FORUM

What Can We Learn from the Collapse of the European Constitutional Project?

Andrew Moravcsik

The draft European constitution sought to legitimate the EU by inducing more popular deliberation about Europe's future. This strategy was doomed to failure because it is inconsistent with basic empirical social science about how advanced democracies work. Salient political rhetoric and increased opportunities to participate do not, as a rule, generate more intensive and informed public deliberation or greater public trust, identity and legitimacy – particularly where the issues in question are not highly salient. Two conclusions follow. First, the failure of constitutional reform is, paradoxically, evidence of the success and stability of the existing "European constitutional settlement." The rhetoric of federalism has not changed to reflect this new reality. Second, prescriptive analysis of real-world constitutional reform requires that normative theorists draw more heavily on empirical social science in order to ascertain to what extent institutions actually have the consequences ideally ascribed to them.

1. Introduction

What lessons does the recent failure of the EU's draft constitution teach us? What can we learn about the future of European integration and the possibility of its democratic legitimation?

The essential starting point of any effort to answer these questions is frank acknowledgement that *wholesale constitutional reform had little legal or substantive justification.* This is not to disparage the reforms contained in the draft constitution, which were pragmatic and desirable adjustments to the existing EU constitutional structure. Proposed reforms would have clarified bureaucratic responsibility for foreign policy, streamlined presidential leadership, re-weighted national voting in favor of larger countries, expanded the use of majority voting and parliamentary co-decision, and altered procedures for further enlargement. These modest changes aimed at a minor improvement in the structure of EU governance, not a major reform of its structure – much less anything that amounts to a wholly new "constitution". Surely many of the proposed changes would have been obtainable by piecemeal implementation over the five

years during which the draft constitution monopolized the time, energy and political capital of European leaders. After all, the EU had just completed its most successful decade ever, counting among its achievements monetary union, two rounds of enlargement, greater transparency, more foreign policy coordination, movement toward EU policies on energy, and movement toward services deregulation. Entirely absent from the constitutional draft – surprisingly so, by comparison to the Single Act, Maastricht Treaty or even the Treaty of Amsterdam – was any significant expansion of the EU's substantive mandate. From a substantive perspective, major constitutional reform was simply unnecessary.

From a legal perspective, major constitutional reform was similarly superfluous. The EU already has a *de facto* constitution, the oft-amended Treaty of Rome, which had served it well – and the draft constitution would not have fundamentally reformed it (for a general treatment see Weiler 1999). To be sure, many seized on the widespread perception that the EU would need a radical overhaul to avoid gridlock with 25 rather than 15 members. Yet this was always more pretext than reasoned motivation.[1] Some complained that the existing treaties were too complex and had to be simplified to be popular, yet it is difficult to believe that the illusion of a simple "American-style" constitution could have survived the first day of constitutional deliberation. Nor is there any empirical reason to believe that it would have had much impact.[2]

If the new constitution lacked a plausible substantive or legal justification, why was the massive project undertaken? Again we must be frank: The draft constitution was, above all, an exercise in *public relations*. Or, in more high-minded constitutional language, its primary purpose was to increase trust and support among European public by altering the EU's symbolic politics and political culture.[3] The basic idea was to legitimate the EU not, as had been the case since its origin, by facilitating mutually beneficial trade, regulation and economic growth, but instead by politicizing and democratizing it in a way that encouraged a shared sense of citizen engagement in a common project.[4] In debating the *"finalité politique"* of Europe, it was claimed, citizens would come to understand and appreciate the EU more fully. Sophisticated critics referred to this as redressing the "democratic deficit," but the immediate policy goal was more concrete: to reverse the sagging popularity of the organization. This opportunity was further exploited by some, not least European parliamentarians, who saw a constitu-

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1 There is, in fact, little evidence that EU decision-making is less efficient under 25. For one example, see Hix/Noury (2006).

2 As a general proposition, the notion that simpler constitutions are more legitimate than complex ones is a curious one, perhaps based on an unreflective analogy to the US. To my knowledge it is without any empirical basis. This sort of argument overlooks the fact that most Europeans want to see core member state prerogatives preserved, and firm legal recognition of this requires that the EU's mandate and procedures be delineated explicitly, and in a finely differentiated fashion, in its treaty base. This explains its length.

3 There is not even a strong case to be made that the EU is fundamentally less democratic in most respects – and thus philosophically less justifiable as a constitutional order – than its member states (Moravcsik 2002; Majone 2005).

4 Some also stated that the positive experience with a convention on EU human rights policy a few years earlier could be extended to the institution as a whole.

tional convention as a golden opportunity to exercise influence in a pro-federalist direction.[5]

As an instrument to bolster trust and support for the EU, and to promote further federalizing reform, of course, the constitution was an utter failure. Yet many believe that this failure was coincidental and reversible. In this view, failure resulted from an insufficiently ambitious document combined with short-sighted or ineffective leadership in Britain, France and the Netherlands. The constitution was insufficiently inspiring. Referendums were opportunistically called, ineptly waged and, in two cases, decisively lost. This, so the argument continues, simply demonstrates the validity of the basic premise underlying the constitutional project – namely that the EU is crippled by its "democratic deficit," "legitimacy crisis," and lack of a common vision of its "finalité politique."[6] Now Europeans must earnestly engage in a "reflection period," await elections and political renewal in Germany, France, and Britain, then relaunch the grand project. The alternative, such critics hint darkly, is stagnation, disintegration, or collapse. The EU has been irrevocably "politicized", and it has no choice but to go further to win public trust by empowering the citizens of Europe. In sum, the only viable response to politicization is more politicization, and the only viable response to a failed constitutional project is another constitution.[7]

This diagnosis fails to heed the fundamental lessons of the five-year constitutional detour. The effort to generate participation and legitimacy by introducing more populist and deliberative democratic forms was doomed to failure because *it runs counter to our consensual social scientific understanding of how advanced democracies actually work.* There is simply no empirical reason to believe, as the advocates of constitutional reform clearly believed, that opportunities to participate generate greater participation and deliberation, or that participation and deliberation generate political legitimacy. These social scientific errors are the focus of my analysis below, but before turning to them I want to underscore two broader implications, one for EU policy analysis and one for political philosophy.

For policy analysis of the EU, the implication of this analysis is that we should be *optimistic* about the EU's future. Far from demonstrating of the failure and fragility of European integration, the collapse of the constitutional project in fact demonstrates the EU's stability and success. Contemporary Europe rests on a pragmatically effective, normatively attractive and politically stable "European constitutional settlement," embodied in the revised Treaties of Rome. This settlement is both popular and broadly consistent with what European citizens say they want the EU to do.

For political philosophers engaged in normative analysis of real-world constitutional systems, the implication of this episode is to counsel skepticism toward those who recommend politicization, deliberation and mass plebiscitary democracy as panaceas to promote political legitimation and effectiveness. Even in a "politicized" environment, there is no reason – particularly, as we shall see, when dealing with the sort of issues the EU handles – to assume that increases in opportunities to participate necessarily

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5 This was the uniform sentiment of those European parliamentarians with whom I spoke on the eve of the convention.
6 For an expression of this view by an insider, see Duff (2006).
7 See Michael Zürn's contribution to this issue.

generate participation, deliberation, legitimacy, or popularity. Nor is there any norma-
tive reason to favor such arrangements. All modern constitutional systems politicize
some functions and depoliticize others, and they do so for deliberate reasons that are
normatively, as well as pragmatically, justifiable. In arguing for constitutional reform
in real-world constitutional democracies, therefore, the critical challenge is rarely how
to increase our adherence to some ideal of participatory democracy. Instead it is how
to design institutions that *politicize and depoliticize* politics functions in a way that
generates more accountability, more desirable outcomes, and more long-term popular
support – a set of goals that have real normative weight (Majone 2005; Moravscik
2002: 613–614; Pettit 2004; Grant/Keohane 2005). From this perspective, I assert, the
existing European constitutional settlement is not just pragmatically more successful,
but also normatively more desirable, than politicization through "democratic" reform.

2. The European Constitutional Project as Political Science

The European constitution project has failed to bolster the EU's support and legiti-
macy, and further efforts to revive it in its current form will similarly fail to do so, be-
cause this strategy rests on flawed premises about everyday democratic politics. The in-
tellectual foundations underlying a constitutional strategy for reviving and legitimating
the EU rest on three empirical claims about the working of advanced industrial de-
mocracies. First, greater institutional opportunity for participation generates greater
public participation. Second, greater participation generates more informed delibera-
tion and decision-making. Third, more informed or intensive decision-making gener-
ates greater trust and a deeper sense of common identity and legitimacy (figure 1).

Figure 1: Empirical Premises Underlying the European Constitutional Project

More Institutional Opportunities to Participate	$\Rightarrow$	Greater Political Participation	$\Rightarrow$	More Informed Deliberation and Decision-Making	$\Rightarrow$	Greater Common Identity Institutional Trust, Political Legitimacy

As general propositions about modern democratic politics, these empirical claims are
dubious. Creating more institutional opportunities to participate politically does not,
in general, generate more participation. Greater participation does not generate in-
formed and intensive deliberation. And participation and deliberation do not generate
trust and legitimacy. Some are *prima facie* invalid, others valid only under specific con-
ditions rarely found in EU policy-making. This may seem surprising to some, because
these relationships do of course hold on the lower extreme of the scale, that is, demo-
cratic governments tend to be more participatory, deliberative and legitimate than a
non-democratic one. My point here is that they do no hold on the margin, that is,
within the population of advanced industrial democracies. It is thus unsurprising – and
was indeed predicted by some – that the effort to achieve legitimacy through constitu-
tional engineering on the basis of these premises would fail. Judged as empirical social

science, rather than political philosophy or constitutional law, the premises underlying the constitutional project were unsound. This was the most fundamental cause of its failure.

3. Do Institutional Opportunities Encourage Participation?

The first premise on which the constitutional project was based is that *increases in institutional opportunities to participate tend to generate greater political participation.* On this view, the major reason why more citizens do not participate in mass politics in general, and European Union politics in particular, is because they lack sufficient institutional opportunities to do so. In this view, the central problem with Europe, and the reason for its declining popularity, is that its citizens had never been asked for their detailed input about the future endpoint of Europe – *la finalité politique.* If only, visionaries behind constitutional reform seem to assume, we expand institutional opportunities, encourage participation, and make the process more salient, citizens will become engaged.
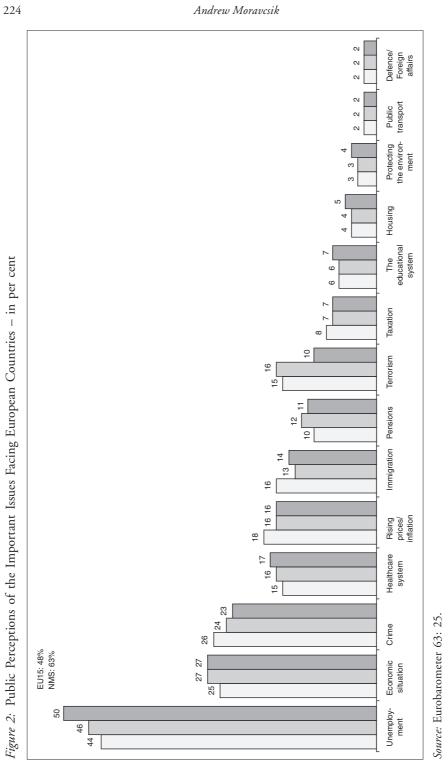
The constitutional deliberation can itself be seen as an effort to generate such a public debate. Enthused by the prospect of a re-enactment of the Philadelphia convention of 1787, millions of web-savvy Europeans were expected to mobilize, to follow the constitutional convention, and to deliberate the meaning of Europe. Over the longer term, constitutional reform would deepen popular understanding of and involvement in the EU – and with it the popularity of the institution. More modest proponents believed a simplification of the treaty and delineation of EU prerogatives would better focus popular attention and disperse fear and suspicion of Brussels.

Not so. Over the years, European citizens have resolutely refused to avail themselves of existing institutional opportunities to participate in EU politics. Not since farmers deserted Charles de Gaulle during the first round of French direct presidential elections in 1965–66 has an EU issue played a decisive role in a West European national election – and even then, it was only for several weeks.[8] Polls tell us citizens are fully aware of – indeed perhaps exaggerate – the increasing importance of the European Parliament, and yet they turn out for direct elections to it in low and declining numbers – something many scholars find baffling (Blondel et al. 1998). Some interest groups do mobilize mass protest around EU policies (with protest directed largely at national governments) but their propensity to do so has not increased with increases in the perceived importance of the EU (Imig/Tarrow 2001: 235).[9] Thus it should have come as no surprise that, as we have seen, the EU – at least until the misguided referenda at the end – did not engage or mobilize European publics.

The most plausible account of why European citizens fail to participate in EU politics, even when institutional opportunities abound, is simply because the issues dealt

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8 De Gaulle won in the second round. For a discussion see Moravcsik (2000: 51–54).

9 One interpretation of this finding is that agriculture and the environment have been issues of serious EU action for decades and are relatively salient in the minds of some concentrated segments of the electorate, whereas more recent issues, such as social policy, tend only sporadically (e.g. in the case of women's rights) to be areas in which the EU has much direct impact.

Figure 2: Public Perceptions of the Important Issues Facing European Countries – in per cent

EU15: 48%
NMS: 63%

Source: Eurobarometer 63: 25.

Note: QA26 "What do you think are the two most important issues facing (OUR COUNTRY) at the moment?". Percentage "Tend to trust".

with by the EU are far less salient to them than issues dealt with by national governments. The issues the EU deals with most intensely – trade, industrial regulation, technical standardization, soft power projection, foreign aid, agricultural policy, infrastructural, and general foreign policy – are not salient issues for the mass public. The most salient issues, notably those involving fiscal outlays, remain firmly national.

The top 14 issues in the minds of European citizens are, in declining order of importance: unemployment, the (macro-)economic situation, crime, healthcare, inflation, immigration, pensions, terrorism, taxation, education, housing, the environment, transport and defense/foreign affairs (see figure 2). Of these top issues in the minds of the electorate, there is only one – the environment, a modestly important issue at number twelve – in which the EU plays a preeminent (though even in this case by no means unique) legislative role unambiguously connected to salient public concerns. Even the environment ranks only number twelve, with 3–4% of the public placing it among the top two issues; and we must remember also that the EU is involved in only a subset of environmental policies. Six issues (healthcare, pensions, taxation, education, housing and transport) have little to do with EU policy. Crime-fighting is, to be sure, subject to modest intergovernmental coordination, as are (though nearly insignificant in their salience) foreign and defense policy. Yet these remain traditional intergovernmental issues still dominated by national policy-making and hedged with unanimity and opt-outs, rather than areas of genuine EU competence. Immigration may become a potentially important issue in the future, and there is no doubt that it played an important role in the minds of constitutional referendum voters in the Netherlands and France. Yet in fact the EU remains relatively ineffectual in this area. The major public concern here is (non-EU) third-country immigration over which the EU has essentially no control.[10] Even in the remaining area of free movement of people *within* the EU, where the EU has some *de jure* competence, the ongoing lack of mobility within the European economy, the unevenness of policy across the EU, and the continued failure to reduce barriers to labor movement from the new member states demonstrates that the limited nature of EU regulation. Critical decisions remain national (Guiraudon 2004; EU Observer 2006).

This leaves three prominent macroeconomic issues: unemployment, inflation, and "economic conditions". At first glance these seem to be closely related to the EU, since these aggregates are influenced to some extent by the activities of the European Central Bank. They might also be the subject of action under the so-called "Lisbon strategy" and the "open method of coordination." Yet neither fact renders them a genuine electoral concern. The link between monetary policy and macroeconomic outcomes remains obscure, and in any case, the ECB (like EU national central banks) is an independent body. For both reasons, its proper connection to political participation is unclear.[11] In any case, most policy analysts believe that today the most influential and

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10 The case of asylum – a hot-button issue in countries such as the UK, and thus somewhat exaggerated in EU scholarship – involves obligations under international law adjudicated, insofar as the mechanisms are regional, largely by the Strasbourg court of the Council of Europe, not the EU.

11 While the unique independent statute of the European Central Bank might raise some concerns about its democratic legitimacy – I have argued elsewhere that this is the one area where

most policy-relevant instruments for influencing employment and growth, and to a lesser extent inflation, involve fiscal, labor market and education policies – all of which remain national.[12] Fiscal policy is essentially outside the EU's mandate, while labor market policies – with the odd exception of gender policy – are subject only to discussion under the "open method of coordination" (OMC). OMC has generated no end of discussion among cutting-edge constitutional lawyers and social policy specialists. But the empirical research is unanimous in concluding that it remains a "talk shop" with almost no demonstrable impact on national policy, let alone macroeconomic aggregates (Zeitlin/Pochet 2005). In sum, meaningful economic management remains an essentially national affair. Nearly all the most salient issues in the minds of European voters – fiscal priorities, social policy and health care, pensions, education, infrastructure, and such – remain national.

Since everyday voters view the matters handled by the EU as relatively obscure, they have little incentive to debate or decide them. Let me be clear. This is *not* to deny that EU issues are important, normatively or positively. In an ideal world, we would surely wish citizens to participate in EU politics, and every other kind of politics, more enthusiastically.[13] The claim here is simply that the time, money and energy of European citizens are too limited to permit a wholesale shift of attention and attachment to EU matters. It is easy to forget that political learning, mobilization, deliberation, and participation are extremely expensive for rational citizens. The number of salient partisan cleavages in Western democracies is relatively few, and the electoral public is generally assumed to hold only a small number major issues in their minds at a time, though others may influence specific subgroups.[14] Existing concerns, of still greater importance in the minds of citizens, must be swept aside to make room for EU issues. It is hard to see why rational citizens would want to do this. Is it surprising that citizens and interest groups are active on a mass basis, domestically and transnationally, on EU issues that are of real electoral significance, such as agriculture and sometimes the environment, but on other issues they tend, at most, to vote left-right or nationalist-cosmopolitan cleavages in a way rather unconnected to the explicit issues?[15] Thus any strategy to expand popular participation in EU matters by expanding institutional opportunities are likely to fail.

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one might perceive a "democratic deficit" in theory – this is surely not the basis of popular discontent with the institution (see Moravcsik 2002: 621). Objections to exchange rate at which the Dutch went into the Euro, which was thought to have pushed up prices, were salient in the Netherlands, but this was a Dutch government decision.

12 For a overview and analysis of current research, see Pontusson (2006).

13 Indeed, this is not a normative claim at all, but simply a positive one–though it may have normative implications.

14 For a range of opinion on this question, see Bartels (2001), Jacobs/Shapiro (2000), Page/Shapiro (1992).

15 This is how I read the contributions to Brouard/Tiberj (2006), Hooghe/Marks (2006); on interest groups, see Tarrow/Imig (2001).

4. Does Participation Generate Informed Deliberation?

The second premise underlying the European constitutional project's that *greater participation generates more informed and rigorous deliberation and decision-making.* It is widely believed that the key to generating support for the EU is to disseminate more accurate information about the EU among voters. The normative case for political deliberation certainly presumes accurate information and a measure of expertise. It is often noted that more educated and informed voters tend to favor European unification, and one reason may be that Euroskeptic campaigns and negative attitudes toward the EU are often based on patently erroneous claims about what happens in Brussels.

Yet little evidence suggests that, even if they participate, citizens will deliberate about non-salient issues in an intense and informed manner. The central problem is, as with participation, insufficient incentive to motivate intensive political learning and engagement. Informed political deliberation and public choice in any mass democracy requires that distinct structural conditions be met. In general, voter beliefs and choices must be structured by salient cleavages, restricted agendas, intermediary organizations, and cultural attachments. Without these, there is little reason to believe that citizens presented with EU issues will make an informed or deliberate choice.

The task of educating and engaging voters is doubly difficult within the EU, as compared to national settings, because intensive involvement would require a redefinition of existing political identities, familiarity with an entirely new set of institutions, new patterns of cleavages and alliances, and the formation of new civil society organizations. This future, foreseen by some Euro-constitutional enthusiasts, is even more expensive for the individual citizen, and would thus require an even more substantial motivation. There is a paternalistic utopianism about the continued insistence by advocates of pan-European democracy that citizens should pay these high costs, even though they do not share the dedicated EU policy wonk's enthusiasm for the EU's relatively arcane and obscure set of concerns.

Forcing participation is likely to be counterproductive, because the popular response is condemned to be ignorant, irrelevant and ideological. *Ignorant* because individuals have no incentive to generate sufficient information to render concrete interests and political behavior consistent. As we see from the 50-year track record of EU referendums, elections, and conventions, the result is an information-poor, institutionally unstructured, and unstable plebiscitary politics. Ignorance about the EU remains stubbornly high. *Irrelevant* because publics are likely to react to efforts to stimulate debate on non-salient issues by "importing" more salient national and local (or global) issues with little to do with the matter at hand (in this case, EU policy). Elections to the European Parliament are routinely turned into "second order" elections in which concerns about national governments – or, more recently, issues handled by national governments – are aired.[16] *Ideological* because intense efforts to stimulate electoral participation tend to encourage symbolic rather than substantive politics. This is because, as polls show, active support and opposition for the EU as a symbol (i.e. general pro- or anti-Europe sentiment) are more salient in the minds of voters than interest in almost

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16 For a humorous but highly informed discussion, see Norman (2006).

any of its direct policy outputs.[17] The result is that electoral politics is quickly dominated by symbolic politics. This, in turn, plays into the hands of small bands of active Euro-enthusiasts and Euro-skeptics, who are likely to dominate any popular debate with ideological appeals to nationalist or anti-nationalist sentiment. This is hardly the sort of informed deliberation Euro-enthusiasts and democratic theorists seek.

Thus it should have come as no surprise to constitutional enthusiasts that, from the Laeken Declaration to the failed referenda, the constitutional process so utterly failed to inspire, engage, and educate European publics.[18] Few citizens were aware of the 200 *conventionnels'* deliberations, and at the end of the process, few could state what was in the resulting document. Constitutional aspirations and democratic reform seemed to have little effect on public knowledge (Brouard/Tiberj 2006). Informed and intense deliberation did not take place. Worse, once the issue was forced onto the agenda via referenda in France and the Netherlands, domestic debates were dominated by issues unrelated to ongoing EU policy, including third country immigration, the rate at which the Dutch government had decided to enter EMU, social welfare reform, and general fears of globalization. Even the few EU issues that were discussed, such as Turkish membership, had little to do with the constitution itself.[19]

In order to give individuals a reason to focus informed debate on EU politics, it would be necessary to give them a stake in it – a basic prerequisite that many philosophically-inspired discussions of a demos, "we-feeling", "community", and "constitutional patriotism" elide. The few viable schemes for creating such a stake that have been proposed rest not on the creation of new political opportunities, but on the emergence of entirely new political cleavages based on salient interest. Philippe Schmitter is one of the few who faces up to this challenge. Accordingly, he proposes that agricultural support and the structural funds be replaced by a guaranteed minimum income for the poorest one-third of Europeans, national welfare systems be rebalanced so as not to favor the elderly, and immigrants and aliens be granted full rights (Schmitter 2000). With the EU acting as a massive engine of redistribution, individuals and groups would reorient their political behavior on whether they benefit or lose from the system.

This is, at least, a coherent scheme targeted at precisely those groups most dissatisfied with European integration today – broadly speaking, the poorer, less well-educated, female, and public sector populations. The virtue of Schmitter's analysis, as opposed to those who believe that informed deliberation is to be had for the asking, is that it is at least directed at resolving the real constraint on pan-European democracy. If we want to see a European democracy, we need to introduce such issues.

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17 For a further discussion of this point, based on different data on issue salience, see Moravcsik (2002: 615–616).

18 It is true that, before and after, those who support European unification tend to be better educated and informed, on the average, than those who oppose it – but this does not mean that, on the margin, greater participation or provision of information will generate more informed and rational deliberation.

19 Some have objected to me that we observe spectacularly informed and eloquent debates conducted by small elites, for example by writers in top Paris-based newspapers. Yet most Europeans do not read nor respect these elites.

Yet this is manifestly infeasible. Schmitter's presentation of such notions as "modest proposals" suggests that he may not himself believe they are viable! His proposals would break with the existing European constitutional settlement, divorcing the EU entirely from its ostensible purpose of regulating cross-border socioeconomic behavior and externalities. The result would almost certainly be political mobilization, but only at the cost of a higher level of opposition to the EU, domestic and interstate, than Europe has seen in several generations.

To see precisely why this is so, consider the most widespread substantive criticism of the EU and its constitution – namely the absence of a meaningful "European social policy." The social theorist Jürgen Habermas has famously argued that in order to create a minimum sense of common identity independent of ethnic attachment, it is necessary to speak to the salient social concerns of citizens. The issue that brings them together as Europeans, and distinguishes them vis-à-vis the US, is their commitment to a social democratic welfare state (see Habermas 2001).[20] This position gains superficial plausibility from the fact that left-wing opposition in France and the Netherlands resulted largely from a sense that social protection in their countries was threatened by globalization, conservative policies, and trends in economic policy. The French Socialist Party was torn in half – as President Chirac hoped it would be – by conflicting positions on the issue (see Brouard/Tiberj 2006).[21]

Yet what is striking about tactical proposals to seize the rhetorical high ground by invoking the EU's role in providing social protection is that they are accompanied by very few, if any, concrete policy proposals. Perhaps the paucity of realistic policy proposals is not a surprising failing for an abstract social theorist such as Habermas – for whom ideal discourse appears not to require a real-world motivation. But it is equally characteristic of political activists. European social policy is a chimera. The French referendum was remarkably free of any serious discussion of what European social policy should be. Indeed, one might say that the prominence of the social policy issue – both at the level of social theory or Socialist praxis – is not just entirely separated from practical proposals, but is critically dependent on that separation.

The lack of social Europe is not the happenstance consequence of short-sighted political decisions; rather, it is inherent in the structure of national interests. Consider the options.

(1) Logically, following the egalitarian rhetoric of European socialism, one might think a pan-European social policy would transfer resources from taxpayers in richer member states, such as Germany and France, to the less advantaged citizens of Europe found almost entirely in new member states such as Lithuania, Slovakia, and Cyprus. (Or, similarly, perhaps it could mean the indirect transfer of income through the suppression of any barriers to the free movement of workers, goods and services emanating from these countries.) Yet there are almost no concrete proposals for a Europe-wide social policy of this kind. Any effort to implement them would only exacerbate the EU's "legitimation crisis," in large part because this is

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20 After the referenda, Habermas (2005) wrote a much cited editorial in *Süddeutsche Zeitung* calling for a renewal of 1968 "romanticism" in harnessing Europe to meet the ideological challenge to social democracy posed by President Bush's America.

21 This is one of the few unambiguous results of the electoral data.

precisely the opposite of what most left-wing proponents of an EU social policy, who are found in richer countries like France and Germany, seek to achieve by raising the issue (see Schmitter 2000). Insofar as they concern themselves at all with the new member states, the goal of those who promote European social policy is rather to protect the well-being of the West European working class against competition from these regions. This is, as we are about to see, characteristic of general thinking on European social policy.

(2) Other advocates of a European social policy, probably including a majority of both practitioners or scholars, imagine that a "European social policy" should be designed to defend the current prerogatives of the working class in richer "old" member states against the erosion of social protection, consolidation of social welfare systems increased labor flexibility, or immigration of low-skilled workers. Most Europeans appear to favor maintaining current levels of welfare spending, as demonstrated by the opposition encountered by national governments that seek to cut spending, and the tendency of such concerns to influence public opinion about the EU. Yet such a policy, European or national, has almost no support among policy analysts, political elites or governments. This is because current levels of social protection are manifestly unsustainable without substantial consolidation. There is rather a consensus – accepted by all member state governments and embodied in the EU's non-binding Lisbon process – that such reforms are required in order to assure the long-term sustainability of existing national welfare policies. An effort to harness the EU to protect current systems of social protection would, therefore, be both politically futile and economically counterproductive.

(3) A more sophisticated understanding of the need for a European social policy might therefore be that Europe requires centralized social regulation in order to prevent specific, particularly undesirable or inequitable developments in social policy from taking place – a regulatory or fiscal "race to the bottom". Fritz Scharpf (1999) offers the most nuanced and rigorous formulation of such a position. In this view, the status quo may not be sustainable today because of the tendency of decentralized market competition to degrade regulatory protection. Trade, immigration and especially foreign investment and capital flows create strong incentives for countries to reduce welfare expenditure and regulatory standards. The EU cannot respond effectively to this tendency, despite overwhelming support for the maintenance of protection, in so far as there is a neo-liberal bias in the constitutional structure of the EU and the rhetoric that surrounds it, which favors market liberalization ("negative integration") over social protection ("positive integration"). Scharpf points to potential jurisprudence of the EU undermining exclusive public service provision, as well as a tendency to increase the share of taxation on labor, as evidence of potential threats.

Yet, as Scharpf himself documents, researchers have found little empirical evidence that the "race to the bottom" is a significant phenomenon in contemporary Europe. The adverse impact of globalization on standards in the major areas of social spending in Europe (pensions, medical care and labour market policy) is easily exaggerated. Insofar as there is downward pressure recent research suggests that the most important factors driving it are domestic: the shift to a post-industrial econ-

omy, lower productivity growth, shifting demand for less skilled workers, and rising costs of health care, pensions and employment policies, exacerbated by increasingly unfavorable demographic trends. These factors fuel welfare deficits and fiscal strains, yet any reform is opposed by entrenched constituencies (the elderly, medical care consumers and the fulltime unemployed) well placed to resist it. For these reasons, not globalization, no responsible analyst believes that current individual social welfare entitlements can be maintained in the face of these structural shifts. With proper reform, however, the European social democratic welfare state is compatible with high levels of interdependence (see de Grauwe/Polan 2005). Scharpf himself concludes ultimately that such a race threatens otherwise sustainable policies in only a few areas, and even there, little evidence suggests that a threat is imminent, or that effects have been significant. National welfare systems are no longer moving strongly in the direction of greater redistribution, but neither are they imploding.[22]

Nor is there much evidence that, even insofar as globalization plays a role, that EU regulation is driving social protection downward. By contrast, the EU has often permitted, even encouraged high standards. It tends to reregulate at a high level (see Vogel 1995; Joerges/Vos 1999). Anecdotal evidence and poll data suggest that the EU is responsive to public and interest group concerns in a way quite similar to national polities. There is far less reason for a social democrat to fear the piecemeal evolution of European law than might have been the case five or then years ago (Scharpf 1999: 121–186). Whatever consequences there may be lie largely in the future.

(4) Some have proposed that a European social policy is required not to protect national social welfare and labor market systems, but to force reform in order to bolster international competitiveness or, at least, render them sustainable at high levels of protection. This view has the virtue of being consistent with current EU policy and most existing policy analysis. The neo-liberal bias of the EU, if it exists, would be justified as a counterbalance to the unsustainable generosity and regulatory bias of current national social welfare and labor market policies. (see Pierson/Leibfried 1995; Rhodes et al. 2001; Iversen et al. 1999). One might thus advocate EU regulation to assure that welfare reforms are sustainable as well as just, for example by mandating inter-generational equity (Scharpf 1999; Schmitter 2002) This is the ostensible purpose of various aspects of the so-called "Lisbon process" of EU information coordination (the "open method of coordination" or OMC) in social policy.

Yet, while liberalization and sustainability are worthy goals, there is little reason to believe that the EU has either a comparative advantage or sufficient political legitimacy to achieve this goal. The diversity of national social welfare systems means that the regulatory requirements of reform are different in each member state. Even Scharpf believes that national governments should take the lead in this matter, and provides evidence that such national efforts can be successful (Scharpf

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22 Recent OECD analyses report that fiscal consolidation has not significantly reduced government revenues as a percentage of GNP, and in most cases the burden of consolidation is placed primarily on revenue increases.

1999: 121–186). Even if pan-European social welfare reform could work, it would not be legitimate – as was the case with the pan-European distributive schemes considered above. And voluntary cooperation under OMC, as we have seen, is inefficacious.

In sum, even if European citizens can be induced to participate in EU politics by way of conventions, elections and referenda, there is little reason to believe that they will engage in informed and intensive deliberation. The main reason for this is the lack of any new and salient issue that might form the basis of a new cleavage pattern, thereby motivting increased voter attention and education – a proposition illustrated by the case of European policy. This conclusion not undermines any normative justification (perhaps from the perspective of deliberative democratic theory) for democratizing the EU, but implies that any effort to do so is likely to have negative side-effects – to which we now turn.

5. Does Deliberation Create Institutional Trust, Shared Identity and Political Legitimacy?
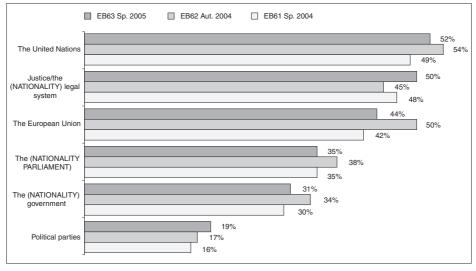
The third flawed premise on which the constitutional project has been based is that *deliberation generate greater trust, shared identity and popular legitimacy.* If the ultimate purpose of the constitutional draft was to increase the legitimacy of the EU, then surely it failed. The discourse surrounding the EU turned nasty, and public opinion support for the EU declined slightly, though it has subsequently rebounded. Referenda finished off the document, but the deeper mission of democratic renewal had been aborted long before. Even insofar as they participated and, to a limited extent, deliberated about Europe's future, this did not translate into either trust or affection. What explains this failure?

What reason is there to believe that greater democratic participation tends to generate a deeper sense of popular trust, community and legitimacy?[23] As a general contention, this claim appears to be empirically false. Democratic publics in advanced democracies generally like and trust insulated institutions – armies, police, constitutional courts and administrative bureaucracies, for example – more than legislatures or political parties. The same holds internationally, where institutions like the European Court of Human Rights (ECHR) in Strasbourg command great legitimacy despite their near total lack of direct democratic legitimacy. The EU's position in the institutional division of labour involves such political functions, and it is unclear why more participation in such functions – a more "political" judiciary or administration – would render them more legitimate (Gibson/Caldeira 1993). Consider, for example, recent Eurobarometer data (see figures 3 and 4).

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23 It is, of course, difficult to draw general conclusions about the relationship between deliberation and trust from this episode, since – we have just seen – participation did not generate a great deal of intense, informed deliberation. Yet we can nonetheless examine the general proposition that a real-world link exists among mass publics between deliberation and legitimacy, based on the broader experience of advanced industrial democracies and, in particular, EU member states.

Figure 3: Institutional Trust among EU-25 Publics (2004–2005)
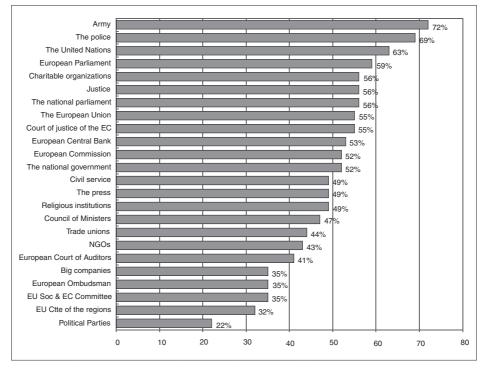

Source: Eurobarometer 61, 62, 63.

Note: Percentage "Tend to trust".

In comparisons of trust in political institutions, the European Union, United Nations and the European Parliament score more highly than elected national parliaments and governments. Political parties, those essential intermediaries of any modern electoral process, score the lowest trust and popularity of any political institution. Overall, there is little reason to believe that even if the constitutional deliberations had been more intense, or the resulting reforms more populist and participatory, they would have resulted in deeper political legitimacy, higher trust and broader support. There is every reason to believe, indeed, they might have had the opposite effect. Democratizing the EU would be expected, if it has any effect at all, to render it *less* popular and legitimate in the eyes of publics.

In the context of EU constitutional ratification, the most troubling implication about the inverse relationship between participation and discussion, and public trust is not that it undermines support for the EU, which in itself is a perfectly legitimate social choice, but that it means that the public fails express its support for the institution and fails to facilitate the adoption of selective reforms favored by substantial majorities of Europeans. Majorities support European integration, but the process of constitutional process appears to have obscured – and, to a modest extent, undermined – that support. For the last decade, just over 50% of Europeans have felt EU membership is a good thing, about 30% have been neutral, and only 15% have felt it is a bad thing (Eurobarometer 64). This number has declined over the past five years. Support for the constitution initially declined, though it has now increased: 63% of Europeans continue to support the idea of a constitution, compared to 21% who oppose the idea – stronger support than in the spring of 2005, before the referenda. In no country do opponents outnumber supporters. And an even larger majority of Europeans support

Figure 4: Institutional Trust among EU-15 Publics (2001)

Institution	%
Army	72%
The police	69%
The United Nations	63%
European Parliament	59%
Charitable organizations	56%
Justice	56%
The national parliament	56%
The European Union	55%
Court of justice of the EC	55%
European Central Bank	53%
European Commission	52%
The national government	52%
Civil service	49%
The press	49%
Religious institutions	49%
Council of Ministers	47%
Trade unions	44%
NGOs	43%
European Court of Auditors	41%
Big companies	35%
European Ombudsman	35%
EU Soc & EC Committee	35%
EU Ctte of the regions	32%
Political Parties	22%

Source: Eurobarometer 56.2 (October/November 2001, cited in Norris 2001).

Note: Q34 and Q26 "I would like to ask you a question about how much trust you have in certain institutions. For each of the following institutions, please tell me if you tend to trust it or not to trust it?"; N=15.939.

specific substantive provisions of the constitution, such as the strengthening of foreign policy coordination.

Those in favor of more participatory EU institutions often claim that citizens who voted no in the referenda must have thus been opposed to the specific content of the constitution. Hence *more* participatory institutions are required. [cf. Zürn in this volume] Yet there is *no* empirical evidence that this is the case. Instead, what is most striking about individual voting behavior in the referenda is that the pro-constitution, pro-EU majority did not assert itself *for reasons that had almost nothing to do with the constitution's content or, for the most part, with the EU at all.* This "disconnect" between issue preferences and electoral behavior has been consistently true of support for or opposition to the EU, and there is good reason to view it as inevitable in any situation where the issues handled by the institution are not highly salient.

6. Lessons for Policy: Acknowledging the "European Constitutional Settlement"

We have seen that the social scientific propositions linking the European constitution with increased legitimacy and trust via expanded participation and deliberation are empirically dubious. Bad social science makes bad public policy. The collapse of the constitutional project – above all, its failure, even before it collapsed politically, to promote engaged deliberation – was entirely predictable. This should be a sobering lesson for those who would promote yet another attempt to *politicize* the EU issue by pressing for ratification of this or any other European constitution.

The overall assessment of the EU's future that follows from this analysis is far from pessimistic. Far from demonstrating the fragility of the EU, *the failure of the constitutional project in fact demonstrates the Europe's stability and success.* The EU has quietly reached a "European constitutional settlement": an enduring set of substantive competences and procedures embodied in the amended Treaties of Rome, which define the scope of the EU's mandate, the respective competences of Brussels and the member states, and the institutional form of EU decision-making. The EU is now older than most existing democracies, and there is little sign that its established institutions face a mortal threat. These institutions appear stable in the face of any conceivable medium-term pressures for change. Indeed, to judge by results rather than aspirations, the *status quo h*as been remarkably successful – and never more so than in the past decade. The 15 years since the fall of the Berlin wall has been, after all, the most successful period in EU history. The single market, the Euro and a nascent European foreign and defense policy came into being. EU enlargement was carried out with surprisingly little disruption in existing member states, and proved the most cost-effective western instrument for advancing global democracy and security.

Why should we refer to this as a "European constitutional settlement"? What are its precise terms? One dimension is *substantive*. The EU is now pre-eminent in trade, agriculture, fishing, Eurozone monetary policy and some business regulation, and helps to co-ordinate co-operation in foreign policy. Yet, contrary to misleading statistics one often encounters, this amounts to only about 20 per cent of European regulation and legislation. Many areas, including those of greatest public concern, such as fiscal policy, social welfare, health, pensions, education, crime, infrastructure, defense and immigration, remain largely national. With a tax base a fiftieth the size of the member states, an administration smaller than that of a small city, no police force or army and a narrow legal mandate, the EU will never encompass these fiscally and administratively demanding tasks. This balance between national and European competences is roughly what Europeans, when polled, say they want.

Another dimension of the settlement is *institutional*. Though Anglo-American Eurosceptics have sought to resurrect the bogeyman of a Brussels superstate headed by the European commission, treaty changes since 1970 have consistently moved Europe in the opposite direction. At the expense of the technocratic Commission, they have increased the power of the Council of Ministers (favored by France and Britain, particularly for matters outside the economic core) and the directly elected European Parliament (favored by Germany). At the same time, the overall powers of the EU are systematically limited by its near total lack of administration, fiscal and coercive capacity,

by multiple levels of indirect and direct democratic control, and by its narrow constitutional mandate. This seems quite appropriate to the feasible tasks European citizens would like to see the EU perform.

The failed constitutional process itself demonstrates the stability of both the substantive and institutional dimensions of the current constitutional settlement. *Even if it had passed,* the draft constitution would have instituted only minor reforms. It tinkered with an existing constitution rather than promulgating a new constitutional order. In 18 months of deliberation, the constitutional convention devoted only two days to the expansion of the EU's substantive competences and agreed upon almost nothing except a very modest increase in internal security policies. This was inevitable. There is no prospective *grand projet*, akin to the single market of the 1980s or the single currency of the 1990s, to justify major constitutional change. General satisfaction with the European health, pension, fiscal and education policies have little support, while a US-style military build-up exceeds Europe's means and insults its "civilian power" ideals.

The proposed constitution sought instead to lock in the *status quo* by marginally improving the EU's institutional efficiency and transparency, while retaining its basic structure. All of this is the sort of sensible stuff European policy wonks espouse and European publics support: European parliamentary co-decision was expanded, national parliaments gained an advisory and gate-keeping role, the rotating presidency was abolished, voting weights were adjusted to represent large countries more fairly, foreign policy co-ordination was centralized in a foreign minister, and so on. The result was an institutional compromise that slightly rebalanced the interests of large and small countries, left and right parties and Europhile and Euroskeptic tendencies. The reforms enjoyed broad support among member states, and none met a serious challenge in the referendum debates. The biggest change – creation of a European foreign minister empowered to recommend, though not impose, a more coordinated foreign policy – enjoys 70% approval across Europe.

The existing European constitutional settlement is more attractive, positively and normatively, than any feasible alternative. This is true both not simply because it generates outputs that Europeans would generally favor, but also because the current indirect democratic controls on EU policy-making are probably – given the real-world constraints we have explored above – more effective means to generate meaningful accountability and deliberation than direct democracy would be (Moravcsik 2002, 2005a, 2005b). One hears everywhere that the EU is so undemocratic that it would not be accepted as a member state. This *bon mot* is simply false. Studies systematically comparing EU policy-making to policy-making by existing national governments, controlling for the type of issues the EU tends to handle (disproportionately those that are insulated or delegated in domestic politics, such as monetary policy, constitutional adjudication, trade policy, expert regulation, and prosecution), conclude that it is more transparent than national policy-making, less corrupt, at least as accountable, and able to provide policies single governments cannot.[24]

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24 For an extended version of this argument, Moravcsik (2002). On the question of standards, see Moravcsik (2004), Majone (2005). On empirical comparisons of EU vs. national accountability and transparency see also Zweifel (2002, 2006).

Contemporary reformers underestimate the virtues of the *status quo* in part because they remain wedded to the anachronistic goal of "ever closer union," culminating in a federal superstate in Europe. Of course few admit openly to such views, but it is implied in the widespread tendency among those who study or support further European integration as *ipso facto* desirable, and by the equally prevalent tendency to hint darkly that without constitutional reform, the process of European integration will falter or collapse. Thus public debate inevitably comes to be dominated by "symbolic extremists" of a Euro-enthusiastic or Euroskeptic persuasion, who cast the failure of the constitution to move toward "ever closer union" in more pessimistic terms than current circumstances warrant – one group because they aspire to much more, and the other because they aspire to much less. The unhealthy ideological codependence between these groups leads to exaggerated rhetoric that unsettles the larger population in the center of the EU political spectrum, whose interests in integration are far more pragmatic. No wonder that in referendum campaigns, ideological appeals drown out pragmatic EU considerations.

What has proven dysfunctional over the past five years is not the EU's policies, or its constitutional structure, both of with remain successful, but its constitutional discourse. This discourse rests on an enduring set of rhetorical illusions that have fueled the European federalist movement since World War II. In this regard, perhaps the most attractive quality of the constitutional draft is that it began that difficult process by striking the classic phrase "ever closer union" from the Treaty of Rome in favor of the more balanced "unity in diversity". We need to go further to recognize the EU as it is, rather than as we would wish it to be. This reflects a basic truth about Europe, namely that it has passed the point of no return and is now a "mature" political system – one that does not need continually to move forward on a neo-functionalist bicycle in order to be stable.

The recent "politicization" of the EU, which many treat as an overwhelming and irresistible force, was in fact a self-inflicted wound. The perverse consequences are there for all to see. A better strategy, pragmatically and normatively, would be to *depoliticize* European constitutional evolution through an incremental, piecemeal strategy of implementing effective policies and modest institutional reforms – the "Europe of results" of which Commission President Barroso has recently spoken. Were it not for a needless constitutional debate, many of the domestic constraints on reform might well not exist, most notably the increasingly widespread requirement of referenda, rather than parliamentary ratification, of enlargement and smaller institutional reforms. This is the traditional EU strategy has been successful, and there is little reason to depart from it now.

In practice, what this means is that pragmatic constitutional reforms should be submitted piecemeal for ratification by the member states, with deliberate efforts to depoliticize the subsequent debate. Surely a proposal to centralize European foreign policy – particularly if it were not presented as creation of a "foreign minister", as was done previously, but (more accurately) as a bureaucratic redesign of the relationship between the Commission and Council – will not rouse masses of Europeans into the street to debate or defeat it. If ratification was secured in this manner, rather than by politicizing the public through constitutional rhetoric, the EU's lack of salience would

work for it rather than against it. In this regard, the EU's greatest tactical advantage is that it is, in a word, so *boring*.

7. Philosophical Conclusion: The Ambiguity of Political Participation

Today some of the most strident criticism of the EU comes from its strongest supporters. I have argued above that one reason why Euro-enthusiasts overlook the virtues of the constitutional *status quo* is that they, unlike the majority of Europeans, are committed to a more federalist future that the current constitutional settlement would not support. Yet there is another utopia at play here as well: the notion of a fully deliberative and participatory democracy as the fundamental philosophical ideal of modern democracy.

Critics of global and regional governance schemes such as the EU often charge that international organizations are illegitimate, because they are less intensely deliberative and participatory than sovereign states (e.g. Nagel 2005; Rabkin 2005). Such critics often treat greater public participation and deliberation as ends in themselves or, which amounts to nearly the same thing, as the sole source of political legitimacy. This is the basis of most criticism of the EU's so-called "democratic deficit" (cf. Moravcsik 2004: 336–379). Those who support the constitutional project, and who seek to legitimate the EU through means open debates over the "finalité politique" of Europe, are essentially claiming that only mass political deliberation can legitimate democratic governance.

I have argued above that it is impractical, even counterproductive, to hold the EU up to such a standard of pure and direct majoritarian democracy. This is due in part to specific characteristics of the EU, notably its lack of salient issue content. But there is a more general philosophical error at work here as well. No modern democracy meets this standard and, more importantly, *no modern democracy aspires to do so*. Recourse to constitutional delegation or insulation is not a flaw, imperfection or substitute for more broad-based deliberative participation. Nor is it limited to incomplete or imperfect polities, as the EU is often wrongly supposed to be. It is an essential characteristic of modern democracies, which are not populist but constitutional (Majone 2005). In existing constitutional democracies, popular participation is not treated as an end in itself, but as one means among others to assure accountability and thus to achieve social goods such as equality, liberty, justice or non-domination. We consistently delegate to constitutional courts, central banks, expert bureaucracies, political elites, party structures, legislative representatives and cabinet members, prosecutors, and many other government officials, because we judge these to more efficiently and effectively realize these social goods.[25]

The widespread use of such constitutional procedures acknowledges implicitly the central insight that more participation does not necessarily generate a more desirable outcome in any respect, whether that be more representative, more popular, more ac-

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"25. With regard to the EU, this point has been advanced most forcefully and consistently by Majone, whose essays of a decade are summarized in Majone (2005). For a more recent generalizations of this point to the international domain, see Grant and Keohane (2005), Moravcsik (2004). For a general philosophical argument consistent with this view, see Pettit (2005).

countable, or more effective policy. From this perspective, one might way that the entire enterprise of modern constitutional design and analysis is devoted to the exploitation of "counter-majoritarian" paradoxes – situations where a less "democratic," in the sense of directly majoritarian, outcome is more "representative" of social. These considerations are not simply pragmatic, but normative. We insulate policy-making in many areas in order to achieve more informed and expert input, to protect minority rights, to counterbalance powerful special interests, or to block tyrannies of the majority – all goals that most normative theorists applaud.[26] Such delegation is systematic and deliberate, a fact confirmed by the observation that the areas to which policies are delegated or insulated within the EU are *the same* as those in most (presumptively legitimate and popularly democratic) national polities. Indeed, the erroneous view that the EU suffers from a greater "democratic deficit" than its constituent member states stems largely from the fact that it deals disproportionately with issues commonly delegated or insulated in modern democratic politics.

This conclusion has a fundamental implication for political philosophers engaged in the normative analysis of real-world constitutional reform, particularly in international affairs. Once we set aside democratic participation or deliberation – or any other procedural norm – as an absolute standard, and instead seek to design constitutional forms to achieve certain social goods, it becomes impossible to draw firm policy recommendations from normative principles without drawing heavily on the empirical social science. The varied dynamics of counter-majoritarian situations can be understood only by analyzing the specifics of the intervening political processes. Since these processes will, as we have seen, vary substantially according to the nature of the issue area, social preferences, institutional settings, and strategic imperatives, we cannot understand them – and thus cannot justify any constitutional design – without substantial recourse to empirical social science. This reliance is itself not a contingent empirical observation, but follows directly from a simple set of philosophical assumptions about the nature of democratic politics in general.[27] In this sense, the European constitutional project rests not only on invalid political science, but on invalid political philosophy. More precisely, it rests on invalid political philosophy *because* it rests on invalid political science.

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26 For detailed discussions of these points, with attention to the normative implications, see Moravcsik (2002: 613–614, 2004: 336–349).

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