European “Federalism”
and its Encroachments on National Institutions

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The European Union is a supranational governance organization that is more federal than unitary but which, instead of a constitutionally established balance of powers, exhibits a dynamic confusion of powers. This institutional structure has not only served to subordinate member-states’ institutional structures, whether federal or unitary, and to alter their traditional balance of powers, it has also served to reduce national governmental autonomy in the name of a shared supranational authority, diminish national control over subnational units, and undermine democratic legitimacy at both the national and EU levels. It has had a differential effect on member states, with a greater disruptive impact on unitary states, such as France and Britain, than on federal states, such as Germany.

To the casual observer, the European Union’s basic institutional structure seems to resemble a typical federal system constituted on the basis of the separation of powers between the executive, legislature, and judiciary and of considerable autonomy for its constituent units. On closer look, however, it becomes clear that the European Union (EU) fits no traditional model of governance. Although the legislative decisions adopted at the center are the supreme law of the land for all constituent members, as in any federal system, only in the European Union are the constituent members almost completely in control of the legislation, in terms of both its approval (as members of the European Council and the Council of Ministers) and its implementation. Moreover, only the European Court of Justice has the power typical of the judiciary in a federal system. The European Parliament is

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weak in legislative power, given the primacy of the European Commission in the initiation and elaboration of legislation and of the Council of Ministers in its approval, while the Council of Ministers is weak in executive power, given the role of the European Union Commission in legislative initiative and enforcement. In fact, the European Union exhibits a dynamic "confusion" of powers insofar as the directly elected legislature is primarily consultative, the indirectly elected executive, which is made up of member-state representatives, plays mainly a legislative role, the bureaucracy takes on most executive functions, and the judiciary overlaps with the executive and legislature in its highly activist role. All of this, in turn, not only engenders the oft-noted "democratic deficit" within the European Union, it also creates a democratic deficit in the national arenas by undermining the democratic legitimacy of elected governments that are no longer accountable for many of the policies they implement.

For all member states, the problems of legitimacy and accountability stem largely from the loss of autonomy related to European integration, economic as well as institutional. The loss of economic autonomy has been dramatic, and has been a primary focus of scholarly research, but it is not the focus herein. The institutional losses are less obvious, but no less important. The European Union undermines member-state institutional autonomy not only through the treaty-related, agreed-upon subordination of member states to the European Union in exchange for the benefits of a shared supranational authority exercised through the European Council and the Council of Ministers but also through a more subtle process of erosion of national institutional power and control. This is related to the ever-growing number of decisions by the European Union Commission, the European Court of Justice, and European standard-setting bodies that take precedence, respectively, over the decisions of national ministries, national courts, and national standard-setting bodies as well as to the ever-widening range of actors, nongovernmental and governmental, subnational national and supranational, that participate in the formulation of policies, which must then be implemented by national governments.


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What is more, within the European Union, some countries have felt the strain of institutional adaptation more than others, mainly because of differences of institutional fit. Whatever the confusion of its own powers, in the exercise of those powers the quasi-federal European Union generally not only reduces member-state autonomy, it also reinforces the separation of powers between the executive, legislature, and judiciary and diminishes central control over subnational units.

Member-state adjustment to this has been harder in some ways for unitary states such as France and Britain, where the traditionally autonomous executive predominates over the legislature and judiciary as well as over subnational units, than for federal states such as Germany, where the executive has never had much autonomy while the legislature and judiciary already benefit from a constitutionally fixed separation of powers and subnational units enjoy constitutionally guaranteed autonomy. This is because in federal states with a greater dispersion of power among the various branches and levels of government, European Union incursions into national autonomy and control have not significantly altered the national balance of powers (although this did demand some internal readjustments), while the addition of European Union governance essentially fits with traditional notions of compounded representation and shared accountability.7 In unitary states with a greater concentration of power in the executive, by contrast, not only has the traditional balance of power been altered in consequence of the loss of executive autonomy and the increasing separation of powers but the addition of European Union governance also basically challenges the more simple (as in noncompounded) national understandings of representation and accountability that focus on the executive.

These differences in member-states’ institutional adaptation to the European Union suggest that one cannot generally claim that the European Union strengthens the state by enhancing the powers of the executive to the detriment of the legislature and societal interests.8 Although one might be able to say this for the most heroic of policies, such as treaty negotiations, in most other cases (and for the bulk of European Union decisionmaking) what the state (meaning the executive) may gain in power over some national actors it loses in autonomy with respect to supranational actors and in power or control over other national and subnational actors. What is more, such gains and losses differ in unitary states, where the executive does not gain much in its often already significant powers over the legislature while it loses much autonomy as well as power over the judi-

7On compounded representation, see Joanne Brzinski, Thomas D. Lancaster, and Christian Tuschhoff, “Federalism and Compounded Representation in Western Europe” (paper presented at the First Workshop on Federalism and Compounded Representation, Emory University, Atlanta, GA, 3-6 October 1997).

ciary and subnational units, from federal states, where the executive, legislature, and judiciary all lose autonomy while none gain significant power over one another or over subnational units.

Thus, this article starts from the premise that governance in the European Union is more multi-level than it is intergovernmental, given the growing numbers of supranational, national, and subnational institutional actors that have gained decisionmaking clout in an ever-expanding system of mutual dependencies with mixed patterns of contestation and collaboration.9 It further suggests that the European Union's multi-level governance system is also multi-form, given its differing impact on different branches and levels of government in unitary versus federal states. And it therefore argues that the "compounded representation" present in all federal systems10 is only further confounded in the European Union, as the European Union's own compounded representation has a differential impact on national governance structures and the conceptions of democratic representation and accountability that underpin them.

In order to demonstrate this, this study makes three interrelated sets of arguments: (1) the European Union is a quasi-federal system with a confusion of powers; (2) the European Union generally undermines national autonomy and control; and (3) the European Union has a differential impact on national institutional structures, with greater adaptational difficulties for unitary than federal states. These arguments are presented with regard first to the legislative function of the European Union and the problems its raises for representation; second, to the executive function of the European Union and the problems it creates for national executive autonomy at the national and EU levels as well as for national executive control over subnational governments; and, finally, to the judicial function of the EU and the rise of national court independence.

One caveat, however, before beginning. Although the language here is of loss, whether of autonomy, of control, of representativeness, or of legitimacy, the author does not intend to suggest that the European Union is therefore necessarily negative in its impact on member states. Much the contrary, the losses in national autonomy and control have been balanced out by gains not only in the shared supranational authority and control created by common European agreements, regulations, and directives that serve to enhance all European Union member-states’ ability to respond to global as well as European competitive pressures but also in individual citizen rights through the general protections and uniform application of European law and rules by European and national institutions. Another way to think about this would be in terms of adaptation pressures. Losses

10See Brzinski, Lancaster, and Tuschhoff, "Federalism and Compounded Representation."
and gains, however, better dramatize the effects of European integration.

**THE LEGISLATIVE FUNCTION AND THE PROBLEM OF REPRESENTATION**

In the European Union, the legislative function is perhaps the most confusing, given overlapping institutional responsibilities. This function raises the most problems for democratic legitimacy within the national as well as the EU arenas. This is because the European Union has served to erode national parliamentary power at the same time that it has created no like parliamentary power for the EU. Nor could it, without risking even greater problems of democratic legitimacy and further erosion of national parliamentary power.

The European Parliament (EP), unlike most parliaments, performs primarily a consultative role even though its members are the only directly elected European Union officials. The EP has minimal legislative powers compared to both the Council of Ministers, which has responsibility for final legislative approval, and the Commission, which has powers of initiation and elaboration of proposed legislation. Moreover, the EP's representativeness is often questioned, given the lack of Europe-wide elections and the fact that European elections within member states tend to be second-order elections, with often disappointing turnouts from voters who cast their ballots more in response to domestic politics than to European dynamics.

The EP's powers and representativeness have increased over time, however, with progressive gains in budgetary responsibility beginning in 1975, the cooperation procedure introduced with the Single European Act and extended with the Maastricht Treaty, and codecision introduced with the Maastricht Treaty and extended with the Amsterdam Treaty. Even so, the democratic deficit remains a problem, with no easy solutions to the question of how to expand representation and, with it, democratic accountability or legitimacy. This is because any increase in the European Parliament's powers decreases those of the nation-state, as represented in the Council of Ministers (and especially the powers of the smaller countries, which have greater voice through the Council than they do through the Parliament, given differences in population size). What is more, any such increase in parliamentary power risks usurping the powers of national parliaments, and would in any case require a rethinking of all the other European Union institutions and their legislative functions.11 In the interim, the EP remains the least powerful of European Union institutions, and the legislative function for the most part goes on elsewhere.

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The primary legislative function is actually left mainly to the member-state ministers in the Council of Ministers, which is the locus of final decisionmaking and also, theoretically, the locus of the representation of national interest. In practice, however, national interest is often diffused in the Council's decisionmaking process, with the "community method" ensuring that although decisionmakers in the Council do not necessarily transfer their loyalties to the European Union, they do see themselves as part of a collective system of decisionmaking with "specific common concerns and shared commitments to the collective arena." What is more, the Council's legitimacy in carrying out the legislative function has been increasingly questioned, as evident from national executives' growing difficulty in ensuring ratification of Council decisions.

The problems of legitimacy, moreover, are joined by major problems of accountability, given that the Council of Ministers is much less transparent than the Commission or the Parliament, and it lacks any significant democratic control from either European or national actors. At the same time that the European Parliament does not have the power to exercise control over the Council of Ministers, national parliaments have minimal control over their own executives acting in the Council of Ministers. National parliaments are generally ill-informed, if they are informed at all, not only of government positions before the decision but also of what stance they took in the negotiations, given the secrecy rule that forbids even minutes being taken during the meetings. This means that they cannot anticipate and respond to EU initiatives before they come to the Council. But even if national parliaments were kept informed, this would not necessarily affect the outcome, given the secrecy in the Council of Ministers, the ability to agree to "package deals," or log-rolling, and qualified majority voting.

Whereas national parliaments are largely left out of the final decisionmaking process in the Council of Ministers, national executives are not only the final decisionmaking power in the Council of Ministers, they are also firmly ensconced in the entire process of elaboration of legislation in the Commission. Through the COREPER, or the Permanent Representation, national civil servants ensure high-level coordination within the domestic policy system and between it and the EU Commission, ensuring that the executive branch of national governments plays a significant role in legislative elaboration. Moreover, through "comitology," or the oversight committees set up by the Council that play an advisory, management, or

regulatory role for the Commission, member-states’ executives may also constrain Commission decisions.16

But the Commission, made up of unelected civil servants, is the main focus of legislative initiative and oversight. It is here that one finds the kind of bargaining that generally takes place in the duly elected legislatures of pluralist systems, where interest groups are actively involved in the policy formulation process.17 Because of the EU Commission’s central legislative role, some observers have suggested increasing its representativeness and legitimacy by directly electing it, although this presents both practical and theoretical difficulties.18 Even if this were practicable, the problems of legitimacy and accountability would remain with regard not only to the European Parliament but also to the parliaments of the memberstates.

All member states have experienced a diminution in parliamentary power as European integration has progressed. This is related not so much to the presence of the European Parliament (although if it were to increase its own powers, the powers of member-states’ parliaments would naturally diminish in relation to it) as to the way in which the European Union has taken over legislative powers traditionally exercised by national parliaments in such areas as economic policy, trade policy, tariff policy, and agricultural policy. National parliaments suffer from a lack of authoritative power over transnational policymaking, which is generally the domain of the national executives; they labor under the burden of a lack of information on European Union developments; and they lack control over policy decisions made in the Council by their own member governments, as noted above.19 Finally, because the role of national legislatures becomes increasingly one of translating into national law European Union directives elaborated in the EU Commission and approved by national executives in the Council of Ministers, their contribution to government is less and less one of initiation and deliberation, and their power next to that of the executive diminishes accordingly.

Within this general context of the reduction in parliament’s powers of initiation, deliberation, and approval, however, different countries’ parliaments have experienced differing degrees of loss of powers. In federal states such as Germany, the loss has been less significant than in most unitary

states, mainly because of Parliament-led adjustments that reinforce powers that had eroded as a result of European integration. In unitary states where power has been highly concentrated in the executive, as in France and Britain, no such reinforcement has taken place, and Parliament, which has never had much independent power as long as the government had a solid majority and could maintain party discipline, has lost even more power with integration.

In unitary France, where Parliament has always been severely limited in its powers of initiative or oversight, European integration has served to limit its power even further, despite reforms attendant upon the Maastricht Treaty. What is more, this loss of power has only relatively recently become a matter of concern or debate. In the mid-1970s, of all the parliaments of the nine member-states, the French alone were seemingly little bothered by the possible encroachment of the EC on its legislative powers and its lack of information.20 This changed slowly, however, in the late 1970s with parliamentary délégations set up to keep the chambers informed of European Community activities, in 1990 with their strengthening, and in 1992 with the amendment to the Constitution following the Maastricht Treaty ratification which obligates the government to inform Parliament of all European Community legislative proposals prior to a decision, although it does not bind the government to any resulting parliamentary resolutions.21 But this has done little so far to increase French parliamentary influence over EU decisions. Parliament continues to be something of a rubber stamp for directives issued from Brussels and negotiated by the French executive in the Council of Ministers.22 Moreover, because there has been a tacit agreement among mainstream parties and politicians that questioning of European integration would be taboo, French MPs have given up their voice in matters of oversight in addition to their powers of approval (given that they have never had much power of initiation).23

In unitary Britain, by contrast, where Parliament has always had greater powers of oversight and has always exercised more voice, the erosion of powers has also been a greater cause for concern. This has been true not only for members of Parliament, intent on maintaining their traditional oversight role, but also for the executive which, given the lesser party discipline and the more vocal, not to say fractious, nature of the British

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Parliament, has been forced to focus more on national self-interest in European Union negotiations (or at least to proclaim so publicly) in order to forestall criticism and to ensure backbench loyalty. The British Parliament, in fact, which over the past thirty years has increased its influence over the executive due to internal dynamics related to party politics, has also over time had more control over executive action with regard to the EC than France. This is so despite the fact that Britain, too, has a unitary state with power concentrated in the executive ensuring that as long as the government has a solid majority, there is little that members of parliament can do. But unlike France, where parliamentary committees had little information and paid little attention to European matters until relatively recently, the British Parliament for most of United Kingdom membership in the EC has sought to scrutinize EC documents and to influence deliberations in the Council of Ministers. Although the lack of a consensus on the merits of EC membership both within and between parties undermined Parliament's ability to influence government positions, such divisions have forced governments to anticipate parliamentary reaction in cases of changes in treaties, especially in the early 1990s with the slim Conservative majority. Therefore, by exercising its voice on European integration, the British Parliament has maintained a larger modicum of control over the executive than the French despite the fact that it, too, has lost powers of deliberation and approval on European-related legislation.

Not all unitary states, however, have experienced the same degree of erosion in parliamentary power. In unitary Denmark, the erosion of parliamentary power has been stemmed much more than in France or Great Britain, mainly because, from the very beginning of the country's European Union membership, the traditionally stronger Danish parliament has scrutinized and largely controlled the policymaking process. The parliament's greater strength has to do with an institutional structure in which power has traditionally never been as concentrated in the executive as in France or Great Britain, as well as with a culture and history in which the Danes, much like the British, have come to expect more from their parliaments than the French, who have never looked to parliament as a counterbalance to the executive or as a voice for public concerns. The unitary nature of the state, however, remains a differentiating factor, as a comparison of unitary Denmark with federal Germany makes clear. For parliament in federal Germany, unlike in unitary Denmark, has parliamentary mechanisms and constitutional guarantees that enable it to reinforce its powers constitutionally (rather than by politics or precedent) and to


exercise control over ministers’ actions in the Council of Ministers.

In federal Germany, although the parliament, as in France and Britain, has lost legislative initiation, deliberation, and approval powers to Brussels and is also at a disadvantage with regard to information on EU developments and on its own government’s actions in the Council of Ministers, it has nevertheless retained more control over the executive than in either France or even the United Kingdom. The constitutive nature of the German federal executive alone (leaving aside the fact that it is weaker than the French and British unitary executives not only because of more limited formal powers but also because of the need for coalition government in the executive and the split in power between the conservative-controlled Bundestag and the social democrat-controlled Bundesrat) ensures greater consultation with parliament in negotiations before the executive signs anything. Moreover, some of the problems with the loss of power and control were reduced with the reforms in 1992 following the Maastricht Treaty, in particular those ensuring that the federal government cannot transfer powers to the European Union without a two-thirds majority in both the Bundesrat (Federal Council of the Länder) and the Bundestag, and that in areas of Land jurisdiction, the vote of the Bundesrat is binding on the federal government in Council of Ministers decisions. This is problematic, however, for the coherence of German European policy, given that Länder representatives can now sit and speak for Germany in the Council of Ministers. Moreover, it has generally slowed executive response time and diminished its initiative and bargaining independence. By the same token, however, this can strengthen it in negotiations because “tied hands” also make for more powerful negotiators (a tactic the United States has used effectively time and again in foreign-trade policy negotiations).

The parliaments of different member states, then, have lost power to differing degrees as a result of European integration, with those in unitary states with greater concentration of power generally more effected than those in federal states with greater dispersion of power. But in all member-states, the balance of power between parliament and the executive has changed, as Ministers go to Brussels to negotiate in the Council of ministers laws that in the past were the purview of national parliaments alone, and that now will be converted by national parliaments into national laws. This is not to suggest that the executive in member-states has been strengthened overall as a result of its supranational authority, because, generally speaking what it may have gained in power over the legislature, it has lost to the European Union in autonomy of decisionmaking.

38Klaus H. Goetz and Peter J. Cullen, “The Basic Law after Unification: Continued Centrality or Declining Force?” German Politics 3 (December 1993): 22.
THE EXECUTIVE FUNCTION AND THE LOSS OF GOVERNMENTAL AUTONOMY AND SUBNATIONAL CONTROL

Although in addition to its legislative function, the Council of Ministers formally holds the central executive role in the European Union, it shares power with the EU Commission, which performs the primary executive function. It is the EU Commission, with its unelected civil servants and its policymaking powers of both initiation and enforcement, that primarily undermines the national autonomy of member-states’ executives as well as their control over subnational authorities.

Through its agenda-setting powers and its monopoly on the right of initiative to the Council of Ministers, the Commission has tremendous leadership capacity. Like many executives in federal systems, it acts as a “purposeful opportunist” by effecting change without dominating the process, and it plays the role of “policy entrepreneur” by finding windows of opportunity through which to push through new policies while enhancing its own powers. Unlike most executives, however, it is not the representative of an elected majority fulfilling an electoral mandate; and therefore, it must look elsewhere for democratic legitimation. Because of this, it is vulnerable to other European Union institutions’ policymaking pressures.

Although the EU Commission is the central policymaking authority, given the powers derived from its role as agenda setter, initiator of legislation, and collector and processor of information, other institutional actors such as the European Council and the European Parliament have been finding ways of honing in on the Commission’s legally mandated monopoly on policy initiation. The European Council manages this through general policy declarations that contain detailed prewritten drafts and through “soft law,” through the ratification of common opinions, resolutions, agreements, and recommendations. The European Parliament accomplishes this by its Maastricht Treaty right to request Commission production of proposals as well as through the representation of “citizen” concerns with the EU Commission. In addition, state executives not only play a significant role in spurring Commission initiatives, but they also pass on any such initiatives as members of the Council of Ministers. In this latter capacity, though they

are not the sovereign power that some integration theorists suggest, given qualified majority voting in many spheres and the weight of Commission technical expertise that makes objections on purely political grounds difficult. \(^{35}\) Finally, the ECJ also makes and implements policy, setting precedents that have expanded its own powers as well as those of the EU Commission.

But, however much the EU Commission finds its executive autonomy undermined by other European Union institutions and actors, through its executive role and its interest-based access, it undermines the autonomy of national executives.

The Loss of Governmental Autonomy

The loss of governmental autonomy resulting from the fact that each member-state in the Council of Ministers is only one of fifteen—here one could argue that nation-states give up a bit of national autonomy to gain supranational authority—is only compounded by the initiation and enforcement powers of the EU Commission. Although member-states are quite clearly major players in the formulation of policy, in particular in the European Council when it comes to setting grand strategies or in the Council of Ministers when unanimity rules apply, to say nothing about national nongovernmental interests that seek to influence policy content and agenda, the Commission nonetheless plays the key role as policy initiator as well as enforcer. Moreover, with the aid of ECJ decisions, or even simply the threat of potential decisions, it has been able to overcome national governments’ opposition to further European Union regulation in a wide range of areas, in particular with regard to competition policy and deregulation in formerly protected sectors, such as telecommunications, road haulage, electricity, and air transport. \(^{36}\)

Many Commission actions, moreover, are taken without the Council of Ministers’ official review, and thus represent an even greater threat to government autonomy. The Directorate-General on Competition, to take only one example, has authority independent of the Council of Ministers to make judgments on the largest business mergers and acquisitions and on state aid to business. In several instances, it has not allowed governments to provide grants to nationalized enterprises on the ground that they were disguised subsidies (e.g., the de Havilland case).

Admittedly, the principle of subsidiarity has minimized many such threats to governmental autonomy by seeking to ensure that regulation occurs at the lowest administrative level possible. As a result, the EC/EU has had a marked preference for standardization either through directives, which

\(^{35}\)See the critique by Marks, Hooghe, and Blank, “European Integration since the 1980s.”

leaves national governments with the responsibility for transposing the standard into the national legal system and implementing it, or through mutual recognition. Both approaches provide for greater flexibility than any set of across-the-board regulations. But both approaches have their problems with regard to national autonomy (although great benefits, of course, in overcoming deadlock). Standard-setting in the EC/EU since the institution of qualified majority voting in the EC has the potential of imposing on individual member-states decisions which they oppose, and has already encouraged compromises in areas of product regulation that had been blocked for years. Moreover, although the widespread use of the principle of mutual recognition has diminished threats to national autonomy, it has in their place raised the specter of triggering a “race to bottom” where companies move their production facilities to countries with the lowest wages, worker safety, and product-quality standards, although this has yet to occur in practice.

The extension of standard-setting to a range of domains outside the original charter—such as environmental protection (in the late 1960s), occupational safety and health (in the mid-1980s), and consumer protection (in the 1980s), all of which were extended in the 1990s with the Maastricht Treaty—has also diminished national governmental autonomy. But these were done with member-state agreement. More significant in terms of encroachments on governmental autonomy is the fact that the EU Commission has used standards in one area to extend its jurisdiction over other areas, for example, to expand the concept of “working environment” to equipment not originally considered related to safety in the workplace (e.g., display-screen equipment). Most problematic in this regard has been the extension of jurisdiction in areas in which countries have expressly gained opt-outs from Commission oversight, as in the case of the limits on working hours, where the 48-hour work week (later upheld by the ECJ) was applied to Britain, despite its opt-out at the time on the Social Chapter.

Only in the welfare and labor areas is governmental autonomy for the most part undiminished. Memberstates have been essentially left alone to deal with the crisis of the welfare state, although even here there have been increasing spillover effects, as competition rules on pharmaceuticals, for example, have an impact on national health-service costs, or the free movement of professionals and services break down borders even with


39Majone, “The European Commission as Regulator,” 75-76.

regard to social delivery systems.\textsuperscript{41} Member states have also had to cope individually with the problems of the labor market, and in particular the high rate of unemployment. The Employment Chapter of the Amsterdam Treaty is only a very minor step in the direction of coordination in this domain, because all it does is to promote the sharing of information among member states of "best practices" and encourage member states to set targets for the reduction of unemployment.

Thus, in those policy areas where nation-states currently have the greatest difficulties, they retain sole jurisdiction. Moreover, the national constituencies in these areas themselves have little access or impact at the European level. Those served by the welfare state—in particular the poor, the elderly, the indigent, and the disabled—have no Europe-wide organizations to speak of. Labor, although present in the European arena, has little effective input into the European policymaking process by comparison with other constituencies, such as business and professional interests, which have had tremendous access and influence. Government autonomy, in fact, is undermined not only by EU institutions per se, but also by the fact that it is no longer alone in bargaining at the EU level, because organized interests of its own as well as other countries, and in particular business and professional interests, play a role in the elaboration of EU legislation through the Commission.\textsuperscript{42} Consequently, what executives may have gained in national powers over the legislature, they have lost in autonomy with regard not only to the supranational institutions of the EU but also to the national constituencies that are supranational actors in the EU.

Those integration theorists who argue that European integration has strengthened the nation-state, meaning the executive, then, take a very partial view of the "strengthening" of the executive.\textsuperscript{43} Although the power of national executives has increased at the European level, as the bilateral negotiations of the past have given way to the common European policies of the present, their autonomy has diminished, as they must negotiate with others at the supranational level on the approval of policies that in the past had been theirs alone. This is more complicated than a simple "pooling of sovereignty" among state executives who exercise a shared supranational authority through the Council of Ministers\textsuperscript{44} because the "others" with which they must negotiate are not solely executives, but include a whole range of EU, national, and subnational actors, such that national executives no longer monopolize European policymaking or the aggregation of domestic interests.

What is more, in their general statement about the rise in executive power

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  \item \textsuperscript{43}See Milward, \textit{European Rescue}, Moravcsik, "Preferences and Power."
  \item \textsuperscript{44}Robert O. Keohane and Stanley Hoffmann, "Introduction," \textit{New European Community}, eds. Keohane and Hoffmann.
\end{itemize}
resulting from a "two-level strategy" to overcome domestic opposition—first, through its mantle of legitimacy and, second, through the creation of policies by way of an insulated process that offers national legislatures and societal interests few opportunities for comment or change.\textsuperscript{45} these integration theorists fail to differentiate among kinds of policies related to European integration.\textsuperscript{46} If one considers the most heroic of European initiatives, whether the Single Market Act or the Maastricht Treaty, which are the object of most of the attention of international relations theorists, then the statement is not wrong. This is where the executive appears most to impose, negotiating behind closed doors for long nights, with no minutes of the meetings and no obligations for transparency, and making deals that national legislatures and societal interests appear bound to accept. Even here, however, the national referenda taken after Maastricht suggest that this kind of executive power to impose is no longer possible, given increasing demands for national parliamentary and societal input into such decisions. Most important, however, these most heroic policies are few and far between, especially compared to the more everyday policies that follow from these heroic policies, namely, the already negotiated treaties, and often do not even reach the Council of Ministers. This is where a large number of actors are involved, and representatives of member states, although the most privileged actors once items move up to the Council, are not necessarily the most influential when it comes to the drafting of legislation—where civil servants and interest groups (business in particular) are most important.

Finally, integration theorists also overlook the fact that the loss in executive autonomy or the gain in powers with regard to European integration is experienced differently in member states, in particular between federal and unitary states. This is mainly because of differences in how the EU affects the national executive's relative internal autonomy with regard to other national government and collective actors as well as the executive's relative powers in policymaking. For unitary states, in fact, the notion of strengthening the state is a hollow concept. For one, although the executive may have enhanced its powers with regard to the legislature, this is insignificant because the executive always had great powers here. Second, the increase in powers over societal interests where they occur can hardly be seen as a strengthening of the state, because it effectively means a loss of the executive's exclusive responsibility in policy formulation (given its loss of autonomy to the EU) and of its flexibility for policy implementation (given the EU's regulatory model). For federal states, by comparison, the notion of strengthening the state barely applies because neither the balance


\textsuperscript{46}Although Andrew Moravcsik ("Why the European Community Strengthens the State: Domestic Politics and International Cooperation" Conference of Europeanists, Chicago, 1994) does not argue that the EU strengthens the state under all conditions, he specifies no conditions where this is not the case.
of powers between the executive and the legislature nor the policymaking processes and societal involvement have been greatly altered as a result of European integration.

The relative loss of internal autonomy in decisionmaking is probably most problematic for a unitary state such as France because it unbalances the traditional power relations among government actors in ways that have significant implications for French policymaking and notions of democratic legitimacy. During the Fifth Republic, the executive has had virtual carte blanche in policymaking because of a Parliament that has acted as a rubber-stamp for the executive’s legislative initiatives (as noted above), a judiciary that has generally been subordinated to the executive, subnational governments that have been under the control of the center, and societal interests that have for the most part been allowed in only at the policy implementation stage. In this context, the executive power was not just the central authority, it was also the embodiment of the French nation, one and indivisible, with representation and accountability all focused on the executive.

With European integration, this concentration of authority in the executive, and with it traditional French notions of democratic legitimacy, are under challenge. Within this context, the gains in executive power over the legislature are relatively insignificant, given the large amount of power the executive has traditionally wielded over the legislature. By contrast, as will be discussed below, the increasing independence of the judiciary is something new and unsettling to the executive’s autonomy, albeit beneficial to societal interests that can find another way into the system, whereas the loss of control over subnational units is not so unsettling, given that devolution had more of an internal push than an external pull. Most important, however, is the diminution in the executive’s traditional control over the policymaking process. In policy formulation, the executive has lost autonomy not only because of its participation in a shared supranational authority but also because societal interests, French and others, have a way into the process at the supranational level. In policy implementation, moreover, it has lost flexibility because laws that in the past were as often as not bent by the executive in the implementation to accommodate societal interests and to avoid confrontation can no longer be bent so easily given the EU’s regulatory model, which allows no exceptions to the rule.47 Other institutions, such as the Bank of France, have also gained in statutory independence from the French government in response, in large measure, to the requirements of monetary integration (although it will be subordinated to the European central bank, once it takes over). All of these changes, in brief, undermine not just France’s simple, executive-centered notions of representation and accountability but also, to some

47See Schmidt, "Loosening the Ties"; Schmidt, "National Patterns of Governance."
extent, the democratic basis of the national policy processes themselves.

Although the British executive has also lost internal autonomy in decisionmaking, it has lost comparatively less than in France. This is mainly because the executive has always been less able to impose on the British Parliament, which has traditionally exercised a more powerful role in terms of oversight and representation of public concerns (as noted above), and on the British judiciary, which has traditionally had significant independence (discussed below), although the executive has imposed even more on subnational governments (which it largely eliminated in the Thatcher years, see also below). Moreover, because societal interests have always had a bit more access in the policy formulation process through parliamentary lobbying, their supranational access has not diminished British executive autonomy in this regard quite as much as the French. But the British, too, have experienced a great loss in flexibility in policy implementation. This is not so much because of an inability to bend the law in order to accommodate societal interests, something the British would in any case not do (given the British respect for the rule of law) as it is because of the greater amount of law generated by the EU, something the British executive had previously managed to limit through its emphasis on informal arrangements that served to accommodate societal interests.48 Finally, in preparation for possible membership in the European Monetary Union, the Bank of England has begun to gain its independence (although it will have to submit to the European Central Bank if and when the United Kingdom joins EMU). For the British, then, the challenges to traditional notions of executive-centered representation with regard to the internal division of power have been less significant than to those of the French, mainly because Britain’s somewhat greater dispersion of power within a unitary state has meant less change. It is the external division of power, between the national executive and the EU, which is the main concern of the British executive as defender of parliamentary sovereignty, and the main challenge to Britain’s somewhat less simple, but still not compounded, notions of democratic representation and accountability.

By comparison with French or British executives, the German executive has experienced the least relative loss of internal autonomy with respect to other national government or societal actors, mainly because it never had much to begin with. Germany’s “semi-sovereign” federal state, in fact, cannot be autonomous in the manner of more unitary states. This is because the German executive has little power to impose, given the autonomous powers of other national and subnational governmental institutions, including the constitutionally guaranteed powers of the Ländere, the constitutionally established independence of the Bundesbank, the legally separate collective-bargaining powers of the social partners, the separate

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48 Schmidt, “National Patterns of Governance.”
jurisdictional powers of the courts, the constitutionally rebalanced powers of the Bundesrat subsequent to the Maastricht Treaty, and so on. But although Germany is a highly decentralized state with a polycentric structure, it is one characterized by "substantive harmonization of policies and highly developed procedural uniformity," mainly because the decentralized actors' institutional autonomy is limited by their integration into a multilateral, intergovernmental bargaining system and polycentric regional networks.\(^49\) This makes not only for a compounded notion of representation but also means a kind of shared accountability for all the actors involved in policymaking. Therefore, to the extent that German institutional actors are now part of the larger, quasi-federal decisionmaking system that is the EU,\(^50\) this additional level of decisionmaking basically complements traditional German notions of democratic representation, by compounding their already compounded understanding of representation.

This is not to suggest, however, that Germany has not also had difficulties in adapting to the larger EU context. Because policy formulation occurs increasingly at the supranational level with a larger group of actors, and because in certain cases of policy implementation new regulatory relationships replace the traditional corporatist accommodations, German institutional actors' shared autonomy has in fact diminished along with the flexibility that comes from the German-specific process of interest accommodation. Moreover, certain institutions are losing their traditional autonomy, most notably the Bundesbank. With the European central bank officially in business, the Bundesbank will lose its lead role not only in Germany but also in Europe more generally. Finally, although the societal interests (primarily big business) that have gained supranational access have not reduced an executive autonomy that was in any case never there, they have increased their influence to the detriment of the traditional national balance of power.

**The Loss of Control Over Subnational Authorities**

As a result of European integration, the relationships between national executives and subnational authorities (primarily regional) have also become more complicated. Although internal, decentralizing reforms preceding the changes related to European integration are the most significant factor related to the diminution in national control over subnational authorities, increasing subnational access to European decision making bodies and resources has also served to diminish subnational


subordination to central authorities. But at the same time that European integration has added to subnational authorities’ growing independence, it has also diminished their autonomy, in particular with regard to EU rules governing a whole range of areas that regions must implement. Moreover, here too, there are differences between federal and unitary states, with the loss of executive control over subnational authorities in unitary states being a matter of greater concern than for federal states.

European integration is certainly not the primary reason for the loss of national executive control over subnational authorities. While subnational units in federal states such as Germany or Austria have always benefited from substantial, constitutionally guaranteed autonomy that ensures limited executive control, the decentralizing or “federalizing” reforms of the 1970s and 1980s that affected most unitary member states except Britain substantially diminished national executive control over subnational authorities. The Italian regions gained significant independent powers in the early 1970s; the Spanish Autonomous Communities even acquired more significant power along with quasi-federal autonomy, or an “asymmetrical federalism,” during the early 1980s. The early 1980s’ reforms of the French regions gave them less power or autonomy, because they are not independent legislative bodies in the manner of Italy or Spain, but they are still significant for France, given that they had been no more than administrative units of the central government. Only Britain remains without significant regional authorities, the country having recentralized in the 1980s, although even here, decentralization has begun under the Labour government, with devolution for Scotland and Wales.

European integration has generally reinforced this trend toward greater subnational independence through subnational authorities’ membership in the Committee of the Regions, the growing role of the structural funds, and the increasing presence of subnational authorities on relevant EU committees. The participation of subnational authorities in EU-related activities varies, however, depending in large measure on central executives’ decisions on the extent of access to be allowed subnational actors, which is in turn related to the institutional structures of member states. In states with more federal or decentralized arrangements, the executive is generally more likely to give up control over its subnational constituencies than those with more unitary or centralized arrangements. In regional planning, for example, the most federalized states, Germany and Belgium,

made their regional authorities basically responsible for regional development plans while in recently federalized Spain, the central government framed the process, despite much regional involvement in planning. By contrast, in the more unitary states such as France, Greece, Ireland, and the United Kingdom, the central governments dominated, with subnational actors playing a weak or insignificant role.  

Subnational authorities' greater independence from central executives depends not only on the executive's granting of permission on EU access but also on subnational authorities' own interest and capacity. Thus, although the subnational authorities of most member states have increasingly participated on European committees on a vast number of issues, this has long been the case for the federal or quasi-federal states such as Germany and Belgium and has only more recently also involved those of more unitary states such as France. Such participation, however, does not extend to all subnational authorities of any given member state: The German Länders, for example, are well represented on a wide range of committees, but that representation comes primarily from the richest of the three Länder operating (so they say) in the interests of the rest. The growing independence of subnational authorities, then, is still related to questions of national institutional structure, with the more unitary and centralized states generally having less independence or capacity than federal states. For all states, however, growing independence from national authority, to whatever degree, has been balanced out by a loss of autonomy with respect to supranational authority. The EU increasingly encroaches in a number of areas, including the application of technical and safety standards, workplace requirements, public procurement, and in regional aids to industry, which the EU limits if they do not meet EU guidelines for regional assistance. Within this context, however, it is the more federal and decentralized states that have experienced greater losses of autonomy, since they have traditionally had more autonomy and have been able to decide more for themselves. For Germany, for example, the EU decision against Saxony's aid to Volkswagen nearly precipitated a crisis of national sovereignty.

What is more, in certain federal states, the executive actually increased its central control over subnational authorities as a result of European integration. In Spain in particular, European integration has served to moderate the extreme form of decentralization instituted in the 1980s, enabling the state to reassert some central control not only through its sole powers of negotiation at the EU level but also through its centralized faculties

54 Marks, "Exploring and Explaining Cohesion Policy."
of control, surveillance, and implementation in cases of inactivity or default by the Autonomous Communities.\textsuperscript{56} In Germany, too, recentralization has occurred, although it has been much more short-lived. Although prior to the Maastricht Treaty, the executive had indeed gained enhanced powers over the \textit{Länder} due to its exclusive participation in decisionmaking in the Council of Ministers, this has been offset since then by the constitutional amendment related to the Maastricht Treaty which institutionalized \textit{Länder} direct participation in EU policymaking and enhanced their scrutiny over national policymaking (to which the \textit{Länder} agreed only in return for that amendment).\textsuperscript{57}

Other federal systems in Europe, such as the Austrian system, have benefited from the German experience. Its \textit{Länder} made certain even prior to accession to membership in the EU in 1995 on a procedure for intrastate participation in EU decisionmaking.\textsuperscript{58} In unitary systems that have not undergone any federalizing reforms, of course, no such cooperative procedures exist for subnational governments to influence directly national decisionmaking at the EU level. Although in unitary states, executive control has also diminished in consequence of EU access and resources as well as decentralizing reforms, the central government nevertheless maintains much greater control than in any federal system. Subnational authorities have none of the autonomy of the German \textit{Länder} and nowhere near their power, although they too have grown in independence in recent years.

In brief, subnational governments have become increasingly independent actors at the EU level, as European integration has diminished national governments’ subnational control along with their autonomy. These are primarily a result of the expanding powers of the EU Commission in policy initiation and enforcement and of the growing direct linkages between it and non-national government actors. Similar losses of autonomy and control are a consequence of the expanding purview of the European Court of Justice.

\textbf{THE JUDICIAL FUNCTION AND THE RISE OF COURT INDEPENDENCE}

Only the European Court of Justice seems to occupy the role that traditional democratic theory gives to supreme judicial courts, but it is one that the ECJ has conferred on itself.\textsuperscript{59} Much like the EU Commission, it too


\textsuperscript{57}Uwe Thaysen, "The Bundesrat, the \textit{Länder} and German Federalism," \textit{German Issues} 15 (Washington, D.C.: American Institute for Contemporary German Studies, 1994).


\textsuperscript{59}See the brief account in Schmidt, "European Integration and Democracy."
acts as a "purposeful opportunist." It has also played a leadership role in expanding the purview of the EC/EU, in the 1960s, through decisions that established Community law precedence over national law; in the 1970s, through decisions that paved the way for EC expansion in such social regulatory areas as environment, health and safety, and labor mobility; and in the 1980s, through decisions that promoted expansion in economic regulation through the internal market. In its leadership role, however, the ECJ has gone way beyond what we are generally used to even from activist supreme courts in federal systems that take the loosest constructionist approach to their constitutions. In so doing, it has not only encroached on the powers and prerogatives of national executives but it has also served to subordinate national judicial authorities even as it has increased their independence not only from national executives but also from one another, with in many instances the lower courts emancipated from their hierarchical superiors through their recourse to the ECJ.

The ECJ's judicial activism has been the main force in the subversion of national autonomy. The most dramatic instance of this is the case of the fishing industry in Britain, in which the ECJ ruled against Britain (Commission v. United Kingdom, 1991) on the ground that the proposed directive that had been blocked by Britain should have been passed and, therefore, had become EC law, even though it had been defeated in the Council of Ministers. Another, less dramatic case involves the ECJ's 1987 decision that overturned the West German's 400-year-old regulations limiting beer sold in Germany (this made unnecessary passage of a draft directive that had been shelved since 1970 as a result of German brewers' opposition).

Societal interests have also used the ECJ to alter national practices and, thereby, to undermine executive autonomy. Although business groups have appealed to the ECJ the most in seeking to alter national practices that they find not in conformity with EU laws and directives, social interest groups have increasingly turned to the ECJ as well, generally to provide protections for citizens that the national government refuses, by forcing them to implement EC legislation. This has been very much the case in the United Kingdom in such areas as the quality of drinking water and equality between working women and men.

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63Garret and Weingast, "Ideas, Interests, and Institutions," 195.
In expanding its powers, however, the ECJ has also served to expand those of national courts. In fact, at the same time that the national courts have lost some measure of independence as a result of the ECJ’s role as a superior level of judicial review, they have gained new national power and autonomy in relation to the executive. Because the lower courts in particular have been able to choose to seek “authoritative guidance” from the ECJ (as per Article 177), by contrast with the highest national courts which much seek preliminary rulings, the lower courts have the opportunity to change national law (because ECJ interpretations are generally accepted as precedent-setting) while circumventing their own national judicial hierarchy.\(^66\) The courts of different countries have availed themselves of this opportunity to differing degrees and in different areas, however. The French (mainly the civil and commercial branch of the judiciary) and the Germans (primarily the tax courts), along with the Italians, have referred the greatest number of questions to the ECJ under Article 177; the British have referred fewer (the largest number from the High Court of Justice, Queen’s Bench Division).\(^67\)

The ascendancy of the ECJ, thus, is another source of the loss of national government autonomy. Such ascendancy, however, along with the concomitant increase in the importance of national judiciaries, has been more difficult to accept by some member states than others, mainly because of differences in the traditional roles and powers of the courts. Neither Germany nor Britain has had much difficulty in accepting the increasing independence of the judiciary, primarily because the German emphasis on the importance of law as a regulatory instrument parallels EU practice, as does the traditional British respect for the law and the fact that British common law is similar in its precedent-setting approach to the EU. In consequence, despite the numerous negative decisions that have affected them, neither Britain nor Germany has resisted the enforcement of ECJ decisions nearly as much as France or Italy, where the judicial authority has traditionally been more subordinated to administrative as well as political authority. In fact, even the French push for the Single European Act and the Maastricht Treaty can be interpreted, in part, as attempts to limit judicial power (even as they consecrated judicial decisions, as in the standard of mutual recognition) in favor of political power.\(^68\)

For the French executive, the rise in the power of the judiciary has been particularly unsettling, given its traditionally subordinate role. The judiciary’s power and legitimacy grew beginning in the 1980s as a result not

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\(^{67}\)Lisa Conant, “Contested Legal Boundaries and Institutional Adaptations: The Europeanization of the Law in France, Germany, and the United Kingdom” (paper presented at the workshop “Europeanization and Domestic Change,” Pittsburgh, PA, 7-8 November 1997).

\(^{68}\)See Schmidt, “Loosening the Ties.”
only of its empowerment through the ECJ as an enforcement arm of the EU but also as a result of internal dynamics.69 These include the magistrates’ increasing activism in the pursuit of malfeasance in high political and business circles alike—a matter of distress for the executive—and the Constitutional Council’s growing influence in settling disputes between executive and legislature, or majority and opposition.

By the same token, however, whereas Germany and Britain have found it easier to accept the increases in judicial independence from the executive, they have found it much harder to accept ECJ encroachments on national judicial autonomy. While Britain may have bristled at giving up its long-established prerogatives, it is Germany that has been most unwilling to subordinate its own judicial powers to those of the ECJ. Although the German courts generally have increasingly accepted EU jurisdiction, the German Constitutional Court has been somewhat recalcitrant, most significantly, when it decided over national government objections that German law takes precedence over European when it comes to sovereignty issues (although this has not been tested yet).

CONCLUSION

EU institutions, with their dynamic confusion of powers, have encroached significantly on member-states’ national institutions. They have generally changed the traditional balance of power in both unitary and federal states, albeit more in the former than in the latter, by reducing executive autonomy and control, diminishing legislative power, and increasing judicial and subnational independence.

In unitary states, the quasi-federal structure of the EU has tended to alter the institutional balance of power by promoting national court independence and subnational autonomy while diminishing legislative power and undermining executive predominance. The national courts have become increasingly independent from national executives, and subnational authorities, having for the most part benefited from “federalizing” internal dynamics and decentralizing reforms, have gained even greater autonomy as a result of their access to EU policymaking and funds. Only the national legislatures have seen their powers largely diminish, with legislative initiatives moving up to the EU level and/or more firmly into the hands of the executive, and oversight increasingly taken over by the courts and the EU. For the executive, the results are more mixed. While it has found its powers over the legislature enhanced by its privileged position in the EU negotiations, it has lost its traditional autonomy in decisionmaking and its exclusive control over subnational units. The changes related to European integration, in consequence, represent a major challenge to the unitary

state's simple, executive-focused conceptions of representation and accountability, conceptions that are only further challenged by the notions of compounded representation and shared accountability often attached to European integration.

In federal states generally, by contrast, much less has changed in response to European integration than in unitary states. This is mainly because federal states already possess a constitutionally based separation of powers and semi-autonomous subnational authorities, all of which have been enhanced by European institutional structures and powers. But it is also because federal states like Germany have responded to European integration with adjustments that ensure that the separate national powers and subnational authorities are not shut out in the process of integration. Consequently, the changes related to European integration do little to challenge national understandings of compounded representation and shared accountability. What is more, such national understandings are essentially complemented by the similar, EU-based understandings of democratic legitimacy also involving compounded representation and shared accountability.

These differences in the impact of EU institutions on federal and unitary states, moreover, ensure that the EU’s problems with democratic representation, accountability, and legitimacy have also generated different problems for its member states, depending on the relative concentration or dispersion of powers. These EU-related problems have again hit unitary states harder than federal ones because unitary states such as France and Britain have a more difficult time legitimizing actions that they no longer entirely control but are expected to, than federal states such as Germany, where the executive generally must carry out policies that it has never, in any case, been expected to control entirely.

The best way to explain these degrees of difficulty in accepting a multiplicity of institutional actors in multi-level decisionmaking is by analogy to polytheistic and monotheistic religions. Where one already has multiple gods, a few more is not a major problem. However, when one believes in only one God, the inclusion of others is an attack on the very fundamentals of one’s faith.70 And so it is with unitary states such as France and Britain, for which the new gods of the EU represent a major challenge to the one and true central power, by contrast with federal states such as Germany, for which the new gods simply add to the diversity in the large pantheon of powers. The problems for France and Britain, therefore, involve not just accommodating themselves institutionally to the new panoply of EU powers that have additionally empowered formerly subordinate subnational powers, but also doing so ideationally, either by finding a way to reconcile the new situation with the old religion or by changing religions. Neither

70My thanks to Fritz W. Scharpf for suggesting the metaphor.
France nor Britain has done the latter. With regard to the former, however, the answer of French political leaders has been to think positively of the European Union as a whole as an extension of state sovereignty but not to say much about it, whereas Britain’s answer has been to say a lot negatively about the EU as a threat to national sovereignty (until Tony Blair).\(^7^1\) Neither, however, has rethought its basic understanding of democratic representation and accountability with regard to the EU. In consequence, these nationally specific ideas about representativeness and accountability find themselves increasingly at odds with the new reality in which the loss of national access to decisionmaking is increasingly balanced by greater EU access, that is, by the rise of a new multi-level European system of governance with highly fluid European governance networks.\(^7^2\) One can only hope that at some point, however, conversion to the “new religion” of compounded representation and shared responsibility will occur. This would not only alleviate some of the pain of French and British adjustment to the incursions of the EU on national policymaking but might also stimulate these countries to rethink the national balance of power and to see that it, too, is moving toward a more compounded representation and shared accountability.

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\(^7^1\) Schmidt, “Discourse and (Dis)Integration.”