

Democracy-Eroding Multilateralism in the EU?*

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Elective affinity between democracy and international institutions is one of the few resilient axioms of modern political science.¹ Although the nature and origins of this relationship are heavily contested, political thinkers since Kant have attended to the ways in which liberal democracies favor rules and institutions to bridle the anarchic dynamics of the international realm.² More importantly, the relationship is also said to go the other way. As Kant writes, “the problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved”.³ It is not just that constitutional democracies make international

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¹ “Elective affinity” is Max Weber’s phrase. Although Weber himself appears to have used it unsystematically, the phrase is widely used to denote the non-deterministic but fairly predictable pairing of two sets of ideas, ideologies, practices, or institutions. Most famously, Weber identified “the elective affinity of Calvinism [...] for capitalism”. He also thought it was “utterly ridiculous to attribute elective affinity with ‘democracy’ or even ‘freedom’ [...] to today’s advanced capitalism”. Finally, he argued that there was an observable degree of elective affinity between certain “concrete structural forms of social action” and “concrete economic forms”, making it possible to draw generalizations “concerning whether and how strongly they mutually favor one another’s continuance or, conversely, hinder or exclude one another”. Richard Herbert Howe, *Max Weber's Elective Affinities: Sociology within the Bounds of Pure Reason*, in “American Journal of Sociology”, vol. 84, no. 2, 1978, pp. 366-385, quoted at pp. 368-369.

² Kant disapproved of “democracy” and favored republican regimes, which he understood as political systems of a broadly representative character that uphold civil liberties and the rule of law. This article elides this conceptual distinction by considering democracy in its contemporary liberal / constitutional form. See further discussion below on what the latter entails.

³ Immanuel Kant [1784], *Idea for a Universal History with a Cosmopolitan Pur-*

institutions; international institutions also make constitutional democracies.⁴ Participation in international institutions is generally understood as proceeding from, embodying, and advancing liberal democratic values.⁵ In its illiberal guise, multilateralism is more commonly termed imperialism, hegemony, or “soulless despotism”.⁶ Finally, states often seek out membership in multilateral institutions, including the EU, the Council of Europe, or the World Trade Organization to “lock in” incipient democratic and/or market institutions.⁷

This article critically examines the democracy-enhancing multilateralism thesis in light of the most advanced multilateral entity that exists today, namely the European Union. As the title indicates, my starting point is the democracy-enhancing effects that Robert Keohane, Stephen Macedo, and Andrew Moravcsik (henceforth, KMM) attribute to multilateral institutions in their celebrated essay.⁸ According to the authors, “involvement with multilateral institutions often helps domestic democratic institutions restrict the power of special interest factions, protect individual rights, and improve the quality of democratic deliberation, while also increasing capacities to achieve important public purposes”.⁹ Although I will not attempt anything like a systematic refutation of KMM’s thesis, I will propose several important ways in which multilateralism may undermine the domestic democratic systems of signatory states.

In so doing, it is not my aim to attack multilateralism, international law, or regional integration as perverse or unworthy projects for democracies to pursue. To the contrary, they are important correctives to a world order composed of sovereign states. However, principles such as democracy, human rights, and the rule of law are not endemic to any form of political ordering, international institutions not excepted. Like states, international institutions are capable of jeopardizing these principles, and much depends on their design and the tasks with which they are charged.

pose, in H.S. Reiss (ed.), *Political Writings*, Cambridge University Press, New York 1991, p. 47

⁴ Allen Buchanan, *Reciprocal Legitimation: Reframing the Problem of International Legitimacy*, in *Politics, Philosophy & Economics*, vol. 10, no. 1, 2011, pp. 5-19

⁵ Robert O. Keohane, Steven Macedo, and Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, in “International Organization”, vol. 63, no. 1, 2009, pp. 1-31; Beth Simmons, *Globalization, Sovereignty, and Democracy*, in Peter F. Nardulli (ed.), *International Perspectives on Contemporary Democracy*, University of Illinois Press, Champaign (IL) 2008; Miguel Poiars Maduro, *Sovereignty in Europe: The European Court of Justice and the Creation of a European Political Community*, in Mary L. Volcansek and John F. Stack Jr. (eds.), *Courts Crossing Borders: Blurring the Lines of Sovereignty*, Carolina Academic Press, Durham (NC) 2005.

⁶ Immanuel Kant [1795], *Towards Perpetual Peace*, in Hans S. Reiss (ed.), *Political Writings*, Cambridge University Press, New York 1991, p. 113. What Kant presumably means is that national – as opposed to global – despotism at least has the virtue of a soul!

⁷ Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, in “International Organization”, vol. 54, no. 2, 2000, pp. 217-252.

⁸ Keohane, Macedo and Moravcsik, *Democracy-Enhancing Multilateralism*, cit.

⁹ Keohane, Macedo and Moravcsik, *Democracy-Enhancing Multilateralism*, cit., p. 2.

This article aims to map some of the shoals on which the EU, as a singularly advanced multilateral regime that places great emphasis on democratic values, might yet founder.

1. Article 2 TEU: High Hopes and Aspirations

Without a doubt, the greatest contribution of the European integration project to democracy is its role in pacifying the relations among the jostling nation-states of a politically congested continent. Any account of the security, prosperity, and stability that Western European societies have come to enjoy in the post-Second World War period must acknowledge that contribution. The procedural discipline of supranational decision-making has accustomed member states to resolving conflicts through bargaining and negotiation. To the extent that the EU allows states to jointly address policy questions that affect them, and discourages states from unilaterally deciding matters that concern their neighbors, it has replaced the solipsism of the national frames of reference with a more inclusive perspective that Tocqueville called “self-interest well understood”.¹⁰

We could stop there. But the democratic aspirations enumerated in the EU’s treaty framework go well beyond peaceful international relations. Article 2 of the Treaty on European Union proclaims:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

For good measure, it adds:

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The values enumerated in the first sentence are derived from the shared political commitments of member states, and are supposed to frame the project of supranational governance. Still, the Treaties skate past vexing questions of whether the Union can practice the “value” of democracy in quite the same way as a sovereign state, or what its role in securing respect for human and minority rights can or should be. The second sentence is equally ambiguous: is the “society” in question a supranational or national or notional one? Are “pluralism, non-discrimination, tolerance, justice, [etc.]” a list of desired *outcomes* with whose realization the EU is tasked, or are they *principles* to guide supranational decision-making, whatever other outcomes it might seek to bring about? Perhaps most important, are these “values” constitutional commands addressed solely to EU institutions, or do they bind the member states in all of their actions, regardless

¹⁰ Alexis de Tocqueville, *Democracy in America*, trans. and ed. Harvey C. Mansfield and Delba Winthrop, University of Chicago Press, Chicago 2002, pp. 487, 501-503.

of whether those actions fall within the material scope of EU law? These questions throw into relief the philosophical (not to mention legal) indeterminacy of the commitments that frame the EU's legal structure and the institutions that it calls into being.

This indeterminacy is symptomatic of a disjunction between the EU's lofty aspirations and what it is configured to deliver in practice. The Treaty on European Union, like most contemporary constitutions, enumerates the substantive values espoused by the political community it establishes. However, constitutions are also expected to translate these values into a practical system of public power by designating the institutions, procedures, and rules necessary to uphold them. If the "really existing" configuration of public power in a polity bears no relation to the strictures of its constitutional document, the latter is often called a "sham constitution".¹¹ What about a constitution that enshrines normative aspirations without establishing the institutional wherewithal to realize them?

This, arguably, is the case with the European Union and the treaties that make up its "constitutional charter".¹² Not only does the EU lack the institutional means to fully realize the commitments enshrined in Article 2, but it also detracts in important ways from the ability of member states to realize these values in the domestic context. In what follows, I will outline some respects in which the EU's institutional configuration is actively at odds with the values it proclaims. I will begin by considering precisely which values are at stake, and argue that the relevant standard for assessment should be a relatively demanding conception of liberal democracy (2). I will then argue that the EU's institutional configuration weakens domestic constitutional checks, obstructs avenues of democratic contestation, narrows the scope of policy competition, empowers executive institutions, and facilitates hegemonic capture (3). In all of these respects, I will argue, the EU might remove obstacles to authoritarian tendencies at the domestic level. Equally importantly, the credibility lent by the coveted status of EU membership may embolden the anti-democratic impulses of member state governments, and citizens may be more willing to countenance authoritarian moves if they are confident of the EU's ability to rein in their government (4). I contend that such trust in the EU's ability to stage a "political bail-out" is severely misplaced given the dearth of usable supranational mechanisms for enforcing democratic norms. Finally, I will argue that the functionalist basis of the EU's authority undermines the credibility of its claim to exercise political and constitutional oversight over member states (5). Although the EU exercises great power over member states in economic and financial matters, this influence does not extend to the constitutional principles enumerated in Article 2. Whatever its lofty aspirations, the EU is still seen by its member states and citizens predominantly as a source of goods rather than values.

¹¹ David S. Law and Mila Versteeg, *Sham Constitutions*, in "California Law Review", vol. 101, 2003, pp. 863-952, 880.

¹² Case 294/83 [1986], *Partie Ecologiste "Les Verts" v. Parliament*, ECR 1339.

2. What Is at Stake? Democracy, the Rule of Law, or Human Rights?

Since 2000, when the Austrian People's Party invited Jörg Haider's far right Freedom Party (FPÖ) into government, several EU member states have seen their constitutional democratic systems come under strain. In two separate stints as Prime Minister of Italy between 2001 to 2011, Silvio Berlusconi attempted to monopolize the public sphere by using his private broadcasting empire to consolidate power and silence rivals. After his Fidesz party won 52.7% of the vote in the 2010 Hungarian elections, Viktor Orbán has used its parliamentary majority to abrogate the separation of powers, reduce the independence of Hungary's judiciary, central bank, and administrative agencies, gut its constitutional court, snuff out academic freedom, and establish sweeping surveillance powers.¹³ In 2012, Romanian Prime Minister Victor Ponta attempted a thinly veiled putsch against the country's President through emergency ordinances abolishing procedural hurdles to his impeachment, curtailing the competences of the Constitutional Court, and altering referendum rules.¹⁴ Shortly after coming to power in Poland in October 2015, the Law and Justice Party (PiS) government hastily altered the composition and procedures of the country's Constitutional Tribunal, and refused to recognize a decision by the Constitutional Court invalidating these changes.¹⁵ Finally, several member states from France to Slovakia have come under criticism for systematically violating the rights of citizens of Roma origin, a perennially vulnerable group of about 6 million people dispersed across Europe.¹⁶

Each of these instances is troubling in its own way, but is there a common underlying principle or norm of which they are violations? The dominant approach in the current debate among EU scholars and policy-makers is to describe them as failures of the rule of law. Proposed EU-level remedies have taken this principle as their point of departure.¹⁷ This ap-

¹³ Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, in "Journal of Democracy", vol. 23, no. 3, 2012, pp. 139-146; Kim Lane Scheppele, "Testimony before the US Commission on Security and Cooperation in Europe Hearing on 'The Trajectory of Democracy – Why Hungary Matters'", 2013. Available at: <http://lapa.princeton.edu/hosteddocs/hungary/Scheppele%20Testimony%20Helsinki%20Commission%2019%20March%2013.pdf>; European Parliament Committee on Civil Liberties, Justice and Home Affairs, 2012, *Report on the Situation of Fundamental Rights: Standards and Practices in Hungary, 2012/2130 (INI)*, 20/03/2012. Available at: [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/2130\(INI\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/2130(INI))

¹⁴ European Commission for Democracy Through Law (Venice Commission), 2012, CDL-AD, 2012, 026 Draft Opinion on the Compatibility with Constitutional Principles and the Rule of Law of Actions Taken by the Government and the Parliament of Romania [...], Opinion no. 685/2012. Available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)026-e)

¹⁵ European Commission for Democracy Through Law (Venice Commission), 2016, CDL-AD, 2016, 001 Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland. Opinion no. 833/2015. Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e)

¹⁶ Amnesty International, *Left Out: Violations of the Rights of Roma in Europe*, Amnesty International Publications, (London 2010). Available at: <https://www.amnesty.org/download/Documents/36000/eur010212010en.pdf>

¹⁷ Carlos Closa, Dimitry Kochenov, and Joseph H.H. Weiler, *Reinforcing Rule of Law Oversight in the European Union*, EUI Working Paper no. 2014/25 Florence 2014;

proach has several advantages. First, appealing to the rule of law to criticize member state governments avoids the difficulty that the governments in question enjoy electoral mandates. The principle of democracy is a notoriously slippery ground on which to build a tenable critique of elected governments, who retreat behind the rhetorical shield of popular sovereignty to defend their authoritarian machinations. Furthermore, given that the EU's own decision-making structures are hardly democratic in any traditional sense, emphasizing the rule of law allows the EU to avoid the *tu quoque* charge.¹⁸ Regrettably, however, the rule of law is too weak of a political principle to invoke in confronting such a wide variety of affronts to democratic institutions. Its normative purchase is too modest: no political revolutions have been undertaken in its name; its requirements are ambiguous at best; and it admits of a minimally demanding definition.¹⁹ *Pace Fuller*,²⁰ authoritarian regimes often make extensive use of the law (statutes, decrees, courts, even constitutional provisions) to oppress their citizens, suggesting that the rule of law and authoritarianism are not mutually exclusive and may even be compatible.²¹

This emphasis on the rule of law is also reflected in the new dialogue mechanism adopted by the Council of the EU in December 2014 in response to challenges to democratic rule in member states such as Hungary and Romania. The ostensible aim of this mechanism, which consists of a yearly “non partisan and evidence-based” discussion in the Council, is to “promote and safeguard the rule of law in the framework of the Treaties” by fostering Council-level dialogue on domestic challenges to this principle.²² The weakness of this remedy reflects the substantive indeterminacy of the principle it sets out to safeguard: many democracy-eroding practices are nimble enough to pass through its widely spaced goalposts of “legality”, “legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review [...] and equality before the law”.²³

It is equally difficult to critique the various scenarios that have played

Carlos Closa and Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge 2016.

¹⁸ Closa, Kochenov and Weiler, *Reinforcing Rule of Law Oversight in the European Union*, cit., p. 25

¹⁹ Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, in “International Journal of Constitutional Law”, vol. 2, 2004, pp. 633-668.

²⁰ Lon Fuller, *The Morality of Law*, Yale University Press, New Haven 1964.

²¹ Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, New York 2008; Tom Ginsburg and Alberto Simpser (eds.), *Constitutions in Authoritarian Regimes*, Cambridge University Press, New York 2013; Turkuler Isiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, in “International Journal of Constitutional Law”, vol. 11, no. 3, 2013, pp. 702-726.

²² Council of the European Union, General Affairs Council Press Release, 16 December 2014 16936/14 EN, p. 21. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/146348.pdf

²³ European Commission, Communication to the European Parliament and the Council on A New EU Framework to Strengthen the Rule of Law, 19 March 2014 COM(2014) 158 final/2, p. 5. Available at: http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf

out in Austria, Italy, Romania, Hungary, Poland, or France on the basis of minimalist conceptions of democracy.²⁴ Contemporary authoritarian regimes are less likely to ban elections than to thwart or dismantle the constitutional infrastructure that makes them meaningful and competitive;²⁵ curtail basic individual rights that guarantee dissent and opposition, particularly the freedoms of expression, association, and information; dismantling requirements of transparency and accountability; or attack the independence of the judiciary or professionalized administrative institutions who uphold these rules. Minimalist conceptions of democracy not only miss what makes democracy work,²⁶ but more significantly, they can also miss what makes democracy fail. Only a procedurally and substantively more demanding conception of collective self-rule, most notably a *liberal* or *constitutional* conception of democracy, can adequately capture the challenges exemplified above.²⁷ Employing this thick conception, as opposed to formalistic criteria of rule of law or electoral alternation, not only helps to flag attempts to tamper with constitutional safeguards as the serious authoritarian challenges they are, but also allows us to hold the EU to its own standards as articulated in Article 2. The remainder of this article highlights aspects of the EU's institutional structure that are at cross-purposes with liberal democracy.

3. Democracy-Eroding Effects of Multilateralism²⁸

Despite many anti-democratic episodes, it is contentious to say that any EU member is currently in the grip of full-blown authoritarianism.²⁹ However, this may not mean all that much. After all, the converse is also true: virtually all political systems fall short of idealized standards of democratic legitimacy.³⁰ As a wide range of scholars have argued, moreover, a dichotomous classification of democracy and authoritarianism is unhelp-

²⁴ Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*, George Allen & Unwin Ltd., London 1942, ch. XXII; Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in Ian Shapiro and Casiano Hacker-Cordon (eds.), *Democracy's Value*, Cambridge University Press, New York 1999.

²⁵ Steven Levitsky, and Lucan A. Way, *The Rise of Competitive Authoritarianism*, in "Journal of Democracy", vol. 13, no. 2, 2002, pp. 51-65.

²⁶ Philippe C. Schmitter and Terry Lynn Karl, *What Democracy Is... and Is Not*, in "Journal of Democracy", vol. 2, no. 3, 1991, pp.75-88.

²⁷ Larry Diamond, *Developing Democracy. Toward Consolidation*, Johns Hopkins Press, Baltimore (MD) 1999.

²⁸ This section advances a democratic critique of the EU's institutional structure that is presented in greater detail in Isiksel, *Europe's Functional Constitution*.

²⁹ Geddes *et al.* code as autocratic regimes those where "an executive achieved power through undemocratic means" (that is to say, by "any means besides direct, reasonably fair, competitive elections in which at least ten percent of the total population [...] was eligible to vote"), where "[t]he government achieved power through democratic means [...] but subsequently changed the formal or informal rules, such that competition in subsequent elections was limited", or where competitive elections were rendered meaningless by military interference. Barbara Geddes, Joseph Wright, and Erica Frantz, *Autocratic Breakdown and Regime Transitions: A New Data Set*, in "Perspectives on Politics", vol. 12, no. 2, 2014, pp. 313-331, 317.

³⁰ Robert A. Dahl, *Polyarchy*, Yale University Press, New Haven 1971.

ful.³¹ Just as many contemporary authoritarian systems have incorporated limited elements of electoral democracy, democratic regimes can harbor serious illiberal or even anti-democratic practices without ceasing to be democracies or changing into “hybrid”, “competitive authoritarian”, or “pseudodemocratic” regime forms. Authoritarian uses of public power need not entail wholesale regime change in which a government seizes power undemocratically or abolishes competitive elections once in office, but can still seriously compromise a constitutional democracy. We can speak of *authoritarian patterns of rule* where the incumbent government changes electoral laws to thwart the opposition; abolishes constitutional checks on its own power; curtails the autonomy of the judiciary, central bank, or administrative institutions or drastically alters their composition; muzzles the press; systematically denies freedoms of expression, association, and information; victimizes minorities; intimidates or persecutes political opponents or engages in other illegitimate practices designed to ensure its permanence in office. Framed in this way, all EU member states have democratic regimes, but a notable few have engaged in behavior that is properly categorized as authoritarian.

The most noteworthy mechanism by which the EU encourages authoritarian patterns of rule is by empowering the executive branch and weakening domestic mechanisms designed to hold it accountable. To the extent that multilateral institutions are empowered to make decisions that are binding on their members, they typically take over decision-making powers that would be exercised by domestic legislatures and/or by administrative bodies accountable to elected representatives. In the EU, entrusting decision-making power to supranational institutions such as the European Commission, European Central Bank (ECB), and the Court of Justice (CJEU) has attenuated or wholly removed important political decisions from the reach of domestic participatory institutions, without fully compensating for the resultant loss of democratic control.³² Although the EU’s main legislative organ, the Council, comprises elected and/or democratically accountable cabinet members from each member state, the kind of democratic pedigree it enjoys is highly attenuated. Unlike elected legislatures, which represent a wide spectrum of political views espoused by citizens, ministerial representation at the Council boils down

³¹ Zachary Elkins, *Gradations of Democracy? Empirical Tests of Alternative Conceptualizations*, in “American Journal of Political Science”, vol. 44, no. 2, 2000, pp. 287-294; Terry Lynn Karl, *The Hybrid Regimes of Central America*, in “Journal of Democracy”, vol. 6, no. 3, 1995, pp. 72-87; Larry Diamond, *Thinking about Hybrid Regimes*, in “Journal of Democracy”, vol. 13, no. 2, 2002, pp. 21-35; Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War*, Cambridge University Press, New York 2010. Cf. Adam Przeworski, Michael E. Alvarez, Jose Antonio Cheibub, and Federico Limongi, *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990*, Cambridge University Press, New York 2000.

³² Tanja A. Börzel and Carina Sprungk, *Undermining democratic governance in the member states? The Europeanization of national decision-making*, in Ronald Holzhaecker and Erik Albaek (eds.), *Democratic governance and European integration: linking societal and state processes of democracy*, Edward Elgar, London 2007; Deirdre Curtin, *Executive Power of the European Union. Law, Practices, and the Living Constitution*, Oxford University Press, Oxford 2009.

the plurality of domestic perspectives to a single national viewpoint on any given issue. The democratic credentials of Council decision-making meet a lower, plebiscitary rather than pluralistic standard of collective self-rule, meaning that the decisive consideration is whether or not a majority of that state's electorate would approve of the position espoused by their representative.³³ This simplification filters out pluralism, thwarts deliberation, and discourages civic engagement.

Although the EU's decision-making mechanisms incorporate democratic flourishes, including the expanded legislative powers of the European Parliament, these are more or less auxiliary to its primary, functionalist mode of political legitimation. The EU's authority to make binding decisions is premised on a claim to effective rather than democratic government.³⁴ This is not objectionable per se: technocratic institutions often enjoy greater legitimacy in certain policy domains than elected ones, particularly those that call for expert knowledge, chain of command, or long-term planning and commitment.³⁵ Insulation from majoritarian influence or partisan manipulation might be necessary to achieve results that democratic publics otherwise desire. Such, indeed, was the original rationale behind delegating market-building and regulatory capacities to the European Communities. Although member state citizens and legislatures would relinquish control over some policy matters, that loss would be compensated by cooperative goods, such as larger and competitive markets, harmonized regulatory standards, higher levels of consumer protection, and more effective environmental safeguards. As KMM write, "multilateral organizations assist domestic publics to achieve goals that they would otherwise have difficulty realizing".³⁶ "Arguably" Simmons concludes, "all but the most powerful democratic governments have traded the people's sovereign self-rule in areas previously defined as domestic for the benefits of international cooperation," including "tariff levels [...] intellectual property rights, environmental regulations, and consumer and labor protection standards."³⁷

There is no abstract formula for calibrating the trade-off between effective government on the one hand, and democratic government on the other. However, as the EU's scope of competence has widened, the balance between losses in democratic control and gains in effective policy-making has been thrown off kilter. Since its main legislative organ, the Council, is composed of government representatives, the expansion of the EU's competences has enabled national executives to commandeer powers that once

³³ Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People*, Harvard University Press, Cambridge (MA) 2014.

³⁴ Fritz Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford University Press, Oxford 1999.

³⁵ Giandomenico Majone, *The Rise of the Regulatory State in Europe*, in "Journal of Public Policy", vol. 17, no. 3, 1994, pp. 77-101; Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, in "Journal of Public Policy", vol. 17, no. 2, 1997, pp. 139-167; Bruce Ackerman, *The New Separation of Powers*, in "Harvard Law Review", vol. 113, no. 3, 2000, pp. 633-729, at 686-698.

³⁶ Keohane, Macedo and Moravcsik, *Democracy-enhancing multilateralism*, cit., p. 15.

³⁷ Simmons, *Globalization, Sovereignty, and Democracy*, cit., p. 173.

rested with parliamentary assemblies. The direct applicability of many of the norms issued by the Council and Commission short-circuits the power of national parliaments to contest, revise, and adapt supranational legislation. Legislative instruments that need to be transposed into domestic statute allow national parliaments limited room for adjustment in light of their constituencies' preferences, on pain of EU infringement action. Even in purely domestic matters, national legislatures are constrained by the existing *acquis communautaire* and the duty of sincere cooperation enumerated in Article 4(3) TEU, which enjoins member states from jeopardizing the EU's objectives in *any* area of domestic policy.³⁸ On many important matters, national parliaments serve as mere stenographers of EU law.

As generations of democratic theorists have argued, the stability of democracy depends on whether governments and, consequently, policies can be changed through popular mobilization.³⁹ If elections no longer produce governments responsive to voter preferences, democracy may lose its charm.⁴⁰ Particularly in the realm of fiscal policy, the EU's monetary union has whittled down the budgetary autonomy of domestic parliaments to a vanishing point and *de facto* removed basic distributive questions from the reach of majoritarian politics.⁴¹ Given strict supranational rules about borrowing, deficits, revenue, and redistribution, domestic electorates can no longer hope to change the direction of domestic economic policy through old-fashioned alternation in government.

The dramatic changes in government in Greece during the sovereign debt crisis provide a vivid illustration. Despite careening between center-left, center-right, and radical left parties between 2011 and 2015, the Greek electorate failed to effect even the slightest course correction against the austerity regime mandated by the eurozone. While Greece is an admittedly extreme case, its situation is not asymptomatic: arguably, there are few states in the eurozone in which electoral alternation can still generate a significant change of policy in the economic realm. In turn, the hollowing out of partisan competition raises the danger that voters will lose faith in the ability of the democratic process to generate change and turn to anti-democratic movements for succor.⁴² By stripping democratic contestation of its capacity to produce policy change and itself failing to offer alternatives to the harsh discipline of austerity, the EU may create a perverse incentive for authoritarian mobilization.

Equally importantly, the transfer of authority to powerful multilateral institutions can upset the domestic constitutional equilibria that keep executive power in check. EU obligations create an expectation of pliancy

³⁸ Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality*, The Hague, Kluwer Law 2007, p. 127.

³⁹ Schumpeter, *Capitalism, Socialism, and Democracy*, cit.; Przeworski, *Minimalist Conception of Democracy: A Defense*, cit.

⁴⁰ Adam Przeworski, *Democracy and the Market. Political and Economic Reforms in Eastern Europe and Latin America* Cambridge University Press, New York 1991, p. 180.

⁴¹ Wolfgang Streeck, *German Hegemony: Unintended and Unwanted*, Blog post dated May 15, 2015. Available at: <http://wolfgangstreeck.com/2015/05/15/german-hegemony-unintended-and-unwanted/>

⁴² Peter Mair, *Ruling the Void*, Verso, New York 2013.

on the part of national parliaments, judiciaries, and bureaucracies, weakening the “veto players” who pose obstacles to authoritarian patterns of rule.⁴³ While the expectation of compliance is the very foundation of multilateral institutions, the substantive scope of EU law is so broad as to trivialize the prerogatives of all domestic branches of government save the executive. Multilateralism in general, and the EU in particular, encourage and strengthen habits of executive governance liberated from constitutional scrutiny.⁴⁴ The EU’s reliance on the Council as its central legislative institution practically encourages state capture by allowing ruling parties to monopolize representation. Invoking the trump card of decisions made at the EU level helps to sideline domestic rivals.⁴⁵ The EU’s culture of governance by *acquis* – in which decisions are hammered out during opaque cabinet-level discussions rather than through the participation of a broad array of elected representatives – serves regimes that are keen to stifle pluralism and bypass constitutional checks and balances.

Although this pattern of executive empowerment and technocratic decision-making affects all EU member states,⁴⁶ some may weather this challenge better than others. Robust constitutional democracies can find effective ways of clawing back some of their parliamentary oversight functions, as the Danish and German legislatures have done.⁴⁷ However, executive empowerment poses serious dangers for regimes that have yet to consolidate their institutional commitment to liberal democracy. In such contexts, it can create greater opportunities to sideline domestic constitutional constraints and domestic opposition mechanisms. The “regionwide trend of backsliding away from democracy” among member states from Bulgaria to Poland in the years since accession must not be understood purely as a domestic phenomenon. Rather, it should be situated in the broader institutional context of supranational politics, which concentrates decision-making power in the executive and inculcates an “economistic and technocratic variant of [liberalism]”⁴⁸ at the expense of a more full-blooded commitment to liberal democracy, participatory self-rule, and pluralism. The proposition that varieties of multilateralism may perform a priming role for authoritarian patterns of rule by empowering the executive and eroding domestic checks and balances merits further empirical investigation.

⁴³ George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, in “British Journal of Political Science”, vol. 25, 1995, pp. 289-325.

⁴⁴ Curtin, *Executive Power of the European Union*, cit.

⁴⁵ As Katz and Mair observe, “cartel parties” can restrict policy competition by empowering non-majoritarian institutions like administrative agencies, central banks, and multilateral institutions. Richard S. Katz and Peter Mair, *The cartel party thesis*, in “Perspectives on Politics”, vol. 7, no. 4, 2009, pp. 753-766, 758.

⁴⁶ Ivan Krastev, *Liberalism’s Failure to Deliver*, in “Journal of Democracy”, vol. 27, no. 1, 2016, pp. 35-39.

⁴⁷ Peter L. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State*, Oxford University Press, Oxford 2010, ch. 5.

⁴⁸ James Dawson and Seán Hanley, *The Fading Mirage of the “Liberal Consensus”*, vol. 27, no. 1, 2016, pp. 20-34, 21, 23.

4. No Political Bail-Outs

EU membership also has significant symbolic value. It is a seal of approval for states that claim to be liberal, democratic, Western, and civilized. Its cachet is particularly strong in societies that have, at one point or another, been denied these coveted labels. Since EU membership lends a certain prestige and credibility to its bearers, it may be invoked to legitimize the otherwise constitutionally suspect political maneuvers that their governments pursue. For instance, as Scheppele reports, the Fidesz government in Hungary has defended each of its democracy-eroding legal and constitutional measures by pointing out “that there was some law just like it somewhere in Europe”.⁴⁹

The impulse to treat EU membership as a proxy for high standards of constitutional democracy is partially justified. Although the six original members of the EEC were by no means long-standing democracies at the time they initiated the integration process, and were partly motivated to pursue integration as a means to democratic consolidation, political standards of admission to membership were more firmly articulated when the prospect of admitting the newly post-Communist states of East Central Europe appeared on the horizon. To gain EU membership, these countries were asked to demonstrate stable compliance with the Copenhagen political criteria which, elaborated at the 1993 European Council summit, were subsequently folded into Article 2 as binding on all member states and the EU’s institutions. In articulating the standards it expected prospective members to meet, the EU made the commitment to liberal democracy central to its constitutional compact.

In most cases, moreover, the prospect of EU membership has been a powerful motivator for transitioning democracies to swallow the costly and otherwise unpopular reforms associated with admission.⁵⁰ However, the process by which these reforms were enacted in candidate countries did not exactly inculcate healthy democratic habits. In fact, the process of accession conditionality was akin to legislation by decree, whereby the legal changes required for compliance with EU *acquis* were typically pushed through legislatures without adequate deliberation, debate, and social consensus. Although these reforms doubtless “created an environment more conducive to democracy in economic and political terms”,⁵¹ the manner of their adoption ran contrary to the procedures and habits of democratic rule. As one prominent constitutional scholar put it – albeit in somewhat supercilious terms – “[t]he accession process has deprived the

⁴⁹ Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, in “Governance”, vol. 26, no. 4, 2013, pp. 559-562, 561.

⁵⁰ Milada Anna Vachudova, *Europe Undivided: Democracy, Leverage and Integration after Communism*, Oxford University Press, Oxford 2005; Frank Schimmelfennig and Ulrich Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe*, Cornell University Press, Ithaca (NY) 2005; David Cameron, *Post-Communist Democracy: The Impact of the European Union*, in “Post-Soviet Affairs”, vol. 23, no. 3, 2007, pp. 185-217; Grigore Pop-Eleches, *Between Historical Legacies and the Promise of Western Integration: Democratic Conditionality after Communism*, in “East European Politics & Societies”, vol. 21, no. 1, 2007, pp. 142-161.

⁵¹ Jan Zielonka, *The Quality of Democracy after Joining the European Union*, in “East European Politics and Societies”, vol. 21, no. 1, 2007, pp. 163-180, 173.

incompletely democratized East European states of that most important 'school of democracy', namely, the necessity, under the pressure of events, to hammer out a coherent policy out of a cacophony of domestic interest and opinions".⁵²

Once candidate countries secured admission, moreover, conditionality lost its power to alter behavior.⁵³ The EU lacks a comprehensive, continuous mechanism for monitoring democratic standards in its member states (whether new or long-standing) comparable to the Commission's pre-accession monitoring.⁵⁴ This conveys an assumption that democratization is irrevocable and irreversible once set in motion, when precisely the opposite assumption is warranted. Scholarship on democratic transitions shows that democratizing reforms are fragile and reversible.⁵⁵ Reforms that have been adopted in defiance of elite interests or popular preferences may unravel once the incentive of EU membership no longer exists.

Finally, waves of transitional democracies have pursued EU accession for its promise of political and economic stability. Jan-Werner Müller characterizes the genesis of the integration project as a way to "lock in' liberal-democratic arrangements, and to prevent any backsliding towards authoritarianism".⁵⁶ This perception, however, creates a moral hazard of sorts: the expectation of safety and stability attached to EU membership may encourage authoritarian experimentation if membership is seen as an insurance scheme against the risks that come with such experimentation. National electorates may be more willing to countenance hegemonic maneuvers by a ruling party if they are confident of the EU's ability to rein in their government when these maneuvers go too far.

Such confidence in the EU's ability to stage a political bail-out is misplaced at best. The most serious institutional mechanism available to the EU for addressing threats to democracy, namely the Article 7 procedure that allows the Council to suspend the voting rights of a member state in the event of a "serious and persistent breach" of the standards enumerat-

⁵² Stephen Holmes, *A European Doppelstaat?*, in "East European Politics and Societies", vol. 17, no. 1, 2003, pp. 107-118, 113.

⁵³ Pop-Eleches, *Between Historical Legacies and the Promise of Western Integration*, cit., p. 151; Ulrich Sedelmeier, *Is Europeanisation through Conditionality Sustainable? Lock-in of Institutional Change after EU Accession*, in "West European Politics", vol. 35, no. 1, 2012, pp. 20-38.

⁵⁴ Upon their admission in 2007, Bulgaria and Romania were subjected to a special Cooperation and Verification Mechanism (CVM) designed to ensure their progress towards judicial reform and the struggle against corruption and organized crime. See Aneta B. Spendzharova and Milada Anna Vachudova, *Catching Up? Consolidating Liberal Democracy in Bulgaria and Romania after EU Accession*, in "West European Politics", vol. 35, no. 1, 2012, pp. 39-58.

Jan-Werner Müller has proposed the establishment of a new institutional mechanism to shore up the EU's democracy oversight and enforcement functions. The remit of the "Copenhagen Commission" would include all EU member states. See Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, in "European Law Journal", vol. 21, no. 2, 2015, pp. 141-160.

⁵⁵ Guillermo O'Donnell, *Delegative Democracy*, in "Journal of Democracy", vol. 5, no. 1, 1994, pp. 55-69.

⁵⁶ Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*, Yale University Press, New Haven 2011, p. 149.

ed in Article 2, has never been utilized. In fact, it is widely regarded as unusable.⁵⁷ The “pre-Article 7” procedure, which requires a four fifths majority in the Council to establish a “clear risk” of a serious breach of democratic principles on the part of a member state, has also never been invoked, and not for lack of such risks. Finally, the Council recently rejected a rule of law monitoring mechanism proposed by the Commission, and instead adopted a much looser, intergovernmental dialogue framework.⁵⁸

As a *de facto* and *de jure* mechanism of ostracism, the Article 7 procedure contradicts the Council’s deeply ingrained culture of consensus, comity, and civility. In forcing member state governments to sit in judgment of one another’s domestic affairs, it has the potential to create deep, acrimonious rifts. It is therefore not so much the nuclear option as the boomerang option. Unsurprisingly, governments are more willing to expanding the power of multilateral institutions when doing so expands their domestic opportunity sets, but reluctant to use them in ways that snarl future opportunities for international cooperation.

5. The EU remains a source of goods, not values

The most deep-seated reason why the EU is ill equipped to champion the values enumerated in Article 2, and may indeed work at cross-purposes with them, has to do with its continuing reliance on a technocratic rather than democratic mode of legitimation. Having been designed to defer contentious questions of political integration in favor of tractable economic goals, the EU is still perceived as an instrumental mechanism for achieving concrete policy goals that member states acting singly cannot attain.⁵⁹ Its mode of legitimation is functional and administrative rather than principled and democratic. Fritz Scharpf’s well-known formulation that the EU counts on “output legitimacy” (according to which “political choices are legitimate if and because they effectively promote the common welfare of the constituency in question”) to secure the allegiance of its member states and citizens is still accurate.⁶⁰ Like many other multilateral institutions, the EU’s claim to authority is based on creating quantifiable policy gains such as harmonized trade and investment rules, competitive markets, global negotiating power, and regulation of cross-border hazards such as environmental degradation and criminal networks. Although its mandate is far broader than a functionally specialized multilateral regime such as the Universal Postal Union or the International

⁵⁷ Ulrich Sedelmeier, *Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession*, in “Journal of Common Market Studies”, vol. 52, no. 1, 2014, pp. 105-121, 108

⁵⁸ Council of the European Union (2014) General Affairs Council Press Release 16936/14 EN, 16/12/2014. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/146348.pdf

⁵⁹ Anand Menon and Stephen Weatherill, *Transnational Legitimacy in a Globalising World: How the European Union Rescues Its States*, in “West European Politics”, vol. 31, no. 3, 2008, pp. 397-416, 398.

⁶⁰ Scharpf, *Governing in Europe*, cit., p. 6; Renaud Dehousse, *Rediscovering Functionalism*, Harvard Jean Monnet Working Paper, Cambridge (MA) 2000, p. 8.

Civil Aviation Organization, the EU's returns are understood mainly in terms of material benefits rather than shared principles and values. This is a pronounced legacy of the technocratic path of integration that member states have chosen to pursue. Rather than forging a federal polity through extensive popular engagement and partisan contestation, as a long line of politicians from Spinelli to Fischer have urged, member states have advanced European integration by insulating ever greater swathes of policy-making from majoritarian influence.⁶¹

Although this strategy has been successful to a point, the functionalist basis of the EU's authority undermines its attempts to exercise political and constitutional oversight over member states. Having configured the EU's authority along a "problem-solving" pattern of legitimation,⁶² member states do not expect normative backtalk, let alone disciplinary action, concerning how they manage (or mismanage) their domestic political systems. In fact, matters of domestic constitutional integrity are deliberately *excluded* from the EU's scope of competence by Article 4(2) of TEU, which provides that "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." In other words, what the Treaty gives with Article 2, it effectively takes away with Article 4(2): the constitutional democratic standards the EU is tasked with safeguarding are subject to the EU's duty to refrain from encroaching on the constitutional "identity" of its member states.

It might be objected that subnational authoritarianism is a generic problem encountered by federal or composite polities such as the EU, which tend to lack effective mechanisms for correcting failures of democracy in their constituent units.⁶³ After all, even strong federal states are sometimes powerless to combat authoritarian patterns occurring on a sub-national level.⁶⁴ The best example is the failure of the US federal government in the aftermath of the Reconstruction Era to eradicate the system of racial domination in its southern states until the late twentieth century. Unlike the US federal government's relationship to the Jim Crow regime, however, the EU's failure to combat authoritarian trends in member states is not due to its *dearth* of influence over member states' policies. To the contrary, measured by the standards of conventional multilateral organi-

⁶¹ See, for instance, Altiero Spinelli and Ernesto Rossi [1941], *The Manifesto of Ventotene For a Free and United Europe*; Altiero Spinelli, *The American Constitutional Model and Attempts at European Unification*, in "The Federalist", vol. 47, no. 2, 2005, pp.115-125; Giandomenico Majone, *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth*, Oxford University Press, Oxford 2005.

⁶² This is, of course, something of a noble lie. In contrast to a postal union or aviation authority the tasks entrusted to the EU are not simple coordination problems that admit of Pareto-optimal solutions; instead, they are deeply contentious and politically fraught.

⁶³ R. Daniel Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, in "Government and Opposition", vol. 52, no. 2, 2017, pp. 211-238.

⁶⁴ Edward L. Gibson, *Boundary Control: Subnational Authoritarianism in Federal Democracies*, Cambridge University Press, New York 2012; Kelemen, *Europe's other democratic deficit*, cit.

zations, and perhaps even of federal polities, the EU has been strikingly effective at enforcing supranational legal and policy discipline. It makes use of extensive mechanisms for monitoring compliance, adjudicating disputes, and holding states to account over infringements. Substantively speaking, however, supranational enforcement is most effective vis-à-vis fiscal and market policies, and does not extend to key democratic or constitutional principles.⁶⁵

To appreciate this point, it is instructive to compare the EU's extensive powers of oversight over member states in budgetary matters with the weakness of remedies against grave violations of constitutional principles. The excessive deficit procedure (EDP) outlined in Article 126 of the treaty sets out extensive supranational monitoring and enforcement powers against unacceptable budget deficits and levels of public debt. Among other things, it allows the Council to assess whether an excessive deficit exists and to prescribe measures for reducing it within a given period (Art 126(6) and (7) TFEU). Where the member state in question fails to follow the Council's recommendations, the Council can take drastic measures including urging the European Investment Bank to restrict lending to the member state in question, requiring the state to make a deposit with the Union for a period of time, and finally, to fine the member state (Art 126(11) TFEU). Since 2004, the EDP has been invoked against all but two EU member states, and has more often than not been faithfully implemented by the states concerned.⁶⁶

In stark contrast, the Council has never exercised a similar supervisory role over violations of liberal and democratic principles, even though Article 7 gives it some latitude to do so. In other words, the emergence and persistence of anti-democratic practices within member states does not mean that the EU lacks influence over member state governments. As the EDP procedure shows, the EU is highly effective in exerting pressure on member states in what both sides consider to be among the EU's central areas of competence, namely, enforcing fiscal discipline. The EU's lack of comparable clout over member states concerning the principles enumerated in Article 2 suggests that neither side seriously considers the latter to be among the EU's actionable priorities.

It may be countered that despite their occasional missteps, the democratic institutions of EU member states are far more secure relative to other states in the region. Any cursory comparison between Poland and Ukraine, Lithuania and Belarus, Croatia and Serbia, Greece and Turkey suggests that the member state in each dyad adheres more consistently to the principles of liberal democracy than the non-member country. On this view, far from encouraging authoritarian tendencies, EU membership appears to bolster democratic consolidation. Unfortunately, however, comparisons of this sort overlook the key point that EU membership is not a treatment randomly assigned to states. Countries such as Ukraine, Moldova, Turkey, or Serbia cannot serve as the control group since their dem-

⁶⁵ Sedelmeier, *Anchoring Democracy from Above?*, cit., p. 105

⁶⁶ An up-to-date tabulation of EDP procedures applied against each member state along with the relevant legal documents is available at: http://ec.europa.eu/economy_finance/economic_governance/sgp/corrective_arm/index_en.htm

ocratic failings have kept them below the membership threshold in the first place. To assume that EU membership explains whatever differences remain between Poland and Ukraine in terms of liberal democratic standards is to ignore this crucial selection effect.

Similar difficulties hobble intra-EU comparisons, such as that between member states who have experienced anti-democratic episodes and those that have not. The particular domestic circumstances of each state will shape how it responds to the rigors of membership, such that some may be more likely to succumb to the authoritarian tendencies encouraged by the EU's institutional configuration than others. For a variety of reasons ranging from their political systems to economic performance, social cleavages, and historical and cultural contexts, some regimes may be more susceptible to taking authoritarian shortcuts than others.

Conclusion

In this essay, I have argued that while international organizations can support constitutional democracy, the EU's institutional structure works to weaken domestic constitutional constraints and can help to reinforce the most troubling aspects of sovereign prerogative. This is not to rehash the critique of international institutions as empty shells tossed around by mighty states, but to place renewed emphasis on the issue of institutional design. Multilateral institutions can enhance rather than undermine constitutional democracy to the extent that they can constrain the authoritarian impulses of the states that call them into being, an accomplishment that is feasible, but not assured. In the case of the EU, the deliberate strategy of putting technocratic, non-majoritarian institutions in charge of ever more significant domains of policy has had the democracy-eroding effect against which proponents of an alternative, avowedly federalist route to European integration such as Altiero Spinelli have long cautioned.