EU Treaties to their truly constitutional elements and downgrade other Treaty provisions that were not constitutional in nature to the status of secondary law.

(ii) Competence: Vertical and Horizontal Dimensions

Constitutionalization is not the only constitutional constraint on political choice. It is also limited by the competence accorded to the EU. Political choices placed before the electorate in nation states are paradigmatically predicated on the state having plenary power. The assumption is that, subject to constitutional limits, the rival political parties can place before the electorate a range of options, which cover economic, social and political issues, broadly defined. This is the very lifeblood of normal politics, with contestation concerning matters such as economic redistribution, social welfare, health, crime and education, featuring prominently on the electoral agenda. There is a vertical and a horizontal dimension to such limitations on competence as they pertain to the EU.

The most obvious dimension of competence is on the vertical plane, insofar as it demarcates the respective spheres of authority of the EU and the Member States. It follows that, even assuming the Member States were willing to alleviate the democratic deficit by embracing political reordering of the kind set out above, the choices that rival political parties could place before the electorate are framed by the limits of EU competence. It is not, therefore, open to a political party to promise far-reaching change in social welfare or economic redistribution, since the EU does

^[28] Ibid 465.

^[29] Ibid 467.

^[30] J Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1YBEL 267, and 'The Transformation of Europe' (1991) 100 Yale LJ 2403, 2412–31; P Craig, 'Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) 12 OJLS 453.

^[31] Grimm (n 23) 471.

not have competence over such matters, nor does it have the tax base from which to effectuate such change, the EU still being principally a regulatory state in this regard. It is, moreover, not open to a political party to promise far-reaching change on matters that are of prime concern to voters in national elections, such as education, health, crime and the like, since the EU's powers are limited in such areas.

There is, however, a less obvious dimension of competence that resonates horizontally, insofar as it frames the exercise of political choice by the EU institutions when making EU policy. This is the consequence of the fact that not all heads of competence are created equal. The EU's power over different areas varies significantly, being dependent in part on whether the competence is exclusive, shared or complementary, and in part on the fact that even within each such category it is only by looking closely at the relevant Treaty provisions that one can determine the real scope of EU power. There is therefore no 'boilerplate' that determines the nature of power possessed by the EU in the diverse areas that fall within, for example, shared competence. The horizontal dimension to competence is, moreover, manifest in the fact that the Treaties specify to some significant degree the hierarchy of substantive provisions, as attested to most notably by the dominance of the four freedoms. This perforce shapes the political choices that the EU institutions are able to make.

There are, moreover, instances where there is a mismatch between the expectations of what the EU is expected to do, and the limits of the competence accorded to it, as powerfully exemplified by the rule of law crisis. This may, in the medium term, prove to be the most serious of the crises faced by the EU. There is a rich and sophisticated literature on the topic, which explores the limits of the powers currently available to the EU, and how they could be applied^[32]. There is, moreover, a duality to the concept of national constitutional responsibility as it pertains to the rule of law crisis most especially in Poland and Hungary. There is the fact that the principal responsibility for the crisis resides with the states that introduced the illiberal measures threatening the rule of law. There is the secondary responsibility that lies with the Member States collectively, as reflected in the Treaty provisions, which give expression to the limits of the controls over Member State action that they are willing to accept. The terms of Article 7 TEU set the parameters for such action, and are predicated on the assumption that there will not be more than one misbehaving state at any point in time. The reality is that the EU is caught between a rock and a hard place, or if you prefer more classical illusions, between Scylla and Charybdis: it risks being damned for doing too little, criticized for being ineffectual; or criticized for trying to do too much, and thereby straying into the terrain of domestic politics where it lacks competence.

[32] A von Bogdandy, M Kottmann, C Antpöhler, J Dickschen, S Hentrei, M Smrkolj, 'Reverse Solange—Protecting the essence of fundamental rights against EU Member States' (2012) 49 CMLRev 489; I Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust among the Peoples of Europe"' (2013) 50 CMLRev 383; S Carrera, E Guild and N Hernanz, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism*, CEPS 2013; A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart, 2015); D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 European Constitutional Law Review 512; J-W Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States?' (2015) 21 ELJ 141; D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) YBEL; A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Methods against Defiance* (Oxford University Press, 2016); C Closa and D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

(d) Substantive Constraints

The fourth constraint on exercise of democratic political choice is substantive. It is related to the constitutional constraint, but distinct nonetheless, and hence warrants separate consideration. The balance between the economic and the social has been a contentious feature of the EEC since its inception, and continues to be so. It is manifest in two ways.

(i) The Economic and the Social: Core Treaty Provisions

Scharpf has long argued that the EU embodies an asymmetry between the economic and the social, such that the former is prioritized at the expense of the latter^[33]. He contends that the EU is premised on asymmetrical treatment of the economic and social spheres. The economic order has predominated, as evidenced by the Treaty provisions, and the primacy accorded to completion of the single market, with the attendant priority placed on market and competitive principles. Scharpf argued that it would have been possible, when the Rome Treaty was framed, to have made harmonization of social protection a pre-condition for market integration, given that the welfare regimes of the original six Member States were relatively rudimentary and closer than they have since become.

If the Rome Treaty had been cast in this form, then the debates at EU level about the interplay between social protection and the market mechanism would have replicated similar discourse at national level. Matters developed very differently. The Treaty focus was heavily on markets, with the consequence that there was a decoupling of economic integration and social protection. This led to constitutional asymmetry. Whereas at national level economic and social policy had the same constitutional status, it was economic policy that predominated at the EU level. The very predominance afforded to economic policy reduced the Member States' ability to influence their own economies or to 'realize self-defined socio-political goals'^[34].

The doctrines of direct effect and supremacy heightened these constraints. Scharpf argues that the Member States failed to recognize the impact of these twin doctrines, which laid the foundations for integration through law, whereby the Community courts could advance Treaty objectives if integration through legislation was not possible because of disagreement in the Council^[35]. Negative integration through judicial decisions that deemed national laws to be inconsistent with the Treaty, became the dominant mode of integration, until the new mode of harmonization was introduced post the Single European Act 1986, thereby facilitating positive integration.

There came to be increasing pressure for the EU to play a greater role in social policy, thereby alleviating the constitutional imbalance between the market-making and market-correcting functions of a polity. This goes much of the way to explain the inclusion of more heads of competence dealing with social policy, as well as development of the Structural Funds.

^[33] F Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) 4 JEPP 18; F Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 JCMS 645; F Scharpf, 'Legitimate Diversity: The New Challenge of European Integration', in T Borzel and R Cichowski (eds), *The State of the European Union, Vol. 6: Law, Politics and Society* (Oxford University Press, 2003) 79-104.

^[34] Scharpf, 'The European Social Model' (n 33) 648.

^[35] Scharpf (n 21) 386-7.

There were, moreover, persistent efforts in the latter part of the previous millennium to recast the single market in more holistic terms, so as to include aspects of social and labour policy^[36].

Scharpf argued that it was not, however, possible at the turn of the millennium for the EU to adopt the stance towards social policy that it had declined to take when the Rome Treaty was signed. It was not possible to treat social welfare and protection through uniform rules applicable to all, because of the very diversity in welfare systems that existed within the Member States^[37]. This was the rationale in part for the development of social policy through the Open Method of Coordination^[38].

Political parties and unions promoting 'social Europe' are thus confronted by a dilemma: to ensure effectiveness, they need to assert the constitutional equality of social protection and economic integration functions at the European level – which could be achieved either through European social programmes or through the harmonization of national social-protection systems. At the same time, however, the present diversity of national social-protection systems and the political salience of these differences make it practically impossible for them to agree on common European solutions. Faced by this dilemma, the Union opted for a new governing mode, the open method of coordination (OMC), in order to protect and promote social Europe.

These arguments are important. The following points are, however, pertinent in this context. First, insofar as there is an imbalance between the economic and the social within the EU, this is the result of Member State choice, just as is the current institutional structure. It is of course true that judicial doctrines of direct effect and supremacy, as developed by the CJEU, have heightened this tension, but the fact remains that the centrality accorded to the four freedoms, and the relative weakness of the social as compared to the economic dimension, is reflective of what the Member States have been willing to accept, and the powers that it has been willing to accord, to a supranational polity. There is a paradox lurking here. The desire to preserve national sovereignty underpinned Member State reluctance to accord the EU power over social policy; yet the resulting predominance of the economic over the social within the EU impacted on Member State freedom to choose the balance between the economic and the social within the nation state.

Secondly, there is no doubt that legal doctrines of direct effect and supremacy sharpened the cutting edge of the four freedoms, thereby further enhancing the economic dimension of the Treaties, and the attendant negative integration resulting from the judicial doctrine. Scharpf's argument, to the effect that the Member States were not cognizant of the significance of the legal doctrine, should, nonetheless, be viewed with caution. Member States benefited from such judicial doctrine, insofar as it invested the Treaties, and rules made thereunder, with a peremptory force that they would otherwise have lacked. To put the same point in another way, these doctrines, as enforced by the EU courts, gave greater credibility to the commitments embodied in the Treaties.

^[36] P Craig, 'The Evolution of the Single Market', in C Barnard and J Scott (eds), *The Law of the Single European Market, Unpacking the Premises* (Hart, 2002) Chap 1; P Craig, 'The Community Political Order' (2003) 10 *Indiana Journal of Global Legal Studies* 79.

^[37] Scharpf, 'The European Social Model' (n 33) 649-51.

^[38] *Ibid* 652.

(ii) The Economic, the Social and the Political: EMU and the Financial Crisis

The financial crisis impacted significantly on the balance between the economic and the social, and more broadly on the political structure of decision-making in the EU. The effects were manifest at the EU level, insofar as the financial crisis meant that the EU's energies were concentrated on resolving the economic problems, with scant energy left for broader social policy. They were also manifest at Member State level, since relief for debtor states was subject to conditionality requirements, which imposed strict austerity limits, with attendant implications for national social and welfare policy. Concerns in this respect were voiced by many commentators.

For Scharpf, the imbalance between the economic and the social was heightened by the financial crisis, and the responses thereto^[39]. This was, in part, because the euro regime, as it presently functions, exerts 'downward pressures on public sector functions and on wages – in the upswing to dampen the rise of external deficits and in the downswing to stimulate export-led recovery'^[40]; it was in part also because of what Scharpf regards as the far-reaching discretion afforded to the Commission under the EU legislation enacted to strengthen EU oversight of national fiscal policy after the crisis^[41].

Wilkinson, drawing on the motif of authoritarian liberalism, voiced the concern that 'democratic processes have been side-lined, albeit largely with the complicity of national political and economic elites, not to assert strong statehood but for the purpose of maintaining a project of economic integration said to depend on the success of the single currency'^[42]. In similar vein he deprecates the fact that 'democratic authority is replaced by a combination of executive power and market rationality, defended by the perceived necessity of acting swiftly and bypassing public debate'^[43].

In similar vein, Dawson and de Witte express disquiet at the way in which the financial crisis de facto shifted the substantive boundaries as to the intrusion of the EU into Member States, 'by increasingly making in-roads in Member State autonomy in redistributive, fiscal and budgetary matters'^[44], as manifest in the conditionality criteria imposed on debtor states. They too voice worry about the increased executive dominance in decision-making, with agenda setting being done to an ever greater extent by the European Council. They acknowledge that the rationale for executive control in proposals for reform of EMU is that 'only executives and governments carry the competence, speed, credibility and legitimacy to mandate and direct significant EU intervention in core state powers such as fiscal policy'^[45]. They, nonetheless, deprecate reform initiatives that further enhance executive power. Reform should, they argue, be such that the substantive direction of EU policy can be truly deliberated and contested^[46], thereby meeting a

^[39] F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999); Scharpf (n 21).

^[40] Scharpf (n 21) 391.

^[41] *Ibid* 392.

^[42] M Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21 *ELJ* 313, 315.

^[43] *Ibid* 327.

^[44] M Dawson and F de Witte, 'Self-Determination in the Constitutional Future of the EU' (2015) 21 *ELJ* 371, 372.

^[45] *Ibid* 374.

^[46] *Ibid* 375.

basic precept of political self-determination, that 'government is conducted not just *for* but *by* the people'^[47].

There is force in the preceding arguments. Thus, it is assuredly correct that the Commission has discretion pursuant to various regulations enacted post the financial crisis. The salient regulations were, however, approved through the ordinary legislative procedure, with significant input from the EP as well as the Council, although the room for parliamentary involvement thereafter is limited^[48]. It is, moreover, important not to be asymmetrical in this respect. It is the executives of the Member States that are very much in the driving seat when it comes to setting their national budget. They commonly exercise considerable discretion in this regard, such that it is difficult to ensure parliamentary accountability. There may be reasons why the national executive is willing to tolerate significant budgetary imbalance, or feels powerless to address the issue. This can in turn have serious consequences for other Member States, through the strain thereby placed on the euro. The existence of Commission discretion should, therefore, be viewed in this light. The post-financial crisis legislative schema is, moreover, premised on such Commission discretion, coupled with increased provision for national budgetary targets that can be policed by national legislatures more readily than hitherto.

5. Institutional Structure and Democracy: The Paradox

There is a paradox of cause and effect in the EU's inter-institutional configuration of power as it presently exists, and as it likely to remain in the future. The cause captures the facts as set out hitherto. The Member States have shaped the present configuration of EU inter-institutional power, which is beset by a democratic deficit insofar as there is scant connection between electoral vote and political power or responsibility, such that it is difficult for the voters to express a view as to the direction of EU policy that will be translated into action. Member States bear the principal responsibility for the status quo, since they devised the current schema.

The effect captures the way in which we think about democratic legitimation in the EU. The infirmities in EU decision-making constitute the driver for the argument that EU legitimacy and democracy must be grounded in the Member States, not merely as one mode of representation within the EU. The argument becomes more 'visceral and foundational', in the sense that it is the Member States, and the national parliaments therein, that are regarded as the true bedrock of democracy. Their claims in this regard are grounded in the EU's democratic deficiencies, and this in turn is used to fuel the argument that such parliaments should participate in EU decision-making.

The paradox resides in the conjunction of cause and effect: Member State choice is central to the institutional architecture at EU level and the democratic infirmity that is reflected therein. The infirmity cannot, by definition, be resolved at EU level, given the nature of the choice thus made, with the consequence that the solution must be found elsewhere. The paradox is exacerbated by reason of the fact that, as argued above, most national parliaments would be in accord with their national executives in resisting change that would alleviate the democratic deficit within the EU,

^[47] Ibid 382. Italics in the original.

^[48] C Fasone, 'European Economic Governance and Parliamentary Representation: What Place for the European Parliament?' (2014) 20 ELJ 2.

because of the effect that this could have on their own power. Thus, while 'a true political Union would involve not suppressing, but channelling and promoting meaningful conflict over the EU's substantive goals'^[49], and while reinvigoration in this respect may be especially pertinent post the financial crisis, there is scant likelihood of this occurring.

It should be made clear that nothing in the preceding argument presumes the idea of a single demos for the entire EU; it is not predicated on the denial of plurality in the political choices made by the EU; it does not rest on assumptions of a particular kind of federal order or anything akin thereto; it presumes no particular distribution of power between the EU and the Member States; and it is perfectly consistent with a role for national parliaments.

The paradox is, by way of contrast, simply reflective of the politics concerning the disposition of inter-institutional power as it has unfolded since the inception of the EEC. It is reflective also of normative assumptions as to the type of Community or Union that the Member States are willing to create, and the powers that they are content to invest in it. The enduring paradox persists: Member State refusal to allow institutional change that would alleviate the democratic deficiency in EU decision-making remains a principal cause of the malaise, the consequential effect being that the problem can only be addressed at state level.

The paradox is all the more important because it comes with a 'political bite', which is doubly undermining for the EU. Member States prefer to off-load blame concerning deficiencies in EU decision-making to the EU institutions themselves, and divest themselves of responsibility. They do not readily concede their role as institutional architects of the status quo. It is, moreover, these very institutional deficiencies that serve to rob the EU of the legitimacy that it requires to tackle difficult social or economic issues. The EU is caught between a rock and a hard place, berated in equal measure for its over-attachment to the economic at the expense of the social, while castigated for lacking the democratic legitimacy to make dispositive social or redistributive decisions.

^[49] Dawson and de Witte (n 44) 382.